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PLEADING AND PRACTICE

OF THE

HIGH COURT OF CHANCERY.

BY THE LATE

EDMUND ROBERT DANIELL,

BARRISTER-AT-LAW.

FIFTH AMERICAN EDITION.

WITH NOTES AND REFERENCES TO AMERICAN DECISIONS; AN APPENDIX OF PRECEDENTS; AND OTHER ADDITIONS AND IMPROVEMENTS, ADAPTING THE WORK TO THE DEMANDS OF

AMERICAN PRACTICE IN CHANCERY.

BASED ON THE FOURTH AMERICAN EDITION

BY J. C. PERKINS, LL.D.

BY W. F. COOPER, LL.D.

VOL. II.

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THE

PRACTICE

OF

THE HIGH COURT OF CHANCERY.

CHAPTER XXIII.

SETTING DOWN THE CAUSE FOR HEARING.

When the evidence is closed, the next step is to set the cause down for hearing.[1]

Formerly, the cause might be set down before either the Lord Chancellor or the Master of the Rolls, according to the discretion of the plaintiff, regulated by the nature and importance of the suit, and the arrear of cases depending before each of them respectively;[2] but we have seen[3] that, according to the present practice, it is incumbent upon the plaintiff, at the time when he files his bill, to signify upon the record before which of the Judges of the Court he intends the cause to be heard. The cause may, nevertheless, either before or after it is set down, be transferred to the Court of any other Judge, by special order of the Lord Chancellor, or of the Lords Justices; but, unless so transferred, it must be set down for hearing and heard before the Judge for whom it is *marked.[1] Distinct lists of the causes and other matters set *964 down to be heard before each Judge are kept by the Registrars.[2]

[1] The English Rules in Chancery, relating to setting down a cause for hearing, have not been adopted in Massachusetts. Charles River Bridge *v.* Warren Bridge, 7 Pick. 344; see Pingree *v.* Coffin, 12 Cush. 609; Mass. Eq. Rules, 33, 34. They are inapplicable in New Jersey. West *v.* Paige, 1 Stockt. (N. J.) 203. In this latter State by rule of Court, all causes, including pleas and demurrers, shall be set down for hearing for the first day of the term, if there is sufficient time to give the required notice, if not time, then at a subsequent day in the term, and shall have priority according to the date of the issue. Chancery Rule, [10. See Rev. St. Ch. §§ 47, 48; Dickinson's Pr. 214, 239; Morris *v.* Taylor, 8 C. E. Green, 135. In Tennessee, it is made the duty of the Master to set all causes at issue for hearing, and transfer them to the trial docket. Code, §§ 4431, 4401; Chancery Rules, rule 2, § 4.]

[2] For the practice as to setting down a cause for hearing, where the bill was filed before 20 May, 1837, or 11 Nov., 1841, see Braithwaite's Pr. 432; and for a list, showing the order of succession among the Vice-Chancellors, see Vol. III.

[3] Ord. VI. 1; *ante*, p. 397.

[1] Ord. VI. 4. As to the transfer of causes, see *ante*, pp. 70, 398.

[2] Ord. VI. 8. As to the power of a Judge during vacation to hear a motion or petition, or make special orders, in a cause not attached to his Court, see *post*, p. 984; Ord. VI. 11; and Holloway *v.* Phillips, 17 Jur. 875, V. C. W.; Price *v.* Gardner, 1 Jur. N. S. 975, V. C. W.; Bean *v.* Griffiths, *ib.* 1045, V. C. W. The duties of the Vacation Judge commence as each Court rises, although the vacation may not have actually commenced. Francis *v.* Browne, 8 Jur. N. S. 785; 10 W. R. 811, L. C.

A cause is usually set down for hearing by the plaintiff; and, as we have seen,[3] if the plaintiff neglects to set down the cause to be heard, and obtain and serve a *subpœna* to hear judgment, within four weeks after the evidence has closed,[4] the defendant may move to dismiss the bill for want of prosecution, or may set down the cause, at his own request, and obtain a *subpœna* to hear judgment, and serve the same on the plaintiff.[5] The plaintiff may set down the cause for hearing, and obtain a *subpœna* to hear judgment, on any day, as soon as the evidence has closed.[6]

Where either party has obtained an order enlarging the time for taking the evidence, the cause cannot be set down before the expiration of such enlarged time, except by consent of the plaintiff, and all the defendants with whom issue has been joined:[7] unless the order enlarging the time be made without prejudice to the cause being set down,[8] or direct it to be set down in the mean time; and the order is frequently made in that form.[9] If the cause is thus set down, the parties are not precluded from continuing to take their evidence; but they must, of course, take care that the evidence is completed before the time for taking evidence has closed, and before the cause is put into the paper for hearing.[10] If after the cause has been set down, the time for taking the evidence is further enlarged, the order enlarging the time should be produced, as soon as it is entered, to the Registrars' clerk at the order of course seat: and he will notify the fact against the entry in the cause-book, to prevent the cause being placed in the paper for hearing prematurely.[11]

If the plaintiff, instead of filing replication, desires to set down the cause to be heard upon bill and answer,[12] he must set it down within the same time that is allowed him for filing replication, that is, *965 within four weeks after the answer, or the last of the *answers required to be put in, by the defendant against whom it is proposed to hear the cause upon bill and answer, is held or deemed to be sufficient:[1] or, if the plaintiff has, after answer, amended his bill without requiring an answer to the amendments, he must set the cause down within one week after the expiration of the time within which the defendant might have put in his answer, in cases where the defend-

[3] *Ante*, p. 801.

[4] Hart *v.* Roberts, 32 Beav. 231; and see Braithwaite's Manual, 193, n. (135).

[5] Ord. XXI. 1; XXXIII. 10 (3). It is the plaintiff's duty, in such case, to serve any co-defendants. Clarke *v.* Dunn, 5 Mad. 474; Smith *v.* Wells, 6 Mad. 193.

[6] Ord. XXI. 1, 4; Dowson *v.* Solomon, 4 Drew. 642; Braithwaite's Pr. 427; Braithwaite's Manual, 94, 131.

[7] For form of consent, see Vol. III.

[8] Ellis *v.* King, 4 Mad. 126; Langley *v.* Fisher, 5 Beav. 588; Dowson *v.* Solomon, *ubi sup.*; Braithwaite's Pr. 427.

[9] Langley *v.* Fisher, *ubi sup.*; Braithwaite's Pr. 427.

[10] *Ibid.*

[11] See *ante*, p. 889, n.

[12] Where an answer, if true, is an insufficient defence, the proper course is to set the cause down for hearing on the bill and answer which is tantamount to a demurrer at Law. Bridge *v.* Burns, 1 Morris, 287. See *infra*, 982.

[1] Ord. XXXIII. 10 (1). In Elston *v.* Elston, 24 L. J. Ch. 408; 3 W. R. 398, V. C. W., the cause was, by consent, allowed to be set down, notwithstanding the defendant had not answered interrogatories filed to the bill.

ant does not desire to answer the amendments; or within fourteen days after the refusal to allow further time, in cases where the defendant, desiring to answer the amendments, has not put in his answer within the time allowed for that purpose, and the Judge has refused to allow further time: or within fourteen days after the filing of the answer, in cases where the defendant has put in an answer: unless the plaintiff has, within such fourteen days, obtained a special order for leave to except to such answer, or to reamend the bill.[2]

A defendant who has not been required to answer the bill, and has not answered it, may apply for an order to dismiss the bill for want of prosecution, at any time after the expiration of three months[3] from the time of his appearance, unless a motion for decree has been set down in the mean time, or the cause has been set down to be heard.[4]

A cause is set down for hearing by the Registrars' clerk, at the order of course seat,[5] upon being furnished with a certificate of the proper officer, that is to say, the Clerk of Records and Writs in whose division the cause is, that the same is in a fit state to be set down for hearing.[6] The solicitor of the party setting down the cause must indorse the certificate with a memorandum, stating, if there be any infant defendant, that a guardian *ad litem* has been appointed; or, if there be not, stating that there is not any infant defendant.[7] The Registrars' clerk, on the cause being thus set down, will give to the solicitor a note of the day on which the *subpœna* to hear judgment is to be made returnable.[8] The * Record and Writ Clerk's certificate, that the *966 cause is in a fit state to be heard, will be granted, after replication, at any time after the evidence has closed. Where, however, the time for taking evidence has been extended: unless it is so extended without prejudice to the cause being set down, or all parties consent, the certificate will not be delivered out until such extended time has expired.[1] If the cause is set down by the defendant, the words, "at the request of the defendant," must be written on the certificate.[2] If there are any formal defendants, a memorandum of the service of the bill on them must be entered, before the certificate will be given out.[3]

Where it is desired to set down the cause on bill and answer, the cer-

[2] Ord. XXXIII. 12 (1–3); Braithwaite's Manual, 93, 156, n. (5); *ante*, pp. 765, 802. Times of vacation are not reckoned in computing the times under this order. Ord. XXXIII. 13 (4); Braithwaite's Manual, 186; and as to the Vacations, see *ante*, p. 374.

[3] That is, twelve weeks. Ord. XXXIII. 10. The three months run during vacations. Bothomley *v.* Squire, 7 De G., M. & G. 246; but see Braithwaite's Manual, 186, n. (109).

[4] Ord. XXXIII. 13; see *ante*, p. 802.

[5] Reg. Regul. 15 March, 1860, r. 1.

[6] Ord. XXI. 2; and see Ord. VI. 2, 3. The Record and Writ Clerk was ordered to give the certificate, notwithstanding a bare trustee defendant had not appeared. Westhead *v.* Sale, 3 Jur. N. S. 1299; 6 W. R. 52. V. C. W. For form of certificate, see Vol. III.

[7] Reg. Regul. 15 March, 1860, r. 7. The certificate must be marked with the designation of the Judge to whose Court the cause is attached: Ord. VI. 2, 3; and be also indorsed with the name of the solicitor by whom it has been obtained, and of his client, with the date of setting down the cause. A fee of 4s., in Chancery fee fund stamps, is payable on bespeaking the certificate. Regul. to Ord. Sched. 4. For forms of certificate and indorsement, see Vol. III.

[8] See *post*, p. 966.

[1] *Ante*, p. 963.

[2] Braithwaite's Pr. 428.

[3] See *ante*, p. 429.

tificate will be given as soon as the answers are filed. A cause cannot be heard on bill and answer against a defendant against whom a traversing note has been filed;[4] but a cause may be set down to be heard on bill and answer against one or more defendants, although it is to be heard on an order to take the bill *pro confesso* against other defendants.[5]

If the preliminary order has been obtained to take the bill *pro confesso* against a sole defendant,[6] the cause is set down by the Registrars' clerk, upon production of the order, and of the Record and Writ Clerk's certificate.[7]

Where an order has been made to take evidence in chief *vivâ voce* at the hearing,[8] the Clerk of Records and Writs makes, upon the certificate, an entry showing that such an order has been made; and the Registrar, in setting down the cause, marks the same so as to indicate that the taking of evidence in chief *vivâ voce* at the hearing has been ordered; and the cause will be put in the paper to be heard without the special direction of the Court: which may be obtained upon an application to the Court, by either party, upon notice, to have a day fixed for the hearing.[9]

The practice, as to setting down a cause to be heard on notice of motion for a decree, has been before stated.[10]

[4] See *ante*, p. 514.
[5] Braithwaite's Pr. 429.
[6] *Ante*, pp. 517–524.
[7] See *ante*, p. 485; and Braithwaite's Manual, 189, n. (121). For form of certificate, see Vol. III.
[8] Ord. 5 Feb., 1861, r. 3; *ante*, p. 844.
[9] Ord. 5 Feb., 1861, r. 8. For the mode in which the special direction is obtained, see *ante*, p. 911. As to marking a cause as short, see *post*, p. 971. As to setting down a record for trial by jury, or before the Court without a jury, see *post*, Chap. XXVII., *Trials of Questions of Fact*.
[10] *Ante*, pp. 824, 825. As to setting down a special case for hearing, see *post*, Chap. XLIII., *Special Case*.

*CHAPTER XXIV. *967

THE SUBPŒNA TO HEAR JUDGMENT.

When the cause has been set down, the next step is to give notice to the adverse party of the day appointed for hearing. This is done by means of a writ called a *subpœna* to hear judgment.

The plaintiff must, as has already been stated, obtain and serve a *subpœna* to hear judgment, as well as set his cause down for hearing, within four weeks from the time of closing the evidence: and in general, before the time at which the defendant may move to dismiss the bill for want of prosecution.[1] The practice is to issue this *subpœna* at the time the cause is set down; and if the plaintiff sets his cause down without then suing out the writ, he will not be able to obtain it subsequently without a special application to the Court to adjourn the cause; so that the *subpœna* may issue and bear date at the time when the cause is entered for hearing.[2]

The *subpœna* must be obtained and served, as well where replication has been filed, as where the cause is set down on bill and answer, including the case where a traversing note has been filed,[3] or where a defendant, not required to answer, has not answered;[4] but it is unnecessary in the case of a defendant against whom the bill is to be taken *pro confesso*.[5]

The *subpœna* to hear judgment is prepared by the solicitor requiring it;[6] and is sealed by the Clerk of Records and Writs in whose division the cause is. When the *subpœna* is presented for sealing, a note from the Registrar, of the day on which the *subpœna* is made returnable, called a "*subpœna note*," and a *præcipe* must be left with the officer.[7] The Registrar will not * give the *subpœna* note, until *968 the cause has been set down for hearing.[1]

[1] Ord. XXI. 1; XXXIII. 10 (2); *ante*, p. 962; Braithwaite's Manual, 137. For form of *subpœna* to hear judgment, see Ord. XXVIII. 2, and Sched. E., No. 1; and Vol. III. [In the United States, the general theory of the law is that the parties are in Court during the regular terms of the Court, and no notice is required for either the hearing of the cause, or any motion made therein. See Rentfroe *v.* Dickinson, 1 Tenn. 196.]

[2] Harvey *v.* Towle, 4 Hare, 166.

[3] Braithwaite's Pr. 259.

[4] Lanham *v.* Pirie, 2 Jur. N. S. 1201, V. C. S.

[5] Braithwaite's Pr. 260.

[6] Ord. III. 1.

[7] Ord. XXI. 3; XXVIII. 1; Braithwaite's Pr. 258. Each *subpœna* must be stamped with a 5*s*. Chancery fee fund stamp. Regul. to Ord. Sched. 4. Forms of the *præcipe* may be had at the Record and Writ Clerks' Office; and see Vol. III.

[1] Ord. XXI. 3. The *subpœna* note is delivered out by the clerk at the order of course seat, on the cause being set down with him.

A *subpœna* to hear judgment may be served and returnable on any day, as well out of as in term;[2] but it is not to be returnable at any time less than one month[3] from the *teste* of the writ; and it is to be served at least ten days before the return thereof.[4] It is, therefore, necessary to issue the *subpœna* as soon as the cause is set down: for the date inserted in the *subpœna* note by the Registrar seldom exceeds twenty-nine or thirty days from the time it is granted by him.[5] If the *subpœna* has not been issued in such time as will allow twenty-eight days between the *teste* and the return of the writ, an alteration and extension of the return in the *subpœna* note must be procured from the Registrar: otherwise, the *subpœna* will not be sealed.[6]

Where the cause is set down by the defendant, it should appear in the *subpœna* that the cause is set down "at the request of the defendant."[7] In such a case, the defendant setting the cause down need only serve the plaintiff: it being the latter's duty to serve the other defendants, if any.[8]

Upon the back of the writ, as upon other proceedings, must be indorsed the name and place of business of the solicitor issuing the *subpœna*, and of his agent, if any, or the name and place of residence of the party where he sues it out in person, and, in either case, the address for service, if any;[9] and an affidavit of service of the *subpœna* must state the indorsement.[10]

A *subpœna* to hear judgment may contain three names where necessary or required:[11] in reckoning which, the names of husband and wife are counted as one.

Service upon a defendant's solicitor of a *subpœna* to hear judgment, is to be deemed good service upon such defendant.[12] The service of the *subpœna* is effected, by delivering a copy of the writ, and of the indorsement thereon, and at the same time producing the original writ.[13]

The service of the *subpœna* will not be valid, unless made at least ten days before the return of the writ.[14]

*969 * In the interval between the suing out and service of any *subpœna*, the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ resealed, upon leaving a corrected *præcipe* of such *subpœna*, marked with the words "altered and resealed," and signed with the name and address of the solicitor suing out the same.[1]

2 Ord. XXI. 4.

3 That is, twenty-eight days. Ord. XXXVII. 10.

4 Ord. XXI. 5.

5 Braithwaite's Pr. 258.

6 *Ibid.*

7 *Ib.* 259; the words are usually inserted immediately after the recital of the title of the cause: *ibid.*; and see form in Vol. III.

8 Clarke *v.* Dunn, 5 Mad. 474; Smith *v.* Wells, 6 Mad. 193.

9 Ord. III. 2, 5; see *ante*, pp. 453, 454. For a form of indorsement, see Vol. III.

10 Powell *v.* Martin, 1 J. & W. 292; Rigg *v.* Wall, 3 M. & C. 505; 2 Jur. 1080; and see form of affidavit in Vol. III.

11 Ord. XXVIII. 3.

12 Ord. XXVIII. 7. Where a solicitor is concerned for more than one defendant, a copy of the *subpœna* should be served on him for each defendant. Braithwaite's Pr. 259.

13 Ord. XXVIII. 6.

14 Ord. XXI. 5.

1 Ord. XXVIII. 5.

If an irregularity occurs, either in the writ or in the service of it, the appearance of the parties in pursuance of the writ will waive the irregularity. And where a defendant, after service of a *subpœna* to hear judgment, in which the plaintiff's name was misspelt, appeared upon a motion to advance the cause, and opposed it, but did not appear at the hearing, whereupon a decree was made by default, it was held that the defendant had waived the objection, by appearing upon the motion, and not then objecting.[2]

When a cause has been once set down, and a *subpœna* to hear judgment served, a revivor of the suit, after abatement by the death of the plaintiff, will not render the service of a new *subpœna* to hear judgment necessary.[3] In *Byne* v. *Potter*,[4] however, where the abatement was occasioned by the death of a sole defendant, the Registrar considered that service of a new *subpœna* to hear judgment, upon the executor, was necessary: though Lord Rosslyn doubted it, and appeared to think that the service of the order to revive was sufficient notice to the defendant. But it seems that, where a cause is ordered to stand over for want of parties, with liberty to amend, the mere service of the order to that effect will not prevent the necessity of serving a new *subpœna* to hear judgment.[5]

Where a defendant became bankrupt after the institution of the suit, and his assignees were made parties by supplemental proceedings, it was held to be unnecessary to bring the bankrupt to the hearing, by serving him with a *subpœna* to hear judgment.[6]

Where the plaintiff was unable to effect service, the Court, on an *ex parte* motion by him, allowed the *subpœna* to hear judgment to be advertised.[7]

Where, upon a motion to dismiss for want of prosecution, a plaintiff undertakes to set down his cause for hearing, it is held, that his undertaking extends to serving a *subpœna* to hear *judgment.[1] *970 Where, however, a plaintiff, who had replied to the answer, was permitted to withdraw his replication, upon his undertaking to set the cause down for hearing upon bill and answer, it was decided, that service of the order made thereon was equivalent to serving a *subpœna* to hear judgment; and upon the plaintiff's not appearing when the cause was called on, the bill was dismissed with costs.[2]

Each party, as well the one served as the party serving the *subpœna*, will do well, before the day of hearing, to file at the Record and Writ

2 Carvick *v.* Young, Jac. 524.

3 Bray *v.* Woodram, 6 Mad. 72; Sparrow *v.* Ewing, 1 W. N. 191; 12 Jur. N. S. 428, V. C. W.

4 5 Ves. 305; see, however, Cockburn *v.* Raphael, 4 Sim. 18. The correct practice would seem to be to serve only the new parties. Braithwaite's Pr. 259.

5 Knowles *v.* Spence, Mos. 224, 226; Davis *v.* Prout, 7 Beav. 256; Cockburn *v.* Raphael, *ubi sup.*

6 Stahlschmidt *v.* Lett, 5 Hare, 595; 11 Jur. 885; and see *ante*, p. 159.

7 Jenkin *v.* Vaughan, 24 L. J. Ch. 495; Leehmere *v.* Clamp, 30 Beav. 218; 9 W. R. 625. For form of motion paper in such case, see Vol. III.

1 Dixon *v.* Shum, 18 Ves. 520; and see Bartlett *v.* Harton, 17 Beav. 479.

2 Rogers *v.* Goore, 17 Ves. 130.

Clerks' office an affidavit of the service of the writ, and to be provided with an office copy of it: to be made use of, in case the opposite party do not appear when the cause is called on.[3] Such affidavit should be made by the person serving the writ, or served with it, as the case may be; and must state when, where, how, and by whom the service was effected.[4] The affidavit should contain a statement of the writ, and should show that it was duly indorsed: otherwise, a decree taken upon the production of such affidavit will be irregular.[5] If the service of the *subpœna* is made on the solicitor on the record,[6] it is sufficient if the affidavit states that such solicitor is believed to be the solicitor of the defendant.[7] Whenever a party does not appear at the hearing, it is advisable to get the affidavit entered by the Registrar, in order that the decree may be taken on the affidavit of service.

[3] See Evans *v.* Evans, 2 Keen, 604; Frost *v.* Hilton, 15 Beav. 432; and *post*, pp. 976, 977.
[4] Ord. XXVIII. 8.
[5] Powell *v.* Martin, 1 J. & W. 292; Rigg *v.* Wall, 3 M. & C. 505; 2 Jur. 1080; *ante*, p. 967. For forms of affidavit, see Vol. III.
[6] See Ord. XXVIII. 7.
[7] Marsden *v.* Blundell, 15 Jur. 809, V. C. K. B.

* CHAPTER XXV. *971

HEARING CAUSES.

The Registrars keep distinct lists of the causes and other matters set down to be heard before each Judge;[1] and from these lists, the paper of causes to be heard on each day of hearing is made out by them. Usually, twelve causes are put in each paper, and are taken from the cause-books in the order in which they have been set down. A copy of this paper is put up in the Registrars' office, and on the doors of the respective Courts, in the afternoon of the previous day.[2]

But, although causes are always taken from the Registrars' books, for the purpose of being entered in the paper for hearing,[3] * in the order in which they stand, it frequently happens that *972 the Court, upon a proper ground being stated, will order a cause which has been set down for hearing to be taken out of its turn: for the Court holds, that a defendant has no right to object to a cause being heard, at any time, after it has been set down for hearing.[1] Thus, where, in a suit for the specific performance of an agreement to accept a lease for a term of years, the plaintiff applied to the Court to have his cause advanced, on the ground that the term of years would expire before the case could come on in its regular course, the order was made: on the plaintiff's undertaking to give due notice of the advancement to the defendant;[2] and if in such a suit the plaintiff does not apply to have the cause advanced, and by his delay allows the time to expire before the hearing of the cause, the Court will not direct an inquiry as to damages.[3] So, where an annuity, claimed by the bill,

[1] Ord. VI. 8; see Chancery Rules of New Jersey, Rule 40. In Massachusetts, cases in Equity, and motions and other applications therein, whether interlocutory or final, shall in the first instance be heard and determined by one Justice of the Supreme Judicial Court. Genl. Stats. c. 113, § 6.

By Rev. Stats. of Maine, cases in Equity, presented on demurrer to the bill, or when prepared for final hearing, come before the Law Court, c. 77, § 17. Hewett *v.* Adams, 50 Maine, 271.

[In Tennessee, the complainant may set a case for hearing on bill and answer. Code, § 4430. In all other cases, the clerk shall set the cases and transfer them to the trial docket, if the answer is not excepted to within the time prescribed. § 4431. Replication is dispensed with. §§ 4322, 4432.]

[2] Formerly, the last cause in the paper was privileged; but this is no longer the case. Flower *v.* Gedye, 23 Beav. 449.

[3] [There should only be one hearing of a cause on its merits, and, therefore, a plea embodied in an answer cannot be set for hearing on its sufficiency. McLin *v.* McNamara, 1 Dev. & Bat. Eq. 407; Mulloy *v.* Paul, 2 Tenn. Ch. 155. And the parties cannot, even by consent, have several hearings on several defences. Hume *v.* Commercial Bank, 1 Lea, 220.]

[1] Hoyle *v.* Livesey, 1 Mer. 381; Rawson *v.* Samuel, C. & P. 181, 182.

[2] Hoyle *v.* Livesey, *ubi sup.*

[3] De Brassac *v.* Martyn, 11 W. R. 1020, V. C. W.

was all the subsistence the plaintiff had for herself and nine children, that was held a sufficient ground for having the cause advanced.[4] And where an order has been obtained for taking the bill *pro confesso*, the Court may appoint a special day for the hearing.[5] Formerly, the Court would not advance suits for the foreclosure of mortgages;[6] but such causes will now be advanced under the same circumstances, and subject to the same rules, as other causes.[7]

Where a cause involves no question of difficulty, and is not likely to take up much time in argument, or is such that the subject-matter of it would authorize the Court to make a decree as of course, it may be heard as a short cause, amongst the short causes, for the hearing of which one day in each week is appointed, both in term and in the sittings after term.[8] To obtain this privilege, there must be a certificate from the counsel of the plaintiff,[9] that the cause is fit to be heard as a short cause; but the consent of the solicitors for any of the defendants will not be required.[10] Upon the production of such certificate to the Registrars' clerk, at the order of course seat, he will mark the cause as "short," in the cause-book. Notice that the cause has been so marked must be given to the other solicitors in the cause, by the solicitor of the plaintiff.[11] The plaintiff, thus advancing a cause, proceeds at *973 his * peril; and if, on the cause coming on, it appears that it is not one which is entitled to be so advanced, the costs occasioned by the advancement will have to be paid by the plaintiff.

When a cause has been marked short, it will be put in the paper for hearing on the next short cause day after the day when the *subpœna* to hear judgment is returnable. It may, however, with the consent of all parties, be put in the paper for hearing before that time;[1] and, by consent, the Court has made an immediate decree in a cause not in the paper, for the administration of the real and personal estate of an intestate, at the suit of a creditor, after a summons in Chambers for the administration of the personal estate had been taken out by another creditor: which was returnable before the first day on which the cause could be heard as a short cause.[2]

It is to be noticed, that, if a cause which has been advanced as a short cause, or put into the paper as such, should eventually be found to be one not entitled to be so advanced, it will be ordered to be struck

4 White *v.* ——, cited 2 Mad. Pr. 588.

5 Ord. XXII. 6.

6 Rashleigh *v.* Dayman, 2 Mad. 147.

7 Ord. XXI. 6.

8 The minutes of the decree to be made in such cases, are frequently prepared by the plaintiff's junior counsel, and submitted to, and approved by the junior counsel of the defendants, before the cause is called on.

9 In Hargraves *v.* White, 17 Jur. 436, V. C. W., the certificate was dispensed with. For form of certificate, see Vol. III.

10 Reg. Regul. 15 March, 1860, r. 10. A cause is not, generally, fit to be heard as a short cause if it will take more than ten minutes. Anon., 17 Jur. 435.

11 A decree will not be made in a short cause against a defendant who does not appear, unless it is shown that this notice was given. Molesworth *v.* Snead, 11 W. R. 934, V. C. W.; and see Seton, 1121. For forms of notice and affidavit of service, see Vol. III.

1 Reg. Regul. 15 March, 1860, r. 10. For form of consent, see Vol. III.

2 Furze *v.* Hennet, 2 D. & J. 125; *ante* p. 799.

out of the paper. Thus, in *Rashleigh* v. *Dayman*,[3] where a suit for a foreclosure, which, according to the practice as it then existed, could not be advanced,[4] had been transferred to the paper of short causes, it was ordered to be struck out of that paper; and, where two causes had been set down, on the same day, to be heard as short causes, but occupied in argument a considerable time, Sir Thomas Plumer M. R. directed them to be postponed till after the other short causes: observing that, in such cases, in future, the causes must be restored to their original places.[5]

Formerly, a distinction was made between what were called consent causes, and short causes. This distinction, for practical purposes, seems now to be abolished. Of course, causes in which all parties consent to the decree are short causes; but such cases do not usually occur, as they involve those who conduct them in somewhat unnecessary responsibility.[6] It may be mentioned, with reference to the subject of consent causes, that a decree or order, made by consent of the counsel for the parties, cannot be set aside, either by rehearing or appeal,[7] or by bill of * review;[1] unless, by clerical error, any *974 thing has been inserted in the order, as by consent, to which the party had not consented: in which case, a bill of review might lie.[2] If, however, the decree has been obtained by fraud, relief may be had against it by original bill.[3] The consent of counsel to a decree is to be

[3] 2 Mad. 147.

[4] *Ante*, p. 874.

[5] Walker *v.* Main, 1 J. & W. 1, n. (*a*).

[6] For form of decree by consent, see Seton, 1120, No. 1.

[7] Bradish *v.* Gee, Amb. 229; Harrison *v.* Rumsey, 2 Ves. S. 488; Belt's Sup. 413; Toder *v.* Sansam, 1 Bro. P. C. ed. Toml. 468; Seton, 1120; and see *post*, [1459, n. 4;] and see Cookes *v.* Cookes, 1 W. N. 86; 12 Jur. N. S. 244, V. C. S.; 1 W. N. 91, L. JJ. The same principle applies to orders made on *ex parte* applications. Sturgeon *v.* Hooker, 2 Phil. 289. An order or decree in Chancery, entered by consent, is not the subject of an appeal or rehearing. Atkinson *v.* Manks, 1 Cowen, 693; Armstrong *v.* Cooper, 11 Ill. 540; Stewart *v.* Forbes, 1 M'N. & G. 137; S. C. 13 Jur. 523; Dodson *v.* Scammell, 8 W. R. 252, V. C. K.; [Williams *v.* Neil, 4 Heisk. 279; Winchester *v.* Winchester, 121 Mass. 127; Hudson *v.* Allison, 54 Ind. 215; Terry *v.* Commercial Bank, 92 U. S. 454;] but see Brewer *v.* State of Connecticut, 9 Ohio, 189, decided under the Act of Ohio, 1831, giving an appeal "from any final sentence or decree;" and see also Morris *v.* Davies, 5 C. & Fin. 163. If an order or decree appealed from, purports on its face to have been taken by consent of the party appealing, it will be deemed by the Court above, on appeal, to have been so taken: and they will not hear evidence on the question whether it was so taken. If it was in fact not taken by consent, the party should have applied to the Court below to have the mistake in the entry corrected. Atkinson *v.* Manks, 1 Cowen, 693. A decree by consent is binding and conclusive unless procured by a fraud. French *v.* Shotwell, 5 John. Ch. 564. The filing and affirming by the Court, of the report of a Master in Chancery, without objection by the appellant's counsel, is not such an entry of decree by consent of parties, as to estop him from appealing therefrom. Hershee *v.* Hershey, 15 Iowa, 185. One affected by a decree, though not a party, may aver and prove that it was entered by an agreement of the parties, though it contradict the record. Stark *v.* Thompson, 3 Monroe, 302; see Shute *v.* Gustin, Halst. Dig. 175; Lewis *v.* Lewis, 1 Ala. 35.

[1] Webb *v.* Webb, 3 Swanst. 658; and see Smith *v.* Turner, 1 Vern. 274; and *post*, Chap. XXXIV., § 5, *Bills of Review;* Armstrong *v.* Cooper, 11 Ill. 540; and see Carew *v.* Cooper, 12 W. R. 767, L. C.; Green *v.* Crockett, 13 W. R. 1052, L. C.

[2] Anon., 1 Ves. J. 93; [Lester *v.* Mathews, 58 Ga 403].

[3] Bradish *v.* Gee, *ubi sup.;* Davenport *v.* Stafford, 8 Beav. 503, 523; 9 Jur. 891. Or by setting the decree aside, if the fraud is discovered at the same term the decree is made. Doss *v.* Tyack, 14 How. U. S. 297; [Saleski *v.* Boyd, 32 Ark. 74. So of a compromise of a decree by consent, but if the parties proceed upon motion to enforce the original decree without objection, the appellate Court will not entertain the objection. Gilbert *v.* Endean, 9 Ch. Div. 259. The decree by consent cannot be varied on the

given upon their own conception of their instructions.[4] It has been before stated,[5] that although, where infants are concerned, the Court does not usually make a decree by consent, without first inquiring whether it will be for their benefit, yet, if such a decree is made, the infants will be bound by it.[6]

Sometimes, a cause will be advanced to the head of the paper, *pro formâ*, to enable a witness attending from a public office in the country, to prove a document. Thus, where an application was made to the Court, that a cause, which was not in the paper for the day, might be immediately called on, for the purpose of proving a will, the proper officer having come up from York with the original for that purpose, and being detained in town at a considerable expense, the application was granted; and the cause having been called on, the will was produced by the proper officer to the Registrar.[7]

*975 * Where original and cross-causes are set down, and other causes intervene, the plaintiff in either cause may (if necessary) move for leave to bring forward his cause, or that his cause may stand adjourned, as the case may be, in order that both causes may be heard together.[1] Upon an application of this sort, it may be necessary to request that the evidence taken in the original cause may be read at the hearing of the cross-cause, and the converse.[2] Such an order, when obtained, may be made use of by the other side, without motion: unless he is, upon special reason shown to the Court by the party obtaining such order, prohibited by the same order from so doing;[3] but it is necessary that a *subpœna* to hear judgment should be served in each cause: for the cause of that party who omits serving this process will not come on at the same time with the other party's, unless the latter consents to it.[4]

The like application may also be made by the plaintiff, where there are original and supplemental causes entered for hearing in the same paper, with other causes intervening.

Upon production to the Registrar of a request or consent signed by the solicitors of all parties, at the latest in the forenoon of the day before the day the cause is to be in the paper, it will be marked as

ground of mistake, except for reasons which would enable the Court to set aside an agreement. Attorney-General *v.* Tomline, 7 Ch. Div. 388].

[4] Mole *v.* Smith, 1 J. & W. 673; Bradish *v.* Gee, *ubi sup.*; *Re* Hobler, 8 Beav. 101; Turner *v.* Turner, 2 De G., M. & G. 28, 37; [Corning *v.* Cooper, 7 Paige, 587. But see, where any mistake has occurred, Furnival *v.* Boyle, 4 Russ. 142; Holt *v.* Jesse, 3 Ch. Div. 177; Millspaugh *v.* McBride, 7 Paige, 509. *Infra*, 1026;] Swinfen *v.* Swinfen, 24 Beav. 549; 3 Jur. N. S. 1109; 2 De G. & J. 381; 4 Jur. N. S. 774; Seton, 1121. Where upon the hearing of a cause the counsel of the defendants abandoned the defence after hearing the opening argument in behalf of the plaintiffs, the Court refused to grant a rehearing upon the ordinary certificate of counsel. To obtain a rehearing under such circumstances, the defendants will be obliged to show a violation of duty on the part of their counsel, or that he had clearly mistaken either the law or the facts. Decarters *v.* La Farge, 1 Paige, 574.

[5] *Ante*, p. 164; and see Seton, 1121.

[6] [Wall *v.* Bushby, 1 Bro. C. C. 484; Musgrove *v.* Lusk, 2 Tenn. Ch. 576.]

[7] Anon., 4 Mad. 271.

[1] Hinde, 415; and see *post*, Chap. XXXIV., § 1, *Cross Bills*.

[2] *Ante*, p. 868. For form of order, see Seton, 1275, No. 2.

[3] Ord. XIX. 5; *ante*, p. 807.

[4] Harr. by Newl. 311.

standing over to a day to be named.[5] If all parties do not consent, application should be made to the Court for that purpose, at the latest in the forenoon of the day before the day the cause is to be in the paper: otherwise, if the cause be placed in the paper and called on, it may be struck out, and in that case, it must be again set down at the bottom of the list.[6] If the application is made to the Court on the day on which the cause is in the paper, it will only be granted (unless by consent) upon the terms of the party making it paying to the other the costs of the day.[7]

Where a cause, being in the paper for hearing, is ordered to be adjourned upon payment of the costs of the day, the party to pay the same, whether before the Lord Chancellor, the Lords Justices, the Master of the Rolls, or one of the Vice-Chancellors, is to pay the sum of 10*l.*: unless the Court otherwise directs.[8]

Where there are more defendants than one, the sum of 10*l.* is not payable by the plaintiff to each of the defendants, but is divisible amongst them all.[9]

*The most usual reasons for applying to adjourn a cause, *976 are: the discovery of some defect in the pleadings, which may render an amendment of the bill, or the filing of a supplemental bill, necessary, — the circumstance that the cause is likely to come on for hearing before the evidence is closed (which may happen in cases where either party has obtained an order to enlarge the period for taking evidence, and the cause has, by arrangement or special order, been set down in the mean time),[1] — or the fact that the suit is under compromise. In such cases, an application should be made to the Court for an order to adjourn the cause before it appears in the daily paper of causes: otherwise, the Court, instead of adjourning the cause, may order it to be struck out of the general paper, and thereby impose upon the plaintiff the necessity of again setting it down. And where a cause, which stands for hearing, is called on to be heard, but cannot be decided by reason of a want of parties, or other defect on the part of the plaintiff, and is, therefore, struck out of the paper, and the same is again set down, the defendant will be allowed the taxed costs occasioned by the first setting down, although he does not obtain the costs of the suit.[2]

A cause will not be adjourned merely because a cross-bill has been filed, to which the answer has not been put in. The proper course, in such cases, is, when the cross-bill has been filed in due time to apply to extend the time for taking evidence in the original cause till the answer to the cross-bill has come in.[3]

[5] Reg. Regul. 15 March, 1860, r. 13. For form of request, see Vol. III.

[6] Reg. Regul. 15 March, 1860, r. 13.

[7] Hinde, 416. For form of order in such case, see Seton, 1113. No. 1. The costs of the day will not, however, be given where the defect, which renders an adjournment necessary, has occurred since the cause was at issue. Fussell *v.* Elwin, 7 Hare, 29.

[8] Ord. XL. 22.

[9] See Fowler *v.* Reynolds, cited Seton, 1117; Morgan & Davey, 64.

[1] *Ante*, p. 963.

[2] Ord. XL. 21; see, however, Nelson *v.* Seaman, 1 De G., F. & J. 368.

[3] Coates *v.* Pearson, 4 Mad. 262; see *post*, Chap. XXXIV., § 1, *Cross Bills.*

Where an order has been made, that the evidence in chief as to any facts or issues shall be taken *vivâ voce* at the hearing, the examination in chief, as well as the cross-examination and re-examination, as to such facts and issues, will be taken before the Court, at the hearing, accordingly;[4] and in all cases where replication has been filed, all witnesses who have made affidavits, or been examined *ex parte* before the Examiner, and for the cross-examination of whom notice has been duly given by the other side, will be cross-examined before the Court, at the hearing, accordingly.[5] And it is to be remembered, that the Court has power, upon the hearing of any cause, if it shall see fit so to do, to require the production and oral examination before itself of any witness or party to the cause.[6]

Where evidence is to be taken *vivâ voce* at the hearing, the cause will not be put in the paper for hearing without the special direction *977 of the Court: which may be obtained upon an application * to the Court, by either party upon notice, to have a day fixed for the hearing.[1]

Where any cause becomes abated, or is compromised, after the same is set down to be heard, the solicitor for the plaintiff must certify the fact, as the case may be, to the Registrar: who will cause an entry thereof to be made in the cause-book, opposite to the name of such cause;[2] and if the plaintiff neglects to do this, and the cause comes into the paper for hearing, the defendants will be entitled to the costs of the day.[3]

Where, after a cause has been thus marked as abated, an order to revive the suit is obtained, the order should be produced to the order of course clerk in the Registrars' office; and he will cause the entry in the cause-book of the abatement to be struck out; and the cause will then be put into the paper, in its turn.

Where any cause has been standing for one year in the cause-book, marked as abated, or as standing over generally, it will be struck out of the cause-book;[4] and no cause will be allowed to stand over, for an indefinite period.[5]

When the *subpœna* to hear judgment has been served, each party is entitled to prepare his brief for counsel; and care should be taken that such brief be delivered in due time, before the cause is placed in the paper for hearing.[6]

[4] Ord. 5 Feb., 1861, r. 3; *ante*, pp. 911, 845.

[5] *Ib.* rr. 7, 19; *ante*, pp. 913, 914.

[6] 15 & 16 Vic. c. 86, § 39; see *ante*, p. 912.

[1] Ord. 5 Feb., 1861, r. 8; see *ante*, p. 911.

[2] Ord. XXI. 7. A fee of 6*s.* 8*d.* is allowed. Regul. to Ord. Sched. 2. For form of certificate, see Vol. III.

[3] Saner *v.* Deavin, 14 Beav. 646; and see Roberts *v.* Roberts, 1 S. & S. 39; Gibson *v.* Lord Cranley, 6 Mad. 365; Whalley *v.* Lord Suffield, 12 Beav. 402; Nicholls *v.* Elford, 5 Jur. N. S. 264, V. C. W.

[4] Ord. XXI. 8; but see Brooke *v.* Todd, 6 Jur. N. S. 664, L. JJ.

[5] Ord. XXI. 13.

[6] The brief for the plaintiff will consist of a printed copy of his bill, of each answer and of all the evidence. The brief for each defendant will comprise a printed copy of the bill, of his own answer only, and of all the evidence; see Lord *v.* Colvin, 3 Drew. 222; 1 Jur. N. S. 298; and *ante*, p. 919. The brief, in each case, should be acompanied by such

The plaintiff must, before the cause is called on (and, indeed, an earlier time than the day in which the cause is in the paper, is fixed by some of the Judges), leave with the Usher of the Judge who is to hear it, two printed copies of the bill and answer; one for the use of the Court, and the other for the Registrar.[7]

*978 * The plaintiff's solicitor should, as well as the solicitor for the defendants, be in attendance when the cause is called on, and during the hearing;[1] and if, upon the hearing of any cause or other matter, it appears that the same cannot conveniently proceed, by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the Court, and which, according to its practice, ought to have been delivered, such solicitor will be ordered personally to pay, to all or any of the parties, such costs as the Court thinks fit to award.[2]

The causes in the paper for the day are called on by the Registrar, in the order in which they there stand. If, upon a particular cause being called and the bill opened, the defendant does not appear, the plaintiff must prove service upon him of the *subpœna* to hear judgment;[3] and the Court will then make such a decree, as, upon the pleadings and evidence, the plaintiff is entitled to.[4] Formerly, the decree made, in

observations as may be deemed advisable, and by such copies of, or extracts from, other documents as may be necessary. A consultation between the senior and junior counsel is usually arranged by the solicitor, and is attended by him. If, after the briefs have been delivered, the cause stands over from one term to another, a refresher fee should be marked on each brief. A fee of 2*l.* 2*s.* higher scale, and 1*l.* 1*s.* lower scale, is allowed for instructions for brief. Ord. 6 March, 1860, Sched. No costs are allowed, either as between party and party or as between solicitor and client, for any written brief of a bill, unless the Court, in disposing of the costs of the cause, shall direct the allowance thereof: Ord. XL. 18; nor for any written brief of an answer, unless the Court shall direct the allowance thereof: Ord. 6 March, 1860, r. 13; except, of course, the answers of pat pers, which are not printed; see *ib.* r. 15. As to: the costs of a brief prematurely prepared; of observations; and of a brief to a second or third counsel: and as to: the *quantum* of fees to counsel, and their clerks; special fees; and refreshers, see *post*, Chap. XXXI., *Costs*. For forms of briefs and indorsements, see Vol. III.

[7] Reg. Regul. 15 March, 1860, r. 22; *ib.* 23 Nov., 1861. In New Hampshire, "if the cause is to be heard upon bill and answer, notice shall be given thereof, with a copy of the bill and answer, if not before furnished to the Court or one of the Justices, without delay, or the bill may be dismissed. Rule 25. If the cause is to be heard on the bill and demurrer, copies thereof, if not already furnished, shall be given to the Court or one of the Justices without delay, or the bill may be dismissed. Rule 26. Within ten days after the evidence is by the rules required to be closed, each party shall furnish the evidence taken by him to one of the Justices of the Court, otherwise such evidence may be regarded as waived, or the party in fault may be charged with the costs occasioned by the delay. Rule 27 of Chancery Practice, 38 N. H. 610.

[When a suit in Equity has been heard, and submitted to the Court for decision, neither party has a right to file any paper in the cause except by leave of Court. Union Sugar Ref. *v.* Mathiesson, 3 Cliff. 146.]

[1] Ord. XXI. 11.

[2] Ord. XXI. 12; Courtney *v.* Stock, 2 Dr. & War. 251; and see Gallemore *v.* Gill, 2 Jur. N. S. 1178; 4 W. R. 773, L. JJ., as to the duty of solicitors to have original documents in Court.

[3] See *ante*, p. 969. The affidavit should, in strictness, be produced in Court when the cause is called on; but at the latest it must be produced before the rising of the Court the same day; otherwise, leave must be obtained to restore the cause to the paper, and notice will be required to be given to the defendant who did not appear, and he may in that case appear on the day when the cause is again brought on, and argue it. Seton, 6.

[4] Hakewell *v.* Webber, 9 Hare, 541; Browne *v.* Smith, 5 Jur. 1195, V. C. W.; Hughes *v.* Jones, 26 Beav. 24; Seton, 1121. [See Hardwick *v.* Bassett, 25 Mich. 149.]

such a case, was a decree *nisi*, giving the defendant a day to show cause against it; but now, it is absolute in the first instance.[5] Formerly, the last cause in the paper was privileged; but this is no longer the case.[6]

Where a decree was taken by default, in consequence of the negligence of the clerk of the defendant's solicitor, Sir John Romilly M. R. refused to restore the cause to the paper;[7] but, in a subsequent *979 case, the same Judge, on the motion of the defendant, * allowed the case to be reheard, and modified the decree, upon the defendant paying all the costs subsequent to the original hearing, and reserving the costs up to and including the original hearing. The case, however, it should be mentioned, was a claim, and was heard on motion.[1]

The same course of proceeding, *mutatis mutandis*, as that adopted where the plaintiff has set the cause down and does not appear, may be taken where the cause has been set down at the request of the defendant, and the plaintiff does not appear. In such cases, the decree pronounced by the Court will be for a dismissal of the plaintiff's bill against the defendants, with costs, absolutely;[2] but the defendant can take no advantage of the plaintiff's non-appearance, unless the *subpœna* to hear judgment appears to have been properly served: for, otherwise, the plaintiff is in no default.[3]

Where the cause has been set down by the plaintiff, and the defendant's counsel is ready and appears, and no counsel appears for the plaintiff, the Court always calls upon the defendant to prove service upon him, such defendant, of the *subpœna* to hear judgment.[4] This must be done by affidavit, in the manner before pointed out;[5] and if the Court is satisfied that the *subpœna* to hear judgment has been served, it will make a peremptory decree dismissing the plaintiff's bill with costs;[6] and such dismissal, unless the Court otherwise directs, will be equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.[7]

Where the plaintiff, an executor, did not appear at the hearing, and the bill was dismissed with costs, the Court refused, with costs, an

[5] Ord. XXIII. 12; see Rule 60 of the Chancery Rules of New Jersey. A decree entered by default and enrolled was set aside on motion and notice to the plaintiff, on payment of costs. Beekman *v.* Peck, 3 John. Ch. 415; Tripp *v.* Vincent, 8 Paige, 176; Carter *v.* Torrance, 11 Geo. 654; Beach *v.* Shaw, 4 Barb. S. C. 288. [*Infra*, 1026.]

In New Jersey, if a defendant does not appear at the hearing before the Chancellor, the cause having been regularly noticed for argument, he cannot appeal from a decree thus rendered in his absence. Townsend *v.* Smith, 1 Beasley, 350; see Dean *v.* Abel, 1 Dickens, 287; Stubbs *v.* Dunsany, 10 Ves. 30; Sands *v.* Hildreth, 12 John. 493; Geltson *v.* Hoyt, 13 John. 576.

[6] Flower *v.* Gedye, 23 Beav. 449.

[7] *Ibid.*

[1] Hughes *v.* Jones, 26 Beav. 24; Seton, 29; see also Hale *v.* Lewis, 2 Keen, 318.

[2] Hinde, 407, 418; Clark *v.* Wilson, 24 May, 1775. For form of decree in such case, see Seton, 1133, No. 4. [The cause will be dismissed only as to the defendant who set it down, and the other defendants, in order to have it dismissed as to them must, set it down for themselves. Tatton *v.* London, &c. Fire Ins. Co., L. R. 8 Eq. 450.]

[3] Hinde, 418. For form of affidavit of service of the *subpœna*, see Vol. III.

[4] Rigg *v.* Wall, 3 M. & C. 505; 2 Jur. 1080.

[5] *Ante*, p. 969.

[6] Hinde, 419.

[7] Ord. XXIII. 13; *ante*, p. 659.

application by the plaintiff to have the cause restored to the paper, on the ground that he had, seven months previously, become bankrupt, and believed that his rights passed to his assignees: which (he suing as executor) was not the fact.[8] Where, however, through the neglect of his solicitor, no one appeared for the plaintiff, the Court, thinking under the circumstances that the neglect was satisfactorily explained, ordered the cause to be set down again for hearing.[9]

It is to be observed, that if a plaintiff sets down his cause, but does not serve the defendant with a *subpœna* to hear judgment, the defendant cannot have a decree to dismiss; but should, if he * wishes to have the suit decided, himself set the cause down to *980 be heard, and serve a *subpœna* on the plaintiff.[1]

It sometimes happens, that a person who has not been served with a *subpœna* to hear judgment, or who has not appeared in the cause, is willing to be bound by the decree: in such a case, the rule seems to be, that any party named as a defendant to a bill may, with the consent of the plaintiff alone, appear at the hearing of the cause, and be bound by the decree, although such party has not appeared in the suit; but a person who has not been named as a defendant to the bill, cannot appear at the hearing, without the consent of all parties to the cause.[2]

The fact that the plaintiff is in contempt, is not a ground on which a defendant can object to the cause being heard: because the rules of Court make it imperative on the plaintiff to bring his cause to a hearing at a certain time.[3]

The formal mode of hearing a cause, where all the parties appear upon its being called on, is this:[4] the leading counsel for the plaintiff opens the plaintiff's case, and in so doing states, first the bill, and then the answers, if any: pointing out the matters in issue, and the questions of Equity arising therefrom; after which the plaintiff's evidence is read, either by his leading or junior counsel, and their arguments in support of his case are adduced. The counsel for the defendant are then heard, in support of the defendant's case, and his evidence is read by them; and the plaintiff's senior counsel is then heard in reply.[5] When all are heard, the Court pronounces the decree, either immediately or at a

[8] Frost *v.* Hilton, 15 Beav. 432.

[9] Hale *v.* Lewis, 2 Keen, 318.

[1] See *ante*, p. 962.

[2] Dyson *v.* Morris, 1 Hare, 413, 419; see the remarks on this case in the note to Lewis *v.* Clowes, 10 Hare Ap. 62; and see *ante*, pp. 152, 153, 253.

[3] Ricketts *v.* Mornington, 7 Sim. 200; Futvoye *v.* Kennard, 2 Giff. 110. As to the effect of a contempt, see *ante*, p. 504 *et seq.*

[4] For the course of proceeding on the hearing of a case in Equity, in Maine, see Rule 18, Ch. Pr., 37 Maine, 588, 589.

[5] Hinde, 412; see Higdon *v.* Higdon, 6 J. J. Marsh. 49. Where there are two defendants, who set up adverse claims, the course of practice is for the plaintiff to open: for the defendant who sets up a claim against the other then to go on, and for the other defendant to answer; and there is no reply between the defendants, unless specially directed by the Court. Walton *v.* Van Mater, Halst. Dig. 175. For the mode of proceeding in Maine, see Rule 18, Ch. Pr., 37 Maine, 588, 589.

subsequent day:[6] the minutes of which are taken down by the Registrar.[7]

*981 * Where the evidence in chief, as to any facts or issues, is taken *vivâ voce* at the hearing, the plaintiff's witnesses are examined after his counsel have been heard, and the defendant's witnesses after the defendant's counsel have been heard; and the cross-examination and re-examination of any witness follow immediately upon his examination in chief; and so, where a witness is cross-examined at the hearing upon his affidavit or deposition, the cross-examination and re-examination follow immediately after the reading of the affidavit or deposition.[1]

A plaintiff cannot be heard both in person and by counsel;[2] but where a barrister and his wife were co-plaintiffs, and he appeared for the plaintiffs, the Court allowed another counsel to be heard, on being informed that the plaintiff appeared as counsel.[3] A relator and plaintiff, in a bill and information, cannot be heard in person: as the Court cannot separate the bill from the information, and cannot hear the relator on behalf of the Attorney-General.[4]

Pleadings,[5] affidavits, and depositions are usually read from the printed copies,[6] but office copies of affidavits and depositions must be in Court, and are usually handed up to the Judge, if called for. The original record of the pleadings will be referred to, if necessary, and is always understood to be in Court.[7]

The Court of Chancery will not receive in evidence any document which ought to be stamped, without it has the proper stamp affixed to it; and the Court will itself raise the objection, whether it be taken by the other party or not.[8] A Court of Equity cannot, any more than a

[6] The decree should be dated of the day on which judgment is actually delivered. Attorney-General *v.* Stamford, 7 Jur. 359, L. C. A Lord Chancellor, who has delivered up the Great Seal, may give written judgments, within six weeks after delivering up the same. 15 & 16 Vic. c. 80, § 60. A decree is binding from the day it is pronounced; and not merely from the time when it is drawn up. *Re* Risca Coal Company, 8 Jur. N. S. 900; 10 W. R. 701, L. C.; see Thompson *v.* Goulding, 5 Allen, 84, 85; Genl. Sts. Mass. c. 113, § 16. [See also Carson *v.* Richardson, 3 Hayw. 231, and Jackson *v.* Jackson, 2 Tenn. Leg. Rep. 275; S. C. 7 Rep. 980. And see *infra*, 1016, n. 7; Dick. N. J. Ch. Pr. 249 note.]

[7] See *post*, p. 1004 *et seq.* As to the attendance of the Registrars in Court in rotation, see Ord. I. 17. If the minutes of the order have not been taken down by the Registrars, counsel's notes of it may be acted on. Anderson *v.* Yates, 15 Jur. 833, V. C. K. B. In New Hampshire, when an answer is delivered to the plaintiff's solicitor, the plaintiff shall, within one month, amend his bill by leave of the Court or one of the Justices, and deliver his amendment to the defendant's solicitor, or deliver to such solicitor his replication, or his exceptions allowed by the Court, if not submitted to by the defendant, otherwise the case shall be heard as of course on the bill and answer. Rule 17 of Chancery Practice, 38 N. H. 608.

[1] Ord. 5 Feb., 1861, r. 3; Comp. Ord. XLI. 43.

[2] Parkinson *v.* Hanbury, 4 De G., M. & G. 508.

[3] Newton *v.* Ricketts, 2 Phil. 624; 12 Jur. 107, 238.

[4] Attorney-General *v.* Barker, 4 M. & C. 262; *ante*, p. 10.

[5] See, where bills are taken *pro confesso*, Ord. 13 July, 1861, *ante*, p. 526. Objections to the pleadings which involve no substantial interest, are not allowed upon the final hearing. Freeman *v.* Schofield, 1 C. E. Green, 28.

[6] In New Jersey, by Ch. Rule 95, no documentary evidence which is not made an exhibit before the Master, shall be read at the hearing of the cause.

[7] Huddleston *v.* Briscoe, 11 Ves. 583, 598. As to proving exhibits at the hearing, see *ante*, p. 881 *et seq.*

[8] 17 & 18 Vic. c. 125, § 28; *ante*, pp. 849, 880; and see Seton, 16.

Court of Law, receive parol evidence of the contents of a written agreement, which appears never to have been stamped, even where it is proved to have been fraudulently destroyed by the party against whom it is sought to be enforced.[9] If the instrument objected to is of such a nature that a stamp may be affixed to it on payment of a penalty, the Court will permit it to be so stamped, and will, for that purpose, permit the cause to stand over.[10]

*982 * The course of proceeding is much the same, where the cause has been set down for hearing, upon bill and answer: in such case, the practice is that the answer is read, and must be admitted to be true in all points;[1] and no other evidence is admitted, unless it be matter of record to which the answer refers, and which is provable by the record,[2] or documents which may be proved by affidavit, or *vivâ voce* at the hearing.[3]

If the plaintiff goes to a hearing on bill and answer, and the Court does not see cause to make a decree thereupon, for want of sufficient matter confessed by the answer, the Court will, generally, permit him (if he desires it) to reply, on payment of ten pounds, and such other costs as the Court shall think fit, within four days after such hearing.[5] Thus, where a bill was brought against three several executors of three joint factors, one of whom swore "he believed and hoped to prove" that the plaintiff was satisfied as to his demands, whereupon the plaintiff replied against the other two, and brought the cause on by bill and answer against the third, it was insisted that the plaintiff could have no decree, on thus bringing on his cause: for, though the defendant had not directly sworn by his answer that the money was paid, yet as he had sworn he believed and hoped to prove it paid, and the plaintiff, by not replying, had precluded him from the benefit of his proof, what the defendant stated upon his belief must be taken to be true; and the plaintiff was ordered to pay the costs, and left at liberty to reply to the answer of the other defendant.[6]

Where the bill is dismissed, on a hearing on bill and answer,

[9] Smith *v.* Henley, 1 Phil. 391, 396; Hart *v.* Hart, 1 Hare, 1, 5; *ante*, pp. 785, 816.

[10] Coles *v.* Trecothick, 9 Ves. 234, 239; Carrington *v.* Pell, 3 De G. & S. 512; see *ante*, pp. 849, 880; and Seton, 16; see Disbrow *v.* Johnson, 3 C. E. Green, 36. As to objections to probates for want of a proper stamp, see *ante*, p. 319.

[1] See Childs *v.* Horr, 1 Clarke (Iowa), 432; Warren *v.* Twilley, 10 Md. 39; whether the matters stated in it are responsive to the bill, or of pure avoidance. Perkins *v.* Nicholls, 11 Allen, 542; Buttrick *v.* Holden, 13 Met. 356; Brinckerhoff *v.* Brown, 7 John. Ch. 217; *ante*, 843, notes. And this rule prevails even where the defendant only avers that he believes and hopes to be able to prove such facts. Brinckerhoff *v.* Brown, 7 John. Ch. 217; Dale *v.* McEvers, 2 Cowen, 18.

[2] Ord. XIX. 2. But documentary evidence cannot be read to show facts not stated in the pleadings. Anon., 1 Barb. Ch. 73. [Nor other evidence. Randolph's Appeal, 66 Pa. St. 178.] In a hearing on the bill and answer, averments in the bill which are denied on oath in the answer will not be taken to be true. Tainter *v.* Clark, 5 Allen, 66. [So, if not admitted by the answer: Carrow *v.* Adams, 65 N. C. 32. For the failure to admit is equivalent to a denial; Hardwick *v.* Bassett, 25 Mich. 149.]

[3] *Ante*, p. 828; Rowland *v.* Sturgis, 2 Hare, 520; Chalk *v.* Raine, 7 Hare, 393; 13 Jur. 981; Neville *v.* Fitzgerald, 2 Dr. & War. 530; *contra*, Jones *v.* Griffith, 14 Sim. 262; 8 Jur. 733; and see Wilkinson *v.* Fowkes, 9 Hare, 592.

[4] Ord. XL. 22, fixes the costs of the day at this amount: *ante*, p. 974.

[5] Rogers *v.* Mitchell, 41 N. H. 160.

[6] Barker *v.* Wyld, 1 Vern. 140.

the same order will, generally, be made as to costs as would be made, if the suit had been brought to a hearing, after filing replication.

Formerly, if a question of mere law arose at any hearing in the Court of Chancery, it was the practice of the Court to refer it to the opinion of the Judges of one of the Courts of Common Law, upon a case *983 stated for that purpose;[7] but this practice is now * abolished; and any questions of Law which are necessary to be decided, previously to the decision of the equitable question at issue between the parties will be determined by the Court of Chancery:[1] calling to its assistance, if necessary, one or more of the Common Law Judges.[2] The Court will not require the assistance of a Common Law Judge, unless it entertains a reasonable doubt;[3] and where the Court desires such assistance, the Judge will request the Lord Chancellor to make application accordingly.[4]

It may also be mentioned here, that the Court, or any Judge thereof, may, in such way as they may think fit, obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, the better to enable them to determine any matter at issue in any case or proceeding, and may act upon the certificate of such persons.[5] The allowances in respect of fees to such persons will be regulated by the Taxing Master of the Court, subject to an appeal to the Judge to whose Court the cause or matter is attached: whose decision will be final.[6] The certificates, however, of such persons, although entitled to great weight, are not to be considered in any other light than as furnishing materials for the information and guidance of the Court; and affidavits may, therefore, be received in opposition to them.[7] The Court will not obtain the assistance of any scientific person, until an issue has been raised between the parties to the suit.[8]

[7] In Massachusetts, if, upon making an interlocutory decree or order, the Justice is of opinion that it so affects the merits of the controversy that the matter ought to be determined by a Court of Law before further proceedings are had, he may report the question for that purpose, and stay all further proceedings except such as are necessary to preserve the rights of the parties. Genl. Sts. c. 113, § 12. And it is also provided that "the Justice by whom the case is heard for a final decree may reserve and report the evidence and all questions of law thereon, for the consideration of the full Court, and thereupon like proceedings shall be had as in appeals from final decrees. Genl. Sts. c. 113, § 15.

[1] 15 & 16 Vic. c. 86, §§ 61, 62; 25 & 26 Vic. c. 42, § 1.

[2] 14 & 15 Vic. c. 83, § 8.

[3] Heward *v.* Wheatley, 3 De G., M. & G. 628; 17 Jur. 403; see also Falkner *v.* Grace, 9 Hare, 280, 283.

[4] Hay *v.* Willoughby, 9 Hare Ap. 30; Deerhurst *v.* Jones, 16 Jur. 988, V. C. T., apparently S. C.; Hughes *v.* Chester & Holyhead Railway Company, 8 W. R. 337, V. C. K.

[5] 15 & 16 Vic. c. 80, § 42. For cases in which such assistance has been obtained, see Attorney-General *v.* Chambers, 4 De G. & J. 55, 58; 5 Jur. N. S. 745; Case *v.* Midland Railway Company, 27 Beav. 247; 5 Jur. N. S. 1017. [But the Court has no power to delegate to an expert the power of calling witnesses and administering oaths. Morris *v.* Llanelly R. and Dock Co., W. N. (1868) 46.]

[6] 15 & 16 Vic. c. 80, § 43. In general, the fees allowed accountants will be regulated by those allowed them in bankruptcy; Meymott *v.* Meymott, 10 Jur. N. S. 715; 12 W. R. 996, M. R.; 33 Beav. 590. For the scale of allowances in bankruptcy, see Vol. III.

[7] Per L. J. Turner, in Ford *v.* Tynte, 10 Jur. N. S. 429, 430; 2 De G., J. & S. 127; and see Hill *v.* King, 9 Jur. N. S. 527 L. C.

[8] Stokes *v.* City Offices Company, 13 W. R. 537, V. C. W.; 11 Jur. N. S. 560.

Where, after a cause has come on to be heard, it has been discovered that, through inadvertence, although witnesses have been examined, no replication has been filed, the Court has permitted a replication to be filed *nunc pro tunc*.[9]

If a cause heard on bill and answer is dismissed, with liberty to the plaintiff to reply within a limited time after such hearing, on payment of costs, and the plaintiff does not pay the costs and reply within that period, the dismissal must stand; and, being * signed *984 and enrolled, may be pleaded in bar to a new bill for the same matter.[1]

It has been before stated, that the proper time for taking an objection at the hearing for want of parties is after the pleadings are opened, and before the merits are discussed: though the Court has frequently at a later period permitted the cause to stand over, for the purpose of adding parties.[2] With respect to the question of costs in such cases, it will be sufficient to refer to what has been before said upon the subject,[3] and to add that, if a cause comes on again, after it has been put off by the Court for want of formal parties, an objection for want of other parties which might have been made in the first instance, comes too late.[4]

If a cause, instead of being ordered to stand over for want of parties, is struck out of the paper, so that it is necessary again to set it down, and to serve fresh *subpœnas* to hear judgment, the defendant, if the cause is again set down, is, as we have seen, to be allowed the taxed costs occasioned by the first setting down, although he does not obtain the costs of the suit.[5]

In the matter of Lord Portsmouth,[6] Lord Eldon, before going into his private room, for the purpose of proceeding with the further hearing of the petition and affidavits privately, according to appointment, desired that it might be understood that it was the uniform practice in Chancery, as long as the Court had existed, in the case of family disputes, on the application of counsel on both sides, to hear the same in the Chancellor's private room; and that what was so done was not the act of the Judge, but of the parties themselves in such family cases: but it has since been held, that a cause may be directed to be heard in private, although such course is not consented to.[7]

The parties should take care that the evidence made use of at the hearing is entered in the decree as read;[8] or, if rejected, as having

9 Rodney *v.* Hare, Mos. 296; Wyatt's P. R. 376; *anti*, p. 834.

1 1 Prax. Alm. 18; and see *ante*, pp. 659, 981.

2 *Ante*, p. 292.

3 *Ib.* p. 291.

4 Jones *v.* Jones, 3 Atk. 217.

5 Ord. XL. 21; and see *ante*, § 975

6 G. Coop. 106.

7 Ogle *v.* Brandling, 2 R. & M. 688. [See Andrew *v.* Raeburn, L. R. 9 Ch. App. 522; Nagle-Gilman *v.* Christopher, 4 Ch. Div. 173.]

8 M'Mahon *v.* Burchell, 2 Phil. 127, 137; 1 C. P. Coop. t. Cott. 475; Parker *v.* Morrell, 2 Phil. 453, 463; 12 Jur. 253; and see on this subject, *post*, p. 1003, and Seton, 7. [See Mass. Eq. Rule, 35.]

been tendered and rejected;[9] but it will not be entered "saving just exceptions."[10]

The plaintiff can also, as we have seen,[11] bring his cause to a hearing upon motion for a decree: the hearing in which case is conducted in the same manner as where replication has been filed.

It may be here mentioned that, in the interval between the *985 * close of the sittings after any term, and the commencement of the sittings before or at the beginning of the next ensuing term, applications for special orders may be made to any Judge of the Court, in the same manner as if the rules which attach every cause to a particular branch of the Court[1] had not been made; but orders which may be so made in any such interval by the Lord Chancellor or the Lords Justices, or by the Master of the Rolls, or by any of the Vice-Chancellors are, — if not made by the Judge to whom the application, if made during the ordinary sittings of the Court, would have been made,[2] — to be marked as having been made for such Judge, and are, in the future proceedings of the cause, to be deemed to be the orders of such Judge in all respects, save this: that no order so made by one Judge for another, under the circumstances aforesaid, is to be reheard, for the purpose of being discharged or varied, otherwise than by the Lord Chancellor or by the Lords Justices.[3]

During the like interval, one Judge may also sign and adopt any certificate made by the Chief Clerk of any other Judge, and decrees and orders made by any Judge may be prosecuted at the Chambers of any other Judge, by his permission: and, if not completed during such interval, may be continued at his Chambers, if, and so far as, he thinks fit.[4]

Where, during vacation, a motion in a cause attached to the Court of the Master of the Rolls has been heard by a Vice-Chancellor and refused, the Master of the Rolls will not hear the same application, even if supported on different grounds from those before the Vice-Chancellor;[5] but an order made by one Judge for another may be reheard by the Judge for whom it is made, if the Judge who makes the order expressly gives the parties leave to do so.[6]

By an arrangement among the Master of the Rolls and the Vice-Chancellors, such business of their respective Courts and Chambers as requires their personal attention during the vacations, is ordinarily attended to by one of them only, for the space of one year; and such

[9] Watson *v.* Parker, 2 Phil. 5, 9; 10 Jur. 577.

[10] Watson *v.* Parker, *ubi sup.*; Parker *v.* Morrell, 2 Phil. 453, 462; 12 Jur. 253; Drake *v.* Drake (No. 1), 25 Beav. 641.

[11] *Ante*, p. 819 *et seq.*

[1] *Ante*, pp. 397, 398.

[2] *Ibid.*

[3] Ord. VI. 11; Price *v.* Gardiner, 1 Jur. N. S. 975, V. C. W.; Bean *v.* Griffith, *ib.* 1045, V. C. W.; Holloway *v.* Phillips, 17 Jur. 875, V. C. W.; [Warrick *v.* Queen's College, L. R. 3 Ch. App. 815]. The rule also applies, during the temporary absence of a Judge from illness or otherwise. Paredes *v.* Lizardi, 9 Beav. 490.

[4] Ord. XXXV. 59; see *post*, Chap. XXIX., *Proceedings at Chambers*.

[5] Man *v.* Ricketts, 9 Beav. 4.

[6] Pinchin *v.* London & Blackwall Railway Company, 5 De G., M. & G. 851.

Judge is usually termed "the Vacation Judge."[7] The duties of the Vacation Judge commence immediately on the rising of the Courts for the long vacation.[8]

[7] See *post*, Chap. XXIX., *Proceedings at Chambers.*

[8] Francis *v.* Browne, 8 Jur. N. S. 785; 10 W. R. 811, L. C.

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* CHAPTER XXVI.

DECREES AND ORDERS.

SECTION I. — *General Nature of Decrees and Orders.*

A DECREE is a sentence or order of the Court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit, according to equity and good conscience.[1] It is either interlocutory or final.[2]

An interlocutory decree is: when the consideration of the particular question to be determined, or the further consideration of the cause generally, is reserved till a future hearing.[3] The further

[1] ["It is to be hoped," says Mr. Freeman, "that decrees generally conform to the description here given of them. They are none the less decrees, however, if pronounced without hearing or understanding the points in issue. Neither is it necessary to their existence or validity, that the rights of the parties be determined according to Equity and good conscience." Freem. on Judgts. § 9. And see Randall *v.* Payne, 1 Tenn. Ch. 144.]

[2] See Wyatt's P. R. 154; Hinde, 429. A decree in Equity is for most purposes, if not for all, of as high a dignity and character as a judgment in a Court of Law. Hopkins *v.* Lee, 6 Wheat. 109; Wash. Bridge Co. *v.* Stewart, 3 How. U. S. 413; Crandall *v.* Gallup, 12 Conn. 365; Calkins *v.* Evans, 5 Ind. 441; Loyd *v.* Hicks, 31 Geo. 140. It is equivalent to a judgment at Law as to the distribution of assets. Thompson *v.* Brown, 4 John Ch. 636; Woddrop *v.* Price, 3 Desaus. 206; Blake *v.* Heyward, 1 Bailey Eq. 208; see Phillips *v.* Thompson, 3 Stew. & P. 369.

A decree cannot be incidentally assailed, but is conclusive as to the rights and liabilities of the parties until reversed by the appellate Court, or impeached by an original bill for fraud in obtaining it, or attacked for palpable error, by bill of review. Sanders *v.* Gatewood, 5 J. J. Marsh. 328; Watson *v.* Williams, 8 Ired. Eq. 232; Gardiner *v.* Miles, 5 Gill, 94; Hunter *v.* Hutton, 4 Gill, 115; Hill *v.* Hoover, 9 Wis. 15. The conclusiveness of a decree is not affected by any difference between its being obtained by consent or by a decision of the Court on legal principles involved. Gifford *v.* Thorn, 1 Stockt. (N. J.) 702.

A decree authorizing a sale of all the real estate of a party, is good, as evidence, against all the world, so far as the transfer of the right of such party to another, or to a purchaser under such a decree, is concerned. Ryder *v.* Inverarity, 4 Stew. & P. 14.

All persons who are parties or privies to a decree are bound by it. Gould *v.* Stanton, 16 Conn. 12; Young *v.* Henderson, 4 Hayw. 189; M'Whorter *v.* Standifer, 2 Porter, 519; Marrigauld *v.* Deas, 1 Bailey Eq. 284; M'Call *v.* Harrison, 1 Brock. 126. But none others. Brown *v.* Wincoop, 2 Blackf. 230; Canby *v.* Ridgway, Halst. Dig. 175; Dale *v.* Roosevelt, 1 Paige, 35; Garnett *v.* Mason, 6 Call, 308; Este *v.* Strong, 2 Ohio, 404; Moseley *v.* Cocke, 7 Leigh, 224; Griswold *v.* Jackson, 2 Edw. Ch. 461; Matthews *v.* Roberts, 1 Green Ch. 338. A decree cannot be made as to any who are not parties to the suit. Armstrong *v.* Armstrong, 4 C. E. Green, 357.

The rights of third persons, not parties to a suit, are not affected by the decree therein, although such decree is binding and conclusive with respect to the subject-matter on which it acts. Beers *v.* Broome, 4 Conn. 247; Bailey *v.* Robinson, 1 Grattan, 4; McCall *v.* Harrison, 1 Brock. 126; Carney *v.* Emmons, 9 Wis. 114; Buford *v.* Bucker, 4 J. J. Marsh. 551; [Dunklin *v.* Harvey, 56 Ala. 181; Campbell *v.* Hall, 16 N. Y. 575; Montgomery *v.* Rich, 3 Tenn. Ch. 660;] but see Goss *v.* Singleton, 2 Head (Tenn.), 67.

[3] See Thompson *v.* Peebles, 6 Dana, 391; Dunbar *v.* Woodcock, 10 Leigh, 629; Teaff *v.* Hewitt, 1 Ohio (State), 511. [The Courts have not laid down any satisfactory definition of what is an interlocutory decree. The difficulty is in the subject itself, for, by various gradations, the interlocutory decree may be made to approach the final decree, until the line of discrimination becomes too faint to be readily perceived. Per Baldwin J. in Cocke *v.* Gilpin, 1 Rob. (Va.) 27, where the gradations are admirably illustrated. See

*hearing is then termed a hearing upon further consideration, *987
or upon the equity reserved.[1]

It seldom happens that a first decree can be final, or conclude the cause. Thus, if any matter of fact is strongly controverted, the Court will, where necessary, direct such matter to be tried before itself, either with or without a jury;[2] or, if it can be more conveniently so tried, before a Court of Common Law, in London or Middlesex, or at the Assizes.[3] And where the Court awards damages,[4] they may be assessed in like manner, or before the sheriff.[5] In such cases, no final decree can be pronounced until the issue has been tried. The Court, therefore, in such cases, in the first instance merely orders the issue to be tried;[6]

also Manion *v.* Fahey, 11 W. Va. 482; Robertson *v.* Bingley, 1 McCord Ch. 351; Rowley *v.* Benthuysen, 16 Wend. 369. The difficulty has been increased by the fact that the definition of a final decree has often been made to turn, not upon the nature of the determination, but upon a construction of the statutes regulating appeals. Berryhill *v.* McKee, 3 Yerg. 157; Perkins *v.* Fourniquet, 6 How. 206. And see, under the English Judicature Act, Krehl *v.* Burrell, 10 Ch. Div. 420; Lowe *v.* Lowe, 10 Ch. Div. 432.

Decrees have been termed interlocutory where they are made on motion before the regular hearing. Seaton Dec. 2. Or for the purpose of ascertaining matter of law or fact previous to a final decree. 1 Newl. Pr. 322; 1 Hoff. Pr. 501; 1 Har. Ch. Pr. 420; Delap *v.* Hunter, 1 Sneed, 101. Thus, an order authorizing a defendant to proceed to the trial of an action at Law brought against the complainant, is interlocutory. Horwood *v.* Schmedes, 12 Ves. 311. So is an order for the trial of an issue at Law. Dabbs *v.* Dabbs, 27 Ala. 646; Eames *v.* Eames, 16 Pick. 141. So is an order of reference for an account without settling the principles on which it should be taken. Carter *v.* Privatt, 3 Jones Eq. 345; Brandon *v.* Crouch, 11 Heisk. 605. So is a decree overruling a demurrer, motion to dismiss for want of equity, or plea. Dormer *v.* Fortescue, 2 Atk. 284; Avery *v.* Holland, 2 Tenn. 469; Shaw *v.* Patterson, 2 Tenn. Ch. 172; Knapp *v.* Marshall, 26 Ill. 63. So, in Indiana, is a decree which sustains a demurrer without more. Slagle *v.* Bodmer, 58 Ind. 465. And, generally, where any thing is to be done to complete the decree which is the subject of exception or appeal, it is not final but interlocutory. Pulliam *v.* Christian, 6 How. 209; Bellamy *v.* Bellamy, 4 Fla. 242; Sherin *v.* Smith, 79 N. C. 310; Cocke *v.* Gilpin, 1 Rob. (Va.) 20. And such decrees have, on final hearing, been held interlocutory even after action of the appellate Court upon direct appeal from the particular decrees. Travis *v.* Waters, 1 Johns. Ch. 88; S. C., on appeal, 12 Johns. 500; Price *v.* Nesbit, 1 Hill Ch. 445; Shrewsbury R. Co. *v.* London R. Co., 4 De G., M. & G. 115. And see, as to the power of the Court on final hearing over previous interlocutory decrees, *infra*, 1371, n. 1.

It has also been repeatedly held that a decree which, although it declares the rights of the parties and directs an account in conformity therewith, reserves the consequential directions, and the question of costs until the coming in of the report is interlocutory. Johnson *v.* Everett, 9 Paige, 636; Kane *v.* Whittick, 8 Wend. 219, 224; Garrard *v.* Webb, 4 Porter, 73; Fourniquet *v.* Perkins, 16 How. 82. But such a decree seems, strictly, to be final so far as it adjudges the rights of the parties, and only interlocutory as to the details of the account ordered. Jones *v.* Wilson, 54 Ala. 50; Humphrey *v.* Foster, 13 Gratt. 653; Perkins *v.* Fourniquet, 6 How. 206; Meek *v.* Mathis, 1 Heisk. 536; *infra*, 993, n. 8. An appeal from the final decree opens for revision all previous orders and decrees which could not be appealed from at the time. Morris *v.* Richardson, 11 Hum. 389; Laidley *v.* Merrifield, 7 Leigh, 354. Whenever a matter is by decree duly committed to a commissioner to obtain the result of his investigation and judgment, to serve as a basis for a subsequent decree of the Court, his report, if not excepted to, binds the parties, and the Court should decree accordingly, and the appellate Court cannot review its action. If, however, the interlocutory decree decides the point in issue, making a reference only to ascertain the details, exceptions are not available for a re-examination of the point, but the appellate Court will review without exception, the review being really of the decree. Eaton *v.* Truesdail, 8 Cent L. J. 218, Sup. Crt. Mich. See also Clark *v.* Willoughby, 1 Barb. Ch. 168.]

[1] Seton, 2. In strictness, a decree is interlocutory until it is signed and enrolled: Gilb. For. Rom. 183; Wyatt's P. R. 154; but the term is more generally applied to decrees in which some inquiry as to matter, either of Law or of fact, is directed, preparatory to a final decision. 1 Newl. 508; see *post*, Chap. XXX., *Further Consideration*.

[2] 21 & 22 Vic. c. 27, §§ 3, 5; 25 & 26 Vic. c. 42.

[3] 25 & 26 Vic. c. 42, § 2.

[4] 21 & 22 Vic. c. 27, § 2.

[5] *Ib.* §§ 3, 5, 6.

[6] The Court will not, except by consent, direct the issue to be tried, until the hearing of the cause. George *v.* Whitmore, 26 Beav. 557; Morrison *v.* Barrow, 1 De G., F. & J. 633, per L. J. Turner, 639; Bradley *v.* Bevington, 4 Drew. 511; 5 Jur. N. S. 562.

and adjourns the further consideration of the other questions in the cause, until after the trial.[7]

Sometimes, the object of the suit is a commission to settle the boundaries of lands. In such a case, also, the first decree is not generally final: the further consideration of the cause being reserved till after the commission has been returned.[8]

But the most usual ground for not making a perfect decree, in the first instance, is the necessity which frequently exists to make inquiries, or to take accounts, or sell estates, and adjust other matters: which must be disposed of, before a complete decision can be come to upon the subject-matter of the suit.[9]

There are some cases, in which it is a rule of the Court not to make any decree whatever, till certain preliminary inquiries have been made. Thus, in suits for the specific performance of contracts, the Court will not, in general, permit the question whether a good title can be made or not, to be argued before it, in the first instance; even though the objections to the title are stated, and the questions arising upon
*988 them are properly raised by the * pleadings.[1] The rule is not founded merely on practice, but upon principles which are clearly and accurately defined by Lord Eldon, in *Jenkins* v. *Hiles:*[2] "If," observes his Lordship, "instead of bringing an action of damages for breach of covenant, the plaintiff comes here for a specific performance, the defendant has a right, not only to have such a title as the plaintiff offers upon the abstract unauthenticated, but, in consideration of the relief sought here beyond the law, to have an assurance about the nature of his title, such as he cannot have elsewhere. Therefore, the Court never acts upon the fact, that a satisfactory abstract was delivered unless the party has clearly bound himself to accept the title upon the abstract; but, though the abstract is in the hands of the party, who says, he cannot object to it, yet he may insist upon a reference: Why? because the decree compels the other party to produce all the deeds and papers, in his custody or power: from which reasonable and solid objections to the title may be furnished; which would never have fallen under the view of the purchaser, unless the Court wrung from the conscience of the vendor that sort of information which a pur-

[7] See *post*, Chap. XXVII., *Trials of Questions of Fact.*

[8] Seton, 588, No. 1; and see *post*, Chap. XXVII. § 2, *Proceedings under Decrees to settle Boundaries.* In suits for partition, further consideration may be adjourned, though such course is not usual. Seton, 571, 578. As to proceedings under decrees in such suits, see *post*, Chap. XXVII. § 1, *Proceedings under Decrees for Partition.*

[9] A decree authorizing an executor to sell the lands of his testator, for the payment of debts, and to report his proceedings in execution thereof to the Court, is not final, but an interlocutory decree. Goodwin *v.* Miller, 2 Munf. 42. It is said by Judge Spencer, in Jaques *v.* Method. Epis. Church, 17 John. 558, that no case can be found in which a decree, directing a reference to a Master, or a feigned issue, for the purpose of ascertaining any material fact in the case, has been held to be a final decree; see Travis *v.* Waters, 12 John. 500.

[1] Jenkins *v.* Hiles, 6 Ves. 648, 652; Rose *v.* Calland. 5 Ves. 186, 188; Omerod *v* Hardman, *ib.* 722, 731, are apparently at variance with this proposition; but see the observations of Lord Eldon upon these cases in Jenkins *v.* Hiles, 6 Ves. 654; and see Seton, 593 *et seq.*

[2] 6 Ves. 653.

chaser could by no other means acquire. Inquiries and examinations also may be directed, by which the title may be sifted in a way in which it never could upon a mere abstract, authenticated as the vendor thought proper."

It is not to be inferred, from the opinion above expressed by Lord Eldon, that a purchaser may not preclude himself, by his manner of pleading, from his right to such an inquiry; for his Lordship goes on to say: "I have never understood, that the rule has gone this length: that the defendant, against whom a specific performance is sought, may not by an answer unequivocal, to which he was not drawn by surprise, the propriety of which is not rendered disputable by any subsequent discovery, waive the benefit of this principle; and come here, saying in effect, he trusts the representation of the plaintiff, without the obligation of an oath upon his conscience; offering, in the first instance to the decision of the Court one neat dry point; upon which alone his objection rests. The rule has not been considered so absolute. But such instances, if they have occurred in practice, will not shake the rule: but forming an exception, would confirm the general rule." [3] A purchaser may also preclude himself from his right to such a reference, by agreement,[4] or by acts *in pais:* such as taking possession of the estate, or exercising acts of ownership, over it.[5] Such acts,
* however, will not preclude the purchaser from his right to in- *989
vestigate the title, unless the Court is satisfied, from them, that he intended to waive and has actually waived it, and where such an inference could not be drawn from those facts, the Court refused to depart from its ordinary rules.[1]

It may be noticed here, that the terms in which the direction for an inquiry, as to the title of a purchaser, is framed, are not to inquire whether he could make a good title at the time of entering into the contract, but whether he can, that is, at the time of the inquiry, make a good title; [2] and it has been held, that if the vendor can show a good title, at any time before the result of the inquiry into the title by the officer of the Court has been certified, it will entitle him to a decree.[3]

[3] 6 Ves. 654.

[4] Duke *v.* Barnett, 2 Coll. 337; 10 Jur. 87.

[5] Fleetwood *v.* Green, 15 Ves. 594; Margravine of Anspach *v.* Noel, 1 Mad. 310, 315; Fordyce *v.* Ford, 4 Bro. C. C. 494; Simpson *v.* Sadd, 4 De G., M. & G. 665, 673; 1 Jur. N. S. 457; Bown *v.* Stenson, 24 Beav. 631; and see Sugd. V. & P. 353.

[1] Burroughs *v.* Oakley, 3 Swanst. 159, 167; and where waiver is insisted on, it must be alleged by the bill. Gaston *v.* Frankum, 2 De G. & S. 561; 16 Jur. 507; Sugd. V. & P. 342

[2] Langford *v.* Pitt, 2 P. Wms. 629; Parr *v.* Lovegrove, 4 Drew. 170.

[3] Mortlock *v.* Buller, 10 Ves. 292, 315; [Tilley *v.* Thomas, L. R. 3 Ch. App. 61]; Hepburn *v.* Dunlap, 1 Wheat. 179. A Court of Equity will not decree the specific performance of an agreement of sale, and oblige the purchaser to accept a title, which the vendor cannot make out to be clearly good and free from incumbrance. Butler *v.* O'Hear, 1 Desaus. 282; Lewis *v.* Herndon, 3 Litt. 358, Kelley *v.* Bradford, 3 Bibb, 317; Seymour *v.* Delancey, 1 Hopk. 436; Young *v.* Lillard, 1 Marsh. 482; Morgan *v.* Morgan, 2 Wheat. 290, 290; Reed *v.* Noe, 9 Yerger, 283; Watts *v.* Waddle, 6 Peters, 389; Gans *v.* Renshaw, 2 Barr, 34. The vendor should prove that the title he offers to convey is good beyond any reasonable doubt, and will not expose the vendee to litigation. Sturtevant *v.* Jaques, 14 Allen, 523.

"A Court of Equity will not now compel a purchaser to accept a title, which is so doubtful that it may expose him to litigation,

*990 And even after the certificate, if * the vendor can satisfy the Court that he can make a good title, by clearing up the objections, the Court will make a decree in his favor.[1]

The question, whether a vendor was or was not able to make a good title, at the time when the inquiry was directed, is a very material one with respect to costs, though not with reference to the decree for a specific performance:[2] the rule of the Court being, that a vendor is not entitled to costs, except from the time when his title is certified to be complete; and that, up to that time, he must pay costs himself.[3]

The time when a good title is shown is not, however, conclusive upon the question of costs: being subject to the general rule, that the costs must be paid by the person who caused the litigation.[4] In consequence of the above-mentioned rule, it is the practice, in directing an inquiry into the vendor's title, to direct also that, if it appears a good title can be made, an inquiry be made when it was first shown that such good

though the Court may believe it to be good." Chapman J. in Richmond *v.* Gray, 3 Allen, 27; Park *v.* Johnson, 7 Allen, 383; Pyrke *v.* Waddingham, 10 Hare, 1; Young *v.* Rathbone, 1 C. E. Green, 224. A purchaser cannot be compelled to take land which is involved in doubt or dispute as to boundary. Voorhees *v.* De Meyer, 3 Sandf. Ch. 614.

It is sufficient, however, if the vendor is able to make out a good title before decree pronounced, although he had not a good title when the contract was made; Hepburn *v.* Auld, 5 Cranch, 262, 275; Finley *v.* Lynch, 3 Bibb, 566; Tyree *v.* Williams, 3 Bibb, 366; Seymour *v.* Delancey, 3 Cowen, 445; Pierce *v.* Nichols, 1 Paige, 244; Colton *v.* Ward, 3 Monroe, 304, 313; Baldwin *v.* Salter, 8 Paige, 473; Dutch Church, &c. *v.* Mott, 7 Paige, 78; [Hubbel *v.* Von Schoening, 49 N. Y. 326; Delavan *v.* Duncan, 49 N. Y. 485; Peters *v.* Delaplaine, 49 N. Y. 362; Brown *v.* Crane, 47 Ga. 483; Hays *v.* Harmony Grove Cemetery, 108 Mass. 400; Green *v.* Richards, 23 N. J. Eq. 32]; unless the vendee has objected to a completion of the purchase, seasonably, after discovering the want of title in his vendor. Richmond *v.* Gray, 3 Allen, 29, 30, 31; Wynn *v.* Morgan, 7 Ves. 202; Hoggart *v.* Scott, 1 R. & My. 293; Hepburn *v.* Auld, 5 Cranch, 189; [Barnard *v.* Lea, 97 Mass. 92; Fuller *v.* Hovey, 2 Allen, 324; 10 Allen, 239]. When there is any doubt or difficulty about the title, it is usually referred to a Master to be examined and reported on. Pierce *v.* Nichols, 1 Paige, 246; M'Comb *v.* Wright, 4 John. Ch. 659, 670. But Equity will not relieve a purchaser who had a full knowledge of the defect in the title: Craddock *v.* Shirley, 3 Marsh. 288; or if his conduct has amounted to a waiver of the objection. Roach *v.* Rutherford, 4 Desaus. 126; see Ramsey *v.* Brailsford, 2 Desaus. 590, 591; Barrett *v.* Gaines, 8 Ala. 373; [McClure *v.* Harris, 7 Heisk. 386; Chadwell *v.* Winston, 3 Tenn. Ch. 110.]

There are many cases where Courts of Equity have, upon their own opinion, compelled an unwilling purchaser, to accept a title depending upon questions of great nicety; Scott *v.* Nixon, 3 Dru. & War. 388; Kirkwood *v.* Lloyd, 12 Irish Eq. 585.

In the case of Scott *v.* Nixon, *ubi supra*, Lord Chancellor Sugden compelled an unwilling purchaser to take a title depending upon parol evidence of possession under the English Statute of Limitations; [to the same effect is Goss *v.* Singleton, 2 Head, 69;] see further on the subject of enforcing specific performance in cases of doubtful and defective titles, Tomlin *v.* M'Chord, 5 J. J. Marsh. 136; Beale *v.* Seiveley, 8 Leigh, 658; Bryan *v.* Reed, 1 Dev. & Bat. Eq. 86; Watts *v.* Waddle, 1 M'Lean, 200; Cooper *v.* Denne, 4 Bro. C. C. (Perkins's ed.) 87, 88, and notes; Roake *v.* Kidd, 5 Sumner's Ves. 647, Perkins's note (*a*); Omerod *v.* Hardman, *ib.* 722, note; Garnett *v.* Macon, 6 Call, 308. [It is a matter of favor to decree specific performance, if the vendor is prepared to make title at the hearing, and will be granted only in cases which admit of such relief without prejudice to the rights of the vendee. Christian *v.* Cabell, 22 Gratt. 82 The contract must be mutual, and hence a *feme covert* cannot maintain a bill for specific performance. Farr *v.* Scott, 4 Brewst. 49.]

[1] Paton *v.* Rogers, 6 Mad. 256.

[2] Seton *v.* Slade, 7 Ves. 265, 279.

[3] Harford *v.* Purrier, 1 Mad. 532, 538; Wynn *v.* Morgan, 7 Ves. 202, 206; Wilson *v.* Allen, 1 J. & W. 623; Wilkinson *v.* Hartley, 15 Beav. 183; Seton, 616; and see Morgan & Davey, 177 *et seq.*; and *post*, Chap. XXXI., *Costs*.

[4] Monro *v.* Taylor, 8 Hare, 51, 70; 3 M'N. & G. 713, 725; Scoones *v.* Morrell, 1 Beav. 251, 258; Abbott *v.* Sworder, 4 De G. & S. 448; Lyle *v.* Earl of Yarborough, Johns. 70; Carrodus *v.* Sharp, 20 Beav. 56; Parr *v.* Lovegrove, 4 Drew. 170; 4 Jur. N. S. 600; and see Sugd. V. & P. 651; Seton, 616, 617.

title could be made;[5] but this further inquiry is not directed, where the contract for sale itself is disputed.[6]

It is to be recollected,[7] that it is a fundamental principle of Courts of Equity to make as complete a decision, upon all the points embraced in a cause, as the nature of the case will admit; so as to preclude, not only all further litigation between the same parties, but the possibility of the same parties being at any future period disturbed or harassed by other parties claiming the same matter, as well as of any danger that may exist of injustice being done to other parties who are not before the Court in the present proceedings.[8]

Acting upon this principle, the Court in all cases relating to the distribution of the estate of an intestate, before it makes any decree distributing the estate, directs an inquiry who were the *next *991 of kin of the intestate, at the time of his decease, and whether any of them have since died, and, if so, who are their legal personal representatives.[1] An inquiry of this nature is always directed, in cases in which any part of the property in question in the cause devolves upon the next of kin: whether it be upon a total, or upon a partial or constructive intestacy. It is not now the practice, however, to make the inquiry preliminary to the taking of the accounts, as was formerly the case.[2]

In other cases, also, in which there is a fund distributable amongst persons constituting a particular class, consisting of numerous individuals, as in the case of a bequest to the cousins of a testator, the Court will, before it directs any steps to be taken towards a distribution, satisfy itself, if necessary, by an inquiry that all the individuals constituting the class amongst whom the fund was distributable, are parties to the proceeding.[3] It also adopts the same course of proceeding, where the property is distributable, between one of two or more classes of individuals.[4] A decree of this description is not properly a decree in the cause, but rather a preliminary interlocutory order, with a view to inquiry, before the Court can do any thing determining the rights of the parties.[5]

In like manner, where the plaintiff, at the hearing, establishes a

[5] Seton, 593, No. 1; *ib.* 598. If the plaintiff in a bill in Equity for specific performance of an agreement for an exchange of lands cannot give the title mentioned in the agreement, the bill may be dismissed, although the objection is not stated in the answer or taken until a hearing before a Master to whom the case has been referred to settle a proper conveyance. Park *v.* Johnson, 7 Allen, 378.

[6] Gibbins *v.* North Eastern Metropolitan Asylum District, 11 Beav. 1, 5; 12 Jur. 22; Morris *v.* Wilson, 5 Jur. N. S. 168, V. C. W. As to proceedings under decrees and orders, in suits for specific performance, see *post*, Chap. XXIX., *Proceedings in Chambers.*

[7] See *ante*, p. 190.

[8] Where a lien creditor brings a bill in behalf of himself and other creditors of the same class, and with similar rights, the decree should provide proper relief for all of them. Trustees of the Wabash and Erie Canal Co. *v.* Beers, 2 Black U. S. 448.

[1] Seton, 149, No. 3; 180, No. 3; 182, Nos. 1, 3.

[2] Seton, 185. Whether the inquiry shall be preliminary to taking the accounts, will be determined by the Judge in Chambers, in each case, see Ord. XXXV. 16, 19; and see *post*, Chap. XXIX., *Proceedings in Chambers.*

[3] For forms of inquiry in these cases, see Seton, 182–184, Nos. 2–10; and see *post*, Chap. XXIX., *Proceedings in Chambers.*

[4] *Ibid.*

[5] See Horwood *v.* Schmedes, 12 Ves. 311, 315.

prima facie title to the character in which he sues, but not such as entitles him to a decree, the Court will direct an inquiry as to the facts on which his title depends.[6]

Where it appears that certain preliminary accounts and inquiries must be taken and made, before the rights and interests of the parties to the cause can be ascertained, or the questions therein arising can be determined, the plaintiff may, at any time after the defendants have appeared to the bill, move the Court on notice, that such inquiries and accounts may be made and taken,[7] and an order directing such *992 inquiries and accounts will thereupon be made, * without prejudice to any question in the cause, if it appears to the Court that the same will be beneficial to such (if any) parties to the cause as may not be competent to consent thereto; and that the same is consented to by such (if any) of the defendants as being competent to consent, have not put in their answer to the bill; and that the same is consented to by, or is proper to be made upon the statements contained in the answer of, such (if any) of the defendants as have answered the bill.[1]

This order can be obtained even after the cause is set down for hearing, if the case is in other respects suitable;[2] but it will be refused, where granting the motion would serve no useful purpose, as, where the title of the plaintiff to sue is altogether denied;[3] or where granting the motion would involve a decision upon some of the points in the cause.[4] It seems, moreover, that such an order cannot be obtained, where some of the defendants are out of the jurisdiction.[5]

[6] Miller *v.* Priddon, 1 M'N. & G. 687; see also John *v.* Jones, and Bent *v.* Birch, cited Seton, 186; and Cogan *v.* Stephens, 13 June, 1831, MS.; and see Skarf *v.* Soulby, 1 M'N. & G. 364, 376; 13 Jur. 1109.

[7] But the ascertainment of the account will not be evidence in another suit, if the bill has been dismissed on motion of the plaintiff before a final decree. Capell *v.* Landano, 34 Ala. 135.

[1] Ord. XX.; and see *post*, Chap. XXIX., *Proceedings in Chambers*. For form of notice of motion, see Vol. III. Where a bill seeks for a decree for an account, and the defendant submits to such a decree, no proof in reference to the matters of account is, in the first instance, required, but such a decree will be entered of course. Dozier *v.* Sprouse, 1 Jones Eq. (N. C.) 152. The Chancellor must, however, first be satisfied that the plaintiff is entitled to have an account taken. If he is satisfied upon that point, the practice is to refer the case to a Master to state the details of the account, and ascertain the balance. But the Chancellor may, if he sees fit, take the account himself. He should, however, refuse an account, if he is satisfied upon the evidence tha' nothing is due the plaintiff, or that for any cause an account ought not to be decreed. He may arrive at this conclusion by evidence independent of the account. Campbell *v.* Campbell, 4 Halst. Ch. (N. J.) 743.

[An account cannot be ordered, except by consent, before a hearing on the merits. McLin *v.* McNamara, 1 D. & B. Eq. 409; Neale *v.* Hagthrop, 3 Bland, 551; Harris *v.* Fly, 7 Paige, 423; Wessells *v.* Wessells, 1 Tenn. Ch. 58; Trimble *v.* Dodd, 2 Tenn. Ch. 501; Carey *v.* Williams, 2 Leg. Rep. 193; S. C. 1 Lea, 51; Romine *v.* Vance, 11 Heisk. 227.]

It is a universal rule in Equity, that upon a bill for an account, the party against whom the balance is found will be decreed to pay it. Sometimes that order is contained in the original decree for the account. Sometimes, and usually in modern practice, it is not made until the account is taken and the final decree made, but it forms an essential part of the relief upon the bill. Green C. J. in Campbell *v.* Campbell, 4 Halst. Ch. (N. J.) 740, 741.

[2] Strother *v.* Dutton, 10 Sim. 288.

[3] Topham *v.* Lightbody, 1 Hare, 289, 291; Wilson *v.* Applegarth, 10 Sim. 657; Belcher *v.* Whitmore, 7 Beav. 245, 249; Kinshela *v.* Lee, *ib.* 300; Reed *v.* Don Pedro Mining Company, 9 Jur. N. S. 865, V. C. S.; 11 W. R. 935, L. JJ.

[4] Curd *v.* Curd, 2 Hare, 116; 7 Jur. 104; Breeze *v.* English, 2 Hare, 118; Frost *v.* Hamilton, 4 Beav. 33; Lee *v.* Shaw, 10 Sim. 369; 4 Jur. 102.

[5] Barrett *v.* Buck, 2 Hare, 520; Meinertzhagen *v.* Davis, 10 Sim. 289.

An order of this kind, obtained in an administration suit, does not contain a direction for the payment of the debts of the testator; and therefore has not the same effect as a decree, in entitling the executors to restrain a creditor suing them at Law.[6] But the cause may be brought on for hearing, and a decree obtained, before the Chief Clerk's certificate is made; or a direction may be inserted in the order, excluding the creditors who do not come in from the benefit of the order; and then, payment of the debts may be at once directed by the decree.[7]

A decree for account gives an interest in the suit for many purposes to a defendant; and an order for preliminary accounts has so far the same effect as that, upon the death of a sole plaintiff, * a *993 defendant has been allowed to file a supplemental bill to have the benefit of the inquiries.[1]

The power to obtain an order directing preliminary inquiries on motion is not, however, now of much practical importance; the present practice of the Court enabling the cause to be brought to a hearing on motion for a decree,[2] or on replication filed,[3] much more expeditiously and economically than formerly.[4]

In like manner, in foreclosure suits, the defendant having the right to redeem, and admitting the plaintiff's title, may obtain, upon motion, such order as would be made at the hearing.[5] This course is now, however, for similar reasons, seldom adopted.

It is to be observed, that the reservation of further consideration is not confined to the first decree, but will be repeated in every decree in which it may be necessary to direct an inquiry.[6] It is also to be observed that, after such a reservation, the Court will not interfere upon the matter reserved in a summary way, but will require the cause to be set down for hearing.[7]

When a decree does not adjourn the consideration of the cause, it is said to be a "final decree;" and, when duly signed and enrolled, may be pleaded in bar to any new bill for the same matter.[8]

6 Teague *v.* Richards, 11 Sim. 46.

7 Trotter *v.* Walmesley, 7 Beav. 264.

1 Upjohn *v.* Upjohn, 4 Beav. 246.

2 15 & 16 Vic. c. 86, § 15; *ante*, p. 819 *et seq.*

3 *Ante*, p. 828 *et seq.*

4 See Seton, 7.

5 7 Geo. II. c. 20, § 2; Seton, 389; see Johnson *v.* Everett, 9 Paige, 636; Kane *v.* Whittick, 8 Wend. 219. For orders made under this Act, see Piggin *v.* Cheetham, 6 Jur. 819; 2 Hare, 80, and cases there cited in note; Reeves *v.* Glastonbury Canal Company, 14 Sim. 351. [Bourton *v.* Williams, L. R. 9 Eq. 297.] In Taylor *v.* Coates, 3 Hare, 263, the order was refused. For form of notice of motion, see Vol. III.

6 Seton, 57; Ord. XXI. 10.

7 Cooke *v.* Gwyn, 3 Atk. 689; [Ruckman *v.* Decker, 1 Stew. Eq. 7;] see *post*, Chap. XXX., *Further Consideration*.

8 The order for dismissing a bill at the hearing is not usually termed, in the books, "a decree," but merely "an order of dismission;" but, to prevent confusion, it is thought best to designate it as "*a decree*," to distinguish it from "an order to dismiss" made upon motion.

[A decree which disposes of a cause, without reserving any thing for further consideration, is, of course, final. Mills *v.* Hoag, 7 Paige, 18]; Cook *v.* Bay, 4 How. (Miss.) 485; Britton *v.* Johnson, C. W. Dud. 24; Tennent *v.* Patton, 6 Leigh, 196; Talbot *v.* Todd, 7 J. J. Marsh. 456; Johnson *v.* Everett, 9 Paige, 636; Crittenden. *ex parte*, 5 English, 333; see per Sutherland J. in Kane *v.* Whitman, 8 Wend. 224; Harney *v.* Branson, 1 Leigh, 108; Longfellow *v.* Longfellow, 1 Clarke, 344; Hey *v.* Schooley, 7 Ohio, 48; Brewer *v.* State of Connecticut, 9 Ohio, 117; Newark Plank Road Co. *v.* Elmer, 1 Stockt. 754, 787; Webster *v.* Hitchcock, 11 Mich. 50. [So, if it decides the rights of the parties on

*994 * Of this nature is a decree dismissing the plaintiff's bill: which as we have seen before,[1] may be pleaded in bar to a new suit,[2] unless accompanied with a direction that the dismissal is to be without prejudice to the plaintiff's right to file another bill.[3] Directions of this

the merits, although it make a reference to ascertain the amount due from one party to the other on the basis of the adjudication, reserving nothing except to determine that the report is strictly in conformity with the decree. Jones *v.* Wilson, 54 Ala. 50; Quackenbush *v.* Leonard, 10 Paige, 131. See Story *v.* Hawkins, 8 Dana, 14; Michoud *v.* Girod, 4 How. 503; Forgay *v.* Conrad, 6 How. 203. And such is a decree, and this too both as to an original and cross-bill, that the equity of the case is with the complainant in the original bill, although leave is given to either party to apply, at the foot of the decree, for such further order as may be necessary to the due execution of the same, or as may be required in relation to any matter not finally determined by it. French *v.* Shoemaker, 12 Wall. 98. And see Wyatt *v.* Garlington, 56 Ala. 576. A decree is final which directs land to be conveyed and appoints a commissioner to convey it. Larue *v.* Larue, 2 Litt. 261; Mackey *v.* Bell, 2 Munf. 154. So is a decree directing a conveyance upon the tender of a specific sum of money. Travis *v.* Waters, 1 Johns. Ch. 85; Taylor *v.* Read, 4 Paige, 561. So is a decree of foreclosure by sale ordered. Whiting *v.* Bank of U. S., 13 Pet. 15; Bronson *v.* Railroad Co., 2 Black, 524; Hey *v.* Schooley, 7 Ohio, 48; Graham *v.* Hardin, 4 Dana, 559. Or ascertaining the amount due, directing a sale, and disposing of the costs. Field *v.* Ross, 1 Mon. 137; Craig *v.* Steamer Hartford, 1 McAll. 91. So is a decree for a specific sum of money and the partition of land, appointing commissioners to make partition and report. Talbot *v.* Todd, 7 J. J. Marsh. 459. So is a decretal order upon which an execution may be taken out. Haskell *v.* Raoul, 1 McCord Ch. 32.

Strictly speaking, every decree settling rights upon a hearing on the merits of the original cause, or upon the equity reserved, is *pro tanto* a final decree. But where an appeal is only allowed by statute from a final decree, the Courts have not agreed as to what decree shall be considered final within the meaning of the statute. The Supreme Court of the United States, under such a statute, has reached the conclusion that if the decree decides the rights of property, and orders it to be delivered up or sold, or adjudges a sum of money to be paid, and the party is entitled to have such decree carried into immediate execution, it is a final decree, under the Act of Congress, from which an appeal lies, although there is a reference for an account between the parties upon the basis of the decree, and the cause is retained for the purpose of adjudicating these accounts. Forgay *v.* Conrad, 6 How. 203. Alabama, and other States, have come to the same conclusion. Jones *v.* Wilson, 54 Ala. 50, and cases *supra*. On the other hand, the Courts of Tennessee, and some other States, have held, under a similar statute, that the decree is not final so as to authorize an appeal as of right until the account ordered has been taken, or the sale made, and confirmed. Meek *v.* Mathis, 1 Heisk. 534; Delap *v.* Hunter, 1 Sneed, 101; Woodside *v.* Woodside, 21 Ill. 207; Garrard *v.* Webb, 4 Porter, 73; Wiggle *v.* Owen, 43 Miss. 158. The Code of Tenn., § 3157, authorizes the lower Court, in its discretion, to allow an appeal from a decree determining principles and ordering an account, sale, or partition, if prayed. It also provides for the superseding by the Supreme Court of any interlocutory order or decree, or execution issued thereon. Code, § 3933; see Park *v.* Meek, 1 Lea, 78; Baird *v.* Turnpike Co., 1 Lea, 395.]

When a decree is made as to one of several defendants, whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant, such decree is final as to him, although the cause may still be pending in Court as to others. Royal *v.* Johnson, 1 Rand. 421; [Harrison *v.* Farnsworth, 1 Heisk. 751; Rhodes *v.* Williams, 12 Nev. 20;] see M'Coun *v.* Delany, 2 Bibb, 441. A decree upon a bill of interpleader, that a bill is properly filed, is a final decree. Atkinson *v.* Manks, 1 Cowen, 691; [State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100]. Decrees are final, after the end of the term at which they are rendered, unless specially entered otherwise; and they are final after entered up as final on some day before the end of the term, with a view to other proceeding upon them as to final decrees. Jenkins *v.* Eldredge, 1 Wood. & M. 61.

[1] *Ante*, pp. 659, 878.

[2] Foote *v.* Gibbs, 1 Gray, 412; Bigelow *v.* Winsor, 1 Gray, 299; Gove *v.* Lyford, 44 N. H. 527. As to the effect of a dismissal, without prejudice, see Nevitt *v.* Bacon, 32 Miss. 212; Lang *v.* Waring, 25 Ala. 625.

[3] A decree dismissing a bill upon its merits, is conclusive until reversed, and is a good plea in bar to a second bill for relief on the same subject-matter. Bigelow *v.* Winsor, 1 Gray, 299; Foote *v.* Gibbs, 1 Gray, 412; Durant *v.* Essex Company, 8 Allen, 103; Mickles *v.* Thayer, 14 Allen, 121, 122; Holmes *v.* Remsen, 7 John. Ch. 286; Hall *v.* Dodge, 38 N. H. 350, 351; Sayles *v.* Tibbitts, 5 R. I. 79; Pugh *v.* Holt, 27 Miss. 461; Neafie *v.* Neafie, 7 John. Ch. 1; Perine *v.* Dunn, 4 John. Ch. 140; Estep *v.* Watkins, 1 Bland, 486; Curts *v.* Bardstown, 6 J. J. Marsh. 536; Low *v.* Mussey, 41 Vt. 393; [Knight *v.* Atkisson, 2 Tenn. Ch. 384].

A decree of the Supreme Court of the United States affirming with costs a decree of the Circuit Court for the District of Massachusetts by which a bill in Equity had been dismissed after a hearing, was held, in Durant *v.* Essex Company, 8 Allen, 103, to be a bar to a subsequent suit in Equity in the

sort are inserted, where the dismissal is occasioned by slip or mistake in the pleadings or in the proof. Thus, formerly, where a bill was dismissed for want of parties, it was expressed to be without prejudice;[4] and so, where a bill was dismissed, in consequence of facts not having been properly put in issue;[5] or of the agreement, for the specific performance of which * the bill was filed, turning out, upon the *995 evidence, to be different from that actually proved.[1]

It is to be observed that, although a decree of dismissal of a bill, for the specific performance of an agreement, or for the interference of the Court in aid of legal rights, does not carry with it an implied injunction against a subsequent proceeding at Law, it is the practice of the Court to insert in the decree of dismissal of such a bill, that it shall be without prejudice to a subsequent proceeding at Law;[2] but whether it is introduced or not, the plaintiff, after a bill for a specific performance has been dismissed at the hearing, is still considered by the Court of Equity, as at liberty to bring his action at Law, upon the contract,[3] unless the Court thinks proper specifically to restrain him, by injunction from so doing.[4] The most usual course of preventing a plaintiff from proceeding at Law, after a dismissal in a case of this nature, is to dismiss the bill without costs: on the plaintiff's undertaking not to bring an action; this, however, is only by way of compromise.[5]

In general, where a bill is ordered to be dismissed upon a contingent

State Court of Massachusetts for the same cause, between the same parties, although it appeared by the record of the Supreme Court, that such decree was passed by a divided Court.

If a bill in Equity to redeem land from a mortgage, and requiring an answer under oath, has been dismissed, upon motion of the plaintiff, and without the knowledge of the defendant, after the filing of the answer, and after the expiration of the time when, by the rules of the Court, the plaintiff was entitled to file a replication and take testimony, the decree for the defendant is conclusively presumed to be upon the merits, and is a bar to a subsequent bill for the same cause, brought by the same plaintiff, or by one who acquired his title *pendente lite*. Borrowscale *v.* Tuttle, 5 Allen, 377; Foote *v.* Gibbs, 1 Gray, 413.

But where a cause was set down for a hearing on the bill and answer, and the bill was dismissed with costs, because no person appeared for the plaintiff, and the decree was enrolled, the decree was held no bar to another suit for the same matter. Rosse *v.* Rust, 4 John. Ch. 300; *ante*, 811, 812. Otherwise, where there was a replication filed and an order closing the proofs. Osbury *v.* Lafarge, 2 Comst. 113.

[4] Seton, 1114, 1115, 1135. Now, however, a bill is seldom dismissed for want of parties; but see Williams *v.* Page, 28 Beav. 148.

[5] M'Neill *v.* Cahill, 2 Bligh, 228.

[1] Woollam *v.* Hearn, 7 Ves. 211, 222; Lyndsay *v.* Lynch, 2 Sch. & Lef. 1, 12; Stevens *v.* Guppy, 3 Russ. 171, 185; but see Corporation of Rochester *v.* Lee, 1 M'N. & G. 467, 470, as to the value of such reservations in a decree. But where the decision of the Court that had examined a bill in Equity, with the pleadings and evidence, is entered on the docket, "dismissed," without other words of qualification, such entry is conclusive of the merits of the case, and a final determination of the controversy between the parties, both in Equity and at Law; and a motion to amend the record by adding the words "without prejudice," will be denied. Gove *v.* Lyford, 44 N. H. 525; see Foote *v.* Gibbs, 1 Gray, 412; Bigelow *v.* Winsor, 1 Gray, 301; Borrowscale *v.* Tuttle, 5 Allen, 377.

[2] Mortlock *v.* Buller, 10 Ves. 292, 319; M'Namara *v.* Arthur, 2 Ball & B. 349; Wedgwood *v.* Adams, 8 Beav. 103, 105; Wycombe Railway Co. *v.* Donnington Hospital, L. R. 1 Ch. Ap. 268, 275; 12 Jur. N. S. 347, 349, L. JJ.; Robson *v.* Whittingham, L. R. 1 Ch. Ap. 442; 12 Jur. N. S. 40, L. JJ.; [Avery *v.* Griffin, L. R. 6 Eq. 606; Scott *v.* Rayment, L. R. 7 Eq. 112]. A decree dismissing a bill for specific performance of a parol contract for land, is not a bar against the demand of the plaintiff for money he had advanced on the contract. Webb *v.* Webb, 6 Monroe, 165.

So a decree of dismissal, on a bill to foreclose a mortgage, is no bar to a subsequent suit on the note which it was given to secure. Longworth *v.* Flagg, 10 Ohio, 300.

[3] See Park *v.* Johnson, 4 Allen, 261.

[4] [Mortlock *v.* Buller, 10 Ves. 292.]

[5] Mortlock *v.* Buller, and M'Namara *v.* Arthur, *ubi sup.*

event, the established rule is that such orders are not conclusive, unless the words "without further order" are annexed to the order; and that, where such words are omitted, the defendant must apply for and obtain an absolute order of dismissal. In this respect, however, the rule acted upon, where an order is made for a cause to stand over for a limited time, with liberty to the plaintiff to add parties, and, in default thereof, that the bill stand dismissed with costs, is different; for it seems that, in such cases, the bill is actually out of Court, without further order; because the defendant has it not in his power to set it down again in a fit state to be heard, inasmuch as he is not the person to add the parties.[6]

*996 * Although the general rule of the Court is, to make a complete decree upon all the points connected with the case, it frequently happens that the parties are so circumstanced, that a decision upon all the points connected with their interests cannot be pronounced till a future period. Thus, for example, the interest of a fund may belong to a person for life, and, after his death, the fund may be distributable amongst a particular class of individuals: now, although the persons who form that class, as well as the tenant for life, are in general before the Court at the time when the decree is pronounced, the Court will not, at that time, take upon itself to declare their interests in the fund; because it is a general rule not to declare rights which are not immediately to be acted upon, lest events should occur, before the time of acting upon them, which may create an alteration in those rights. All that the Court, therefore, usually does, under such circumstances, is to decree the interest of the fund to be paid to the person entitled to the dividends during his life, and to declare that, upon his death, the parties interested in the fund are to be at liberty to apply to the Court as they may be advised.[1] The same sort of liberty is also given in any other case in which it may seem requisite; and the effect of it is not to alter the final nature of the decree. A decree, with such a liberty reserved, is still a final decree; and, when signed and enrolled, may be pleaded in bar to another suit for the same matter. The effect of the reservation is to permit persons having an interest under it to apply to the Court touching such interest, in a summary way, without the necessity of again setting the cause down.[2] It may be remarked, that applications, under such a reservation in a decree as that last mentioned, may be made either by motion or petition, or, in many cases, by summons in Chambers; except that, in cases where the object is to have money paid out of Court, the application should be by petition, or summons.[3]

[6] Stevens *v.* Praed, 2 Cox, 374, 376; Seton, 998; see also *ib.* 1270. As to enlarging the time, see Farina *v.* Silverlock, 1 De G. & J. 434; Arnold *v.* Thompson, 11 W. R. 52, V. C. W.

[1] See *post*, Chap. XLI., *Payment out of Court.*

[2] See Seton, 56. The reservation of liberty to apply, does not extend to an application by the plaintiff to be allowed costs, as to which there is no express direction given by the decree. Kendall *v.* Marsters, 2 De G., F. & J. 200.

[3] See *post*, Chap. XLI., *Payment out of Court.* Where the amount is small, liberty to apply at Chambers in respect thereof is sometimes expressly given by the decree or order; see Winkworth *v.* Winkworth, 32 Beav. 233; 9 Jur. N. S. 61.

There are some cases of decrees which, although they are final in their nature, require the confirmation of a further order of the Court, before they can be acted upon.[4] Of this nature are decrees * in suits against infants, in which a day is given to the infant to *997 show cause against it, after he attains twenty-one;[1] and decrees where the bill is ordered to be taken *pro confesso* are also, sometimes, of the same description.[2]

The most ordinary case, in which a further order is necessary to complete the decree, is that of a decree for a foreclosure. Decrees of this nature, after directing an account to be taken of the principal and interest due to the plaintiff upon the mortgage, and the taxation of his costs, direct that, upon the defendant's paying to the plaintiff what shall be certified to be due to him for principal, interest, and costs, within six calendar months[3] after the date of the Chief Clerk's certifi-

[4] In the United States Chancery Courts where the right to appeal is limited to final decrees, [if the decree decides the rights to property and orders it to be delivered up or sold, or adjudges a sum of money to be paid, and the party is entitled to have such decree carried into immediate execution, it is a final decree, under the act of Congress, from which an appeal lies, although there is a reference for an account between the parties upon the basis of the decree, and the cause is retained for the purpose of adjudicating these accounts.] Forgay *v.* Conrad, 6 How. U. S. 203. Thus, in the case of Whiting *v.* Bank of U. S. 13 Peters, 15, it was held, that a decree of foreclosure and sale of mortgaged premises was a final decree, and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order. And this decision is placed by the Courts upon the ground, that, the decree of foreclosure and sale was final upon the merits, and the ulterior proceedings but a mode of executing the original decree. The same rule of construction was acted on in Michoud *v.* Girod, 4 How. U. S. 503.

[1] *Ante*, p. 165; Seton, 685; Dow *v.* Jewell, 21 N. H. 470; Anderson *v.* Irvine, 11 B. Mon. 341. If the infant shows no cause within the specified time the decree is made absolute against him. 1 Newl. Ch. Pr. 501; Gilb. For. Rom. 160; Harris *v.* Youman, 1 Hoff. Ch. 178; Brown *v.* Armistead, 6 Rand. 594; Jackson *v.* Turner, 5 Leigh, 119; Collard *v.* Groom, 2 J. J. Marsh. 562; see Wilkinson *v.* Oliver, 4 Hen. & M. 150; Braxton *v.* Lee, *ib.* 376; Ewing *v.* Armstrong, 4 J. J. Marsh. 68; Funk *v.* M'Keoun, *ib.* 168; Jameson *v.* Moseley, 4 Monroe, 417; Mills *v.* Dennis, 3 John. Ch. 367; Pope *v.* Lemaster, 5 Litt. 77; Beeler *v.* Bullitt, 4 Bibb, 11; Glaze *v.* Drayton, 1 Desaus. 109; Wilkinson *v.* Wilkinson, 1 Desaus. 201; Cole *v.* Miller, 32 Miss. 89. Under Missouri practice, it is not error, that a decree against infants, gives no day for them to show cause after they become of age. Hendricks *v.* McLean, 18 Mis. 32; Heath *v.* Ashley, 15 Missou. 393. As to Texas, see Cannon *v.* Hemphill, 7 Texas, 184. Under the statute, in Alabama, fixing a time within which minors can impeach a decree rendered against them, it is no error that a time is not fixed in the decree for that purpose. Cato *v.* Easley, 2 Stew. 214. But aside from the statutes, a decree against infants must reserve their right to show cause against it after they are of age, or it will be erroneous. Harlan *v.* Barnes, 5 Dana, 223; Lee *v.* Braxton, 5 Call, 459; but see Pickett *v.* Chilton, 5 Munf. 467. An infant plaintiff is as much bound by a decree as a person of full age. Gregory *v.* Molesworth, 3 Atk. 626; Williamson *v.* Johnson, 4 Monroe, 255; Jameson *v.* Moseley, *ib.* 416; Jackson *v.* Turner, 5 Leigh, 119; Bank of U. States *v.* Ritchie, 8 Peters, 128. A decree against a *feme covert* is good until it is reversed. Pillsbury *v.* Dugan, 9 Ohio, 117; [*ante*, 186, 113, n. 5]. In general, a *cestui que trust* is not bound by a decree rendered against his trustees, in a suit to which the *cestui que trust* was not a party. Collins *v.* Lofftus, 10 Leigh, 5. No decree can be made against one on whom process has not been served, unless he has entered an appearance. Ryan *v.* Blount, Dev. Eq. 382.

[2] See *ante*, pp. 518, 526; Ord. XXII. 15; Seton, 1128.

[3] The defendant is entitled to six calendar months; but if the word "calendar" is not used in the order, the time should be computed by lunar months. Ord. XXXVII. 10. [And see, for the proper course of proceeding where there are puisne mortgagees, Fall *v.* Brown, 2 Bro. C. C. 278; Whitbread *v.* Lyall, 8 De G., M. & G. 383. A second mortgagee, made a party to the foreclosure of the first mortgage, who pays under the decree upon the failure of the mortgagor, becomes subrogated to the rights of the first mortgagee, although at the time of such payment a petition was pending to foreclose the second mortgage. Wood *v.* Hubbard, 50 Vt. 82. And see, as to lien of junior mortgagee upon surplus moneys after a sale under the senior lien, Hart *v.* Wingart, 83 Ill. 282. See also Morse *v.* Smith, 83 Ill. 396; Tuttle *v.* Dewey, 44 Iowa, 452.]

cate, at such time and place as shall be thereby appointed, the *998 plaintiff shall reconvey the mortgaged * premises, and deliver up upon oath all deeds and writings in his custody or power relating thereto, to the defendant, or to whom he shall appoint: but that, in default of the defendant's paying to the plaintiff the principal, interest, and costs by the time aforesaid, the defendant shall, from thenceforth, stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the mortgaged premises.[1]

The plaintiff must, unless the time has been enlarged, attend either personally, or by his attorney duly authorized by power of attorney,[2] at the time and place appointed, to receive the money found due to him;[3] and if, upon that occasion, the defendant does not attend to pay the money, the plaintiff's right to the estate will become absolute. He must, however, in order to complete his title, procure a final order confirming it; otherwise, the decree of foreclosure will not be pleadable.[4] This final order is obtained on motion of course, supported by an affidavit of the plaintiff, or his attorney, of due attendance at the appointed place, and of non-payment by the defendant of the amount certified to be due.[5] Where the plaintiff does not attend personally, he must, nevertheless, make an affidavit of non-payment.[6] If one of several mortgagees, to whom the amount is due on a joint account, die after the decree, and before the time appointed for payment, a new time for payment must be fixed, before the final order can be obtained.[7]

In the case also of a suit for the redemption of a mortgage, a final order is necessary. The decree, in such a suit, usually directs the plaintiff to pay the balance certified due from him within six months after the certificate: in default of which, the plaintiff's bill against the defendant is from thenceforth to stand dismissed out of

[1] Seton, 364, No. 1. A decree in Chancery, that "defendant's equity of redemption be for ever barred," will be considered as a formal decree of foreclosure. Hunt *v.* Lewin, 4 Stew. & P. 138. A decree of strict foreclosure, which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, cannot, in the absence of some special law authorizing it, be sustained. Clark *v.* Reyburn, 8 Wallace U. S. 318; see Perine *v.* Dunn, 4 John. Ch. 140; Johnson *v.* Donnell, 15 Ill. 97; [Paute *v.* Bethel, 9 Heisk. 666]. The Court has now power, where it thinks fit, to decree a sale, instead of a foreclosure. 15 & 16 Vic. c. 86, § 48; Seton, 365, 369; and see *post*, Chap. XXIX., *Proceedings in Chambers.*

[2] For form of power, see Vol. III.

[3] The defendant may require the plaintiff to produce an affidavit of documents, when he attends to receive the money; but he must give the plaintiff notice of such requisition, and it will be at his own expense. Weeks *v.* Stourton, 11 Jur. N. S. 278; 13 W. R. 489, V. C. K.

[4] Seton, 393; Ford *v.* Wastell, 2 Phil. 591; 12 Jur. 404; see Whiting *v.* Bank of U. S., 13 Peters U. S. 6. A release of the equity of redemption, after decree, is equivalent to a final order. Reynoldson *v.* Perkins, Amb. 564.

[5] For form of final order, see Seton, 393; and for forms of motion paper and affidavit, see Vol. III.

[6] Seton, 393; see also Anon., 1 Col. 273, where the decree was made absolute, although the mortgagee had not attended during the whole of the appointed time. For form of affidavit of non-payment, see Vol. III.

[7] Blackburn *v.* Caine, 22 Beav. 614; Kingsford *v.* Poile, 8 W. R. 110, M. R. As to proceedings under decrees and orders in foreclosure suits, see *post*, Chap. XXIX., *Proceedings in Chambers.* [Lechmere *v.* Camp, 31 Beav. 578; Marshall *v.* Hills, W. N. (1869) 35; London Monetary Co. *v.* Brown, W. R. 782.]

* Court, with costs;[1] and the final order is obtained on motion *999
of course, supported by the defendant's affidavit of the default.[2]

The practice of directing that, upon non-payment of money by the plaintiff, the bill shall be dismissed, is not confined to bills to redeem mortgages. Thus, in *Lowther* v. *Andover*,[3] on a bill filed by a purchaser, for the specific performance of an agreement for the sale of an estate, it was ordered that a time and place for the payment of the principal money, interest, and costs, should be appointed; and that, in default of payment, the bill should stand dismissed with costs. In such cases, as well as in those above mentioned, a final order is necessary.[4]

In cases of decrees of foreclosure, the Court will, upon application, enlarge the time for payment of the money, even though the final order has been enrolled.[5] Formerly, it would do this without imposing any terms upon the defendant;[6] but it afterwards became the practice to do it, only upon the defendant consenting to a reference to compute interest upon the whole sum reported due for the principal, interest, and costs;[7] and the order will still be made in this form, under special circumstances.[8] The ordinary terms, however, upon which the Court enlarges the time are: payment of the sum found due for interest and costs, and carrying on the account of subsequent interest and costs: the defendant being ordered to pay the costs of the application at once.[9] On these * terms, the time has been enlarged for *1000
six months, and again for three months;[1] and in *Edwards* v.

[1] See decree in Seton, 461, No. 1. The decree upon a bill to redeem should fix the time within which the redemption is to take place; and should direct that the plaintiff's bill be dismissed with costs if the money is not paid within the time prescribed. Waller *v.* Harris, 7 Paige, 168. In Adams *v.* Brown, 7 Cush. 223, Bigelow J. said: "After the condition of a mortgage is broken, and the mortgagee has entered for breach thereof, the legal estate of the mortgagor is determined, and has become vested in the mortgagee. All that the mortgagor has remaining is an equitable estate; that is, a right to redeem the premises, on paying what is due on the mortgage. When, therefore, he comes into a Court of Equity to regain his legal title and possession, he must pay what is actually due on the mortgage up to the time of redemption, before he can entitle himself to be restored to his legal rights." "The Statute of Massachusetts requires the Court to ascertain what sum is due and payable at the time of the decree, not what was due and payable when the bill was filed; and the sum so ascertained is to be embraced in the decree for redemption." If the decree gives a time for redemption after its date, and the mortgagee is in possession, receiving rents and profits during the time prescribed, a further account will be necessary in order to adjust the balance due at the end of the time by the decree for redemption. See Mann *v.* Richardson, 21 Pick. 355; Stewart *v.* Clark, 11 Met. 384; White *v.* Brown, 2 Cush. 412 417.

[2] Seton, 467. A final dismissal of a bill to redeem is equivalent to a foreclosure; Cholmley *v.* Countess of Oxford, 2 Atk. 267; Bishop of Winchester *v.* Paine, 11 Ves. 199; but not a dismissal for want of prosecution. Hansard *v.* Hardy, 18 Ves. 460. As to proceedings under decrees and orders in suits to redeem, see *post*, Chap. XXIX., *Proceedings in Chambers*. For form of order of dismissal, see Seton, 466; and for forms of motion paper and affidavit, see Vol. III.

[3] 1 Bro. C. C. 396.

[4] See Gray *v.* Brignardello, 1 Wallace U. S. 627.

[5] Ford *v.* Wastell, 2 Phil. 591; 12 Jur. 404; Thornhill *v.* Manning, 1 Sim. N. S. 451; Seton, 391.

[6] Ismoord *v.* Claypool, 1 Cha. Rep. 262.

[7] Bickham *v.* Cross, 2 Ves. S. 471; Belt's Sup. 409.

[8] Holford *v.* Yate, 1 K. & J. 677; Bruere *v.* Wharton, 7 Sim. 483; Whitfield *v.* Roberts, 7 Jur. N. S. 1268; 9 W. R. 844, M. R.

[9] Seton, 391; *ib.* 390, No. 1; Finch *v.* Shaw, 20 Beav. 555; Coombe *v.* Stewart, 12 Beav. 111. For forms of notice of motion and summons to enlarge the time, see Vol. III.

[1] Monkhouse *v.* Corporation of Bedford, 17 Ves. 380, 382.

Cunliffe,[2] a fourth order was made for enlarging the time, though the third was directed to be peremptory.

Where the certificate of principal, interest, and costs due on the mortgage is sought to be varied, and the time appointed for payment thereof is likely to arrive before the application to vary is heard, application should be made to have the time for payment enlarged until the application to vary the certificate has been disposed of; but, though this is omitted, the Court, in a proper case, will not make a peremptory order to foreclose, but will order subsequent interest to be computed, and appoint a new time for payment.[3] And so also, if a mortgagee receives rents after the certificate, and before the day appointed for foreclosure, the Court will not make the decree absolute without the further account being taken, and a new day fixed for payment;[4] but if the rents are received after the day appointed for foreclosure, no further account is necessary.[5]

In *Monkhouse* v. *The Corporation of Bedford*,[6] where a decree of foreclosure was appealed from, the Court refused a motion to suspend the execution of the decree till six months after the appeal should be heard, but directed that, on the defendants paying to the plaintiff the interest due from the time of filing his bill, and his costs (upon the plaintiff's undertaking to repay the same, if the decree should be reversed), and consenting to the appointment of a receiver, the defendants might take six months from the time fixed by the report. And in *Finch* v. *Shaw*,[7] the time to redeem, pending an appeal to the House of Lords, was enlarged, on the defendant paying into Court the principal and interest found due, and paying the costs of the suit and the application at once; and the money to be paid into Court was ordered to be invested at the defendants', the mortgagors', risk, and the dividends to be paid to the plaintiff, the mortgagee, he undertaking to refund.

Although the Court will, upon a bill for a foreclosure, allow the defendant, upon application, to enlarge the time appointed for payment of the principal, interest, and costs, it will not do so upon a bill to redeem: for then the plaintiff comes into Court saying, "Here is the money: give me my estate;" but in a suit by a mortgagee to *1001 foreclose, the Court acts against a person unwilling * to pay, and imposes upon him the terms that, if he does not pay, he shall lose his estate.[1]

Formerly, it was not the practice of the Court to make a declaratory decree, without granting consequential relief;[2] but now no suit is open to objection on the ground that a merely declaratory decree is sought

[2] 1 Mad. 287, 289.

[3] See Renvoise *v.* Cooper, 1 S. & S. 364.

[4] Alden *v.* Foster, 5 Beav. 592; White *v.* Brown, 2 Cush. 412, 417. For forms of notice of motion and summons in such case, see Vol. III.

[5] Constable *v.* Howick, 5 Jur. N. S. 331, V. C. W.; Seton, 394; and see *post*, Chap. XXIX., *Proceedings in Chambers.*

[6] *Ubi sup.*

[7] 20 Beav. 555; Seton, 391.

[1] Novosielski *v.* Wakefield, 17 Ves. 417; Faulkner *v.* Bolton, 7 Sim. 319.

[2] See Grove *v.* Bastard, 2 Phil. 619, 621; 12 Jur. 385.

thereby,[3] and the Court may make binding declarations of right, without granting consequential relief.[4] It seems, however, that the cases in which declarations of right may be made are not extended; and that the Court is merely enabled to declare rights, without following up the declarations by the directions which, according to the old practice, would have been necessarily consequent upon them.[5] Where some of the parties interested under a legal decree are infants, a declaratory decree, as to their rights and interests, cannot be made.[6]

It may be here mentioned that, if an order has been irregularly obtained, the party who has obtained it should take the earliest opportunity of discharging it: otherwise, any party affected by it may procure its discharge, at the costs of the person who obtained it;[7] and, moreover, no subsequent order to the same effect can be obtained till that has been done.[8]

Section II. — *The Form of Decrees and Orders.*

Before we proceed to the consideration of the practice arising upon decrees when pronounced, it will not be out of place to make a few observations upon their form. Decrees, in general, consist of four parts: — 1. The date and title; 2. The recitals; 3. The declaratory part (if any); and 4. The ordering or mandatory part.[9]

*1. The decree commences with a recital of the day, month, *1002 and year when it was pronounced,[1] and of the names of the several parties to the cause: who should have the same titles in the decree as they have in the bill;[2] thus, if the plaintiff is described in the bill as executor or administrator, the decree must be accordingly.

[3] But where there is no statute authorizing it, a bill will not be sustained which seeks merely a declaration *of future rights*. Cross *v.* De Valle, 1 Wallace U. S. 1; Langdale *v.* Briggs, 39 Eng. Law & Eq. 194; see Lorillard *v.* Coster, 5 Paige, 172; Hawley *v.* James, 5 Paige, 442; Bowers *v.* Smith, 10 Paige, 200; Baylies *v.* Payson, 5 Allen, 473; [Tayloe *v.* Bond, Busb. Eq. 16; Toomer *v.* Rhodes, 11 Rich. Eq. 256; Alexander *v.* Miller, 7 Heisk. 65, 80; McCall *v.* McCall, 1 Tenn. Ch. 500; Prichitt *v.* Kirkman, 2 Tenn. Ch. 390; see Price *v.* Minot, 107 Mass. 62; Hampton *v.* Holman, 5 Ch. Div. 183; Bright *v.* Tyndall, 4 Ch. Div. 189].

[4] 15 & 16 Vic. c. 86, § 50; [Cox *v.* Barker, 3 Ch. Div. 359].

[5] Per L. J. Turner, in Lady Langdale *v.* Briggs, 8 De G., M. & G. 391, 428; 2 Jur. N. S. 982, 984; see Garlick *v.* Lawson, 10 Hare Ap. 14; Greenwood *v.* Sutherland, *ib.* 12; Jackson *v.* Turnley, 1 Drew. 617; 17 Jur. 643; Trustees of Birkenhead Docks *v.* Laird, 4 De G., M. & G. 732, 738; 18 Jur. 883; Rooke *v.* Lord Kensington, 2 K. & J. 753; Bristow *v.* Whitmore, 4 K. & J. 743; Gosling *v.* Gosling, Johns. 265; Bell *v.* Cade, 2 J. & H. 122; Savile *v.* Bruce, 29 Beav. 557; see also Seton, 23. The cases cited appear to overrule Fletcher *v.* Rogers, 10 Hare Ap. 13. For form of order, see Jenner *v.* Jenner, L. R. 1 Eq. 361; 12 Jur. N. S. 138, V. C. W.

[6] Webb *v.* Byng, 8 De G., M. & G. 633; 2 Jur. N. S. 1242.

[7] See Davis *v.* Franklin, 2 Beav. 369, 375; Tarbuck *v.* Tarbuck, 4 Beav. 149, 153; Lincoln *v.* Wright, *ib.* 166, 172.

[8] Pearce *v.* Gray, 4 Beav. 127, 129.

[9] As to the frame and usual directions in decrees and orders, see Seton, x–xi. 1–96. The reader is also referred to the excellent collection, contained in that work, of forms of decrees and orders, with practical notes.

[1] It is not now necessary to insert the year of the Sovereign. Ord. XXIII. 2; see Whitney *v.* Belden, 4 Paige, 140; Barclay *v.* Brown, 7 Paige, 245. The caption of an order or decree, unless otherwise directed by the Court, should correspond with the time of the actual entry of the decree. Barclay *v.* Brown, *ubi supra*.

[2] Curs. Canc. 359.

2. Formerly, decrees contained recitals of the pleadings in the cause;[3] and in like manner, a decree upon further directions, according to the old form, recited the ordering part of the original decree, and the report made in pursuance of it.[4] But this is no longer the practice, and, unless the Court otherwise specifically directs, no recitals ought to be introduced in any decree or order of the Court; but the pleadings, petition, notice of motion, report, certificate, evidence, affidavits, exhibits or other matters or documents, on which such decree or order is founded, should be merely referred to.[5] In matters *1003 of contempt, however, or where the *decree or order varies from some general rule, or the Registrar in his discretion sees fit,[1] he may make such short recitals as may be necessary, to show the grounds on which the decree or order is granted.[2]

A short recital of the answers, affidavits, and other evidence read, is entered in this part of the decree.[3] This method of entering the evi-

[3] Seton, 4; Bartlett *v.* Fifield, 45 N. H. 82, 83; Burdoine *v.* Shelton, 10 Yerger, 41; see Peters *v.* Rosseter, 1 Root, 273; Bacon *v.* Childs, 1 Root, 466; Sampson *v.* Hunt, 1 Root, 521; Wernwag *v.* Brown, 3 Blackf. 458. But it is not necessary to state in a decree that all the preliminary steps towards maturing the cause for hearing were taken; it being intended where the cause was set for hearing, that it was regularly done, unless the party attempting to impugn the decree show the contrary. Quarrier *v.* Carter, 4 Hen. & M. 242. If the facts found as the basis of a decree are substantially the same as those alleged in the bill, it is not a ground of error in the decree that they vary in some unimportant particulars. Beers *v.* Botsford, 13 Conn. 146; [40 Conn. 300]. The practice of reciting the pleadings, &c., in decrees has been abolished in some of the States, and by the Rules in Equity of the Supreme Court of the United States. [See the Rule, 86, *infra*, 2396.] See, for New York, 1 Barb. Ch. Pr. 338; Dey *v.* Dunham, 2 John. Ch. 182. In Ohio, a final decree need not set out a full statement of the facts on which the Chancellor's opinion is founded. Ludlow *v.* Kidd, 2 Ohio, 872; Strader *v.* Byrd, 7 Ohio, 184.

[A decree shall not contain any recital of the bill, answer, or other pleadings, but the pleadings, report, or other matters or documents on which the decree is founded, should be merely referred to. N. J. Rev. St. Chancery, § 51.]

In Clapp *v.* Thaxter, 7 Gray, 384, 387, Thomas, J. said: "In this country it is not ordinarily the practice to recite in the decree the bill, answer, or pleadings. But these with the decree constitute what may be considered the record of the cause." In Dexter *v.* Arnold, 5 Mason, 311, Story J. said: "In the Courts of the United States the decrees are usually general; they usually contain a mere reference to the antecedent proceedings without embodying them. But for the purpose of examining all errors of Law, the bill, answers, and other proceedings are in our practice, as much a part of the record before the Court, as the decree itself." See Bartlett *v.* Fifield, 45 N. H. 82, 83.

["Decrees need not recite the facts upon which they are based, but only the conclusions to which the Court has come." Code of Tennessee, § 4476. "I could wish," says Lord Hardwicke, "that the orders of this Court were framed with the same simplicity as orders made by the Courts of Common Law; and to be sure in a great many instances they might." Baker *v.* Hart, 2 Atk. 489.]

[4] A decree *pro confesso* against a non-resident should state the facts necessary to show that publication has been made agreeably to the rules of practice. Keiffer *v.* Barney, 31 Ala. 192. It is not enough for a decree to recite that the defendant has been duly served with process, or regularly notified of the pendency of the suit, but the summons or advertisement should appear in the record. Randall *v.* Songer, 16 Ill. 27; Hanson *v.* Patterson, 17 Ala. 738; but see Craig *v.* Sebrell, 9 Grattan (Va.), 131, where the contrary was held. It should appear affirmatively on the face of the decree on record, that the defendant had notice of the process. Allen *v.* Blunt, 1 Blatch. C. C. 480.

[5] 3 & 4 Will. IV. c. 94, § 10; Ord. XXIII. 2; see Hunt *v.* Ellison, 32 Ala. 173; Moore *v.* School Trustees, 19 Ill. 83; Trenchard *v.* Warner, 18 Ill. 142; Tatum *v.* Hines, 15 Ark. 180.

[1] See as to the practice, in drawing up a decree in the Registrars' office, Davenport *v.* Stafford, 8 Beav. 503, 511, 513; 9 Jur. 801.

[2] Ord. XXIII. 2.

[3] Seton, 7 *et seq.* For forms, see *ib.* 23, *et seq.* [It is the duty of the register to enter in the minutes of the proceedings a statement of the papers read, or offered and overruled. Westmeath *v.* Salisbury, 1 Molloy, 421; and cases cited, *ante*, 984, note 8. And see, for the form of entries, Priest *v.* Perrott, 4 De G., J. & S. 777; and Roundell *v.* Breary, 2 De G. & J. 324. So, in New York, it was the duty of the clerk to enter in the minutes of the Court a statement of the pleadings, depositions, and affidavits read, or which were

dence in the decree has been disapproved of, on the ground that the decree ought to specify the facts proved ;[4] but it is still the practice, and would seem to be correct: as it is for the Court, and not for the Registrar, to state what facts are proved.[5] It is of material importance that the evidence should be entered in such a way as will show, upon an appeal, or any subsequent application, precisely what has been received.[6] Thus, where evidence, tendered on behalf of any party, is objected to, the Court ought to decide at once upon its admissibility; and either receive it: in which case it should be entered as read,[7] or reject it: in which case that circumstance should be noticed in the decree.[8]

Every decree, though it merely directs inquiries, ought to contain a statement of the evidence on which it is founded; and, therefore, a decree reciting that certain evidence had been read, but that both parties consented that the entry of it should be without prejudice to its admissibility, and, thereupon, directed certain inquiries, was held to be irregular.[9]

It seems that an answer should always be entered as read, even though the cause be heard on motion for a decree; and it was so held, where the cause had been heard on motion for a decree, and neither

offered and overruled: and a mistake in the entry might be corrected by the Court. Studwell *v.* Palmer, 5 Paige, 166. So, in Alabama, it is the duty of the register to note the evidence. McDonald *v.* Mobile Life Ins. Co., 56 Ala. 470. In Illinois, the evidence is frequently preserved in the decree. Walker *v.* Carey, 53 Ill. 470. As to other evidence than depositions filed, and exhibits made part of the pleadings and filed therewith, the party seeking to sustain the decree must preserve it, either in a certificate under the hand and seal of the Judge who heard the cause, or in the decree itself. Moss *v.* McCall, 75 Ill. 190. So, in West Virginia, the evidence must be referred to in a decree or order. Hilleary *v.* Thompson, 11 W. Va. 113. In Tennessee, the documentary evidence and depositions actually read are, by statute, parts of the record, but oral testimony constitutes no part of the record unless made so by a bill of exceptions. Hill *v.* Bowers, 4 Heisk. 272. Or, perhaps, by being spread on the minutes and thereby authenticated by the Judge by signing the minutes. Wynne *v.* Edwards, 7 Humph. 418; Weakley *v.* Pearce, 5 Heisk. 415. But papers copied into the record, neither made exhibits, nor marked as filed, and having nothing upon them to show that they were evidence in the cause, cannot be looked to for any purpose. Brevard *v.* Summar, 2 Heisk. 97; Mullins *v.* Aiken, 2 Heisk. 535. As to what is a filing, see Bouv. Law Dict. *voce* File; Fanning *v.* Fly, 2 Coldw. 488. The clerk's certificate of a full and perfect transcript is *primâ facie* sufficient, subject to correction by suggestion of diminution and *certiorari*. United States *v.* Gomez, 1 Wall. 690. And if witnesses are examined orally upon the hearing of cases in equity, the testimony must be stated in writing and made a part of the record, or it will be entirely disregarded by the appellate Court. Blease *v.* Garlington, 92 U. S. 1. See Conn *v.* Penn, 5 Wheat. 424. But the evidence used in Chancery cases in the Court below is always part of the record without a bill of exceptions. Bell *v.* Gordon, 55 Miss. 45.]

[4] Brend *v.* Brend, 1 Vern. 214; Bonham *v.* Newcomb, *ib.* 216.

[5] Trulock *v.* Robey, 2 Phil. 395, 397; 11 Jur. 999; Seton, 8.

[6] Seton, 8, 23; M'Mahon *v.* Burchell, 2 Phil. 127; Watson *v.* Parker, *ib.* 5, 9; 10 Jur. 577; Parker *v.* Morrell, 2 Phil. 453; 12 Jur. 253; Drake *v.* Drake (No. 1), 25 Beav. 641; see Tatum *v.* Hines, 15 Ark. 180. A decree must be founded on and sustained by both the allegations and the proofs in the cause; and it cannot be based on a fact not put in issue by the pleadings. Carneal *v.* Banks, 10 Wheat. 181; Gregory *v.* Power, 3 Litt. 339. It must conform to the allegations in the pleadings, as well as to the proofs in the cause. Crocket *v.* Lee, 7 Wheat. 522; Ringgold *v.* Ringgold, 1 Harr. & J. 11; Pigg *v.* Corder, 12 Leigh, 69; Cloud *v.* Whiteman, 2 Harring. 401; Maury *v.* Mason, 8 Porter, 211; Smith *v.* Smith, 1 Ired. Ch. 83; Langdon *v.* Roane, 6 Ala. 518; see Graham *v.* Railroad Co., 3 Wallace U. S. 704.

[7] Parker *v.* Morrell, *ubi sup.*

[8] Watson *v.* Parker, *ubi sup.*; Seton, 8; *ib.* 24. No. 6.

[9] M'Mahon *v.* Burchell, 2 Phil. 127, 137, 138; Drake *v.* Drake, *ubi sup.*; see also Wyld *v.* Ward, 1 Y. & J. 536; Sherwood *v.* Beveridge, 2 Coll. 536; Handford *v.* Handford, 5 Hare, 212; see *contra*, Gee *v.* Gurney, 8 Beav. 315.

the plaintiff nor the defendant had given notice of reading the answer, and it was not in fact read.[10] The answer and affidavits should be entered as read, generally, and not the particular passages which are actually read.[11]

*1004 *Where a decree is made in favor of a defendant, without his being heard, he is entitled to have all the evidence which he could have put in at the hearing entered in the decree as read;[1] and similarly, where notice of reading any affidavits has been given, they should be entered as read, although they may not actually have been read.[2]

The costs only of such evidence as is mentioned in the decree are generally allowed on taxation; it is important, therefore, on this ground, that all evidence used should be mentioned.[3]

3. Where the suit seeks a declaration of the rights of the parties, the ordering part of the decree should be prefaced by such a declaration.[4]

Sometimes, the Court has directed an insertion in the decree of the reasons for making the declaration, and of the grounds upon which it proceeds in making it.[5] This, however, is not frequently done: though the utility of the practice has been recognized.[6]

4. The ordering or mandatory part of the decree contains the specific directions of the Court upon the matter before it. These directions must, it is obvious, depend upon the nature of the particular case which is the subject of the decree; and cannot, therefore, now be made the subject of discussion;[7] they must, however, be framed in conformity with the rules contained in the General Orders of the Court; and the settled forms of decrees should be adhered to as much as possible.[8]

[10] Bright *v.* Legerton (No. 2), 29 Beav. 69.

[11] Manby *v.* Bewicke, 3 Jur. N. S. 685, V. C. W.; Seton, 8; *ib.* 24, No. 2.

[1] Manby *v.* Bewicke, *ubi sup.*

[2] Catholic Printing Company *v.* Wyman, 9 Jur. N. S. 436; 11 W. R. 49, V. C. W.; but see Camille *v.* Donato, 11 Jur. N. S. 26; 13 W. R. 358, L. C.

[3] For a case of exception, see Freer *v.* Rimner, 14 Sim. 391.

[4] Jenour *v.* Jenour, 10 Ves. 562, 568; Seton, 22; and see Lambert *v.* Peyton, 8 H. L. Ca. 2

[5] Gordon *v.* Gordon, 3 Swanst. 400, 478; Maynard *v.* Moseley, *ib.* 653; Onions *v.* Tyrer, 1 P. Wms. 344, n. (1); Gibson *v.* Kinven, 1 Vern. 67, n.; *Ex parte*, Earl of Ilchester, 7 Ves. 348, 373; Attorney-General *v.* Clapham, 4 De G., M. & G. 591, 607; 1 Jur. N. S. 505; 10 Hare, 617; and Seton, 22; Austin *v.* Austin, 11 Jur. N. S. 536; 13 W. R. 761, L. C.

[6] Bax *v.* Whitbread, 16 Ves. 15, 24; Gordon *v.* Gordon, *ubi sup.*

[7] A decree ordering the sale of property in the hands of heirs must specify and identify it. Gayle *v.* Singleton, 1 Stew. 566. In case of a bill to foreclose, it is not necessary that the decree should describe the premises precisely; it is usual to designate them in the decree by reference to the bill. McGee *v.* Smith, 1 C. E. Green (N. J.), 462. [So, the decree is sufficient, if it refer to the mortgage deed which is a part of the record. Sims *v.* Cross, 10 Yerg. 459.] A final decree for money must specify the sum, not leave it to be ascertained by a commissioner; Clark *v.* Ball, 4 Dana, 16; or to computation, Smith *v.* Trimble, 27 Ill. 152; [or to be ascertained and fixed by the Master. Codwise *v.* Taylor, 4 Sneed, 346]. A decree to account should specify the time from which the account is to be taken; Cummins *v.* Adams, 2 Irish Eq. 394; it must direct to what matters the account shall extend, and in decreeing the general accounts, special directions will be rendered proper and necessary by the particular circumstances of the case. The Court will give special directions to the Master as to the manner of taking the account, and the principles by which he should be governed in taking it. Hudson *v.* Trenton Locomotive & Machine Manuf. Co., 1 C. E. Green (N. J.), 475; *ante*, p. 857, note. [See *infra*, 2392, for Rule 73 of the United States Courts, touching an account of the personal estate of a decedent.]

[8] *Re* Cant's Estate, 1 De G., F. & J. 153, 158; Stainton *v.* Carron Company, 7 Jur. N. S. 645, 647, L. JJ.; [Sherwin *v.* Shakspeare, 5 De G., M. & G. 535;] Seton, 1. A decree may be so framed as to meet the case disclosed; but in its decree the Court must be

* Where by any decree or order, whether made in Court or in *1005
Chambers, any accounts are directed to be taken, or inquiries to be made, each direction is to be numbered: so that, as far as may be, each distinct account and inquiry may be designated by a number.[1]

Every decree or order for an account of the personal estate of a testator or intestate, is to contain a direction for an inquiry what parts (if any) of such personal estate are outstanding or undisposed of: unless the Court otherwise directs.[2]

Every decree, or order, requiring a person to do an act, is to state the time, or the time after service of the decree or order, within which the act is to be done.[3]

Where any sums of money, or any securities or other effects, belonging to the suitors of the Court, are directed to be paid into or deposited in the Bank, with the privity of the Accountant-General, or to be paid out, or invested in the purchase of stocks, funds or securities: or where any stocks, funds, or shares are directed to be transferred into the name and with the privity of the Accountant-General, or to be transferred out of Court, carried over, or delivered out: such sum of money, amount of stocks, funds, shares, or securities, or particulars of effects, are to be ascertained by the Registrar, and specified and expressed in the decree or order, in words written at length; except in the case of residues, or shares of residues, of money, stocks, funds, or securities remaining after a portion directed to be applied for particular purposes, the amount of which cannot be ascertained at the time of making the decree or order: in which cases, the amount of such residues or shares of residues is to be verified by affidavit, without any direction for that purpose in the decree or order, unless such residues or shares are certified by the Taxing Master: who may certify the same, without a direction for that purpose in such decree or order.[4]

Where a residue of cash, stocks, funds, shares or securities is directed by any decree or order to be operated upon by the Accountant-General, * the exact amount of such residue, where *1006
the same can be done, is (if required by the Registrar) to be

consistent with itself. The Court may, without contradiction, pass a separate, a reciprocal, a direct or an inverted decree, to meet the nature of the case. Lingan *v.* Henderson, 1 Bland, 275; Hodges *v.* Mullikin, *ib.* 507; Owing's Case, *ib.* 494. Where there are several defendants, and the subject in controversy is divisible, there may be a decree against all for a part: or, if they are disjunctively or separately liable, there may be a decree against each. Lingan *v.* Henderson, 1 Bland, 256. Though specific legatees sue jointly, the decree ought to be several, in conformity to their respective rights. Quarles *v.* Quarles, 2 Munf. 321; Elliott *v.* Pell, 1 Paige, 263.

[1] Ord. XXIII. 15; see also Regul. 8 Aug., 1857, r. 4. For a form, see Sched. D. to Ord.; Seton, 115, No. 1; and Vol. III. Certain directions which were formerly inserted in decrees and orders are now omitted therefrom; provision in lieu thereof being made by Ord. XXIII. 16; Ord. XXIV. 1; Ord. XXV. 12, 13; and Ord. XLII. 9, 11; as to which see *post*, Chap. XXIX., *Proceedings at Chambers;* and the Chief Clerk, in his certificate, is at liberty to state special circumstances, without a direction to that effect in the decree or order. Williamson *v.* Jeffries, 9 Hare Ap. 56.

[2] Ord. XXIII. 14. For a form, see Seton, 115, No. 1; and Vol. III.

[3] Ord. XXIII. 10. For forms, see Seton, 58, Nos. 1, 2.

[4] Ord. XXIII. 3. For forms, see Seton, 58, 73; and see *post*, Chap. XLI., *Payment out of Court.*

verified by affidavit, to be produced to the Registrar, and is to be expressed and specified in the decree or order in words at length: so that the amount of such residue may appear on the face of the decree or order.[1]

All persons, whether representatives or others, who are directed to pay into, or deposit in, the Bank any sum of money, securities, or other effects, with the privity of the Accountant-General, or to transfer any stocks, funds, or shares into his name and with his privity, and all persons, whether representatives or others, to whom any sums of money, stocks, funds, shares, securities, or other effects are directed to be paid out, transferred, carried over, or delivered out, are, except in the case of bodies corporate, companies, or societies, to be described by name in the decree or order, and not merely as plaintiffs or petitioners, or the like; unless such payments, transfers, carryings over, or deliveries are directed to be made to or by representatives, and no probate or letters of administration have been taken out at the time of making such decree or order. And the Christian names and surnames or titles of honor of all such persons, and the titles of all such bodies corporate, companies, and societies, are to be written at length, and without abbreviations.[2]

In all decrees or orders directing the payment of interest, dividends, annuities, or other periodical payments, the times when the first of such payments, and when all subsequent periodical payments, are to be made, are to be specified and expressed in words at length.[3]

Where any stocks, funds, shares, or securities, standing in the name of the Accountant-General, in trust or to the credit of any cause, matter, or account, or any part thereof, are or is directed to be divided and transferred or delivered out of Court to or among several persons or carried over to several separate accounts, and where any money is directed to be paid out to or among several persons, or carried over to several separate accounts, the Registrar may, where it appears to him to be more convenient, state the respective amounts thereof in a schedule at the foot of the decree or order; and it is sufficient to refer to such schedule in the mandatory part of the decree or order; but in every such case, the total amount of the stocks, funds, shares, securities, or money, respectively, to be dealt with in such schedule, is to be stated in words, at length, in such mandatory part.[4]

*1007 * Where, upon or after the death of any person to whom the interests or dividends of any stocks, funds, shares, or securities standing in the name of the Accountant-General, in trust in or to the credit of any cause, matter, or account, or any part of such interest or dividends were, or was payable for life, an order is made for the sale, transfer, or delivery of such stocks, funds, shares, or securities, or for

[1] Ord. XXIII. 4. For forms, see Seton, 71, 72.

[2] Ord. XXIII. 5. For forms, see Seton, 67, 68.

[3] Ord. XXIII. 6. For a form, see Seton, 205, No. 13.

[4] Ord. XXIII. 7. For a form, see Seton, 72, No. 7.

payment of the interest or dividends to accrue due thereon subsequently to the death of such person, the same order is to provide for the payment to the legal personal representatives of such person, of such proportion of the interest or dividends on such stocks, funds, shares, or securities as may have accrued between the last period of payment, and the day of his death, unless the Court or Judge is of opinion that such legal personal representatives are not entitled thereto, or otherwise directs.[1]

Every decree or order, whereby the Accountant-General is directed to pay or transfer any fund, or part of any fund in respect of which any duty is payable to the revenue, under the Acts relating to legacy or succession duty, is, unless such decree or order expressly provides for the payment of the duty, also to direct the Accountant-General to have regard to the circumstance that such duty is payable. And where, by any decree or order, any carrying over to a separate account of any fund in respect of which any such duty may be chargeable, is directed, the words "subject to legacy duty," or "subject to succession duty," as the case may be, are to be added to the title of the account.[2] And in order the better to provide security against the payment or transfer by the Accountant-General of any fund chargeable with any such duty, without the duty being first paid, the Accountant-General, on receiving notice from the proper officer that the duty is payable, is to cause a memorandum to be made in his books in conformity with such notice; and the Accountant-General, before executing any decree or order directing the payment or transfer of any fund, or part of any fund, in respect of which any such duty is payable, is to require the production of the official receipt for the duty, or a certificate from the proper officer of the payment of the duty, chargeable in respect of any such fund or any part thereof respectively.[3] The amount of the duty is usually directed to be paid to the Receiver-General of Inland Revenue; but where it is small, it may be directed to be paid to the solicitor of the party having the carriage of the decree or order, on his undertaking duly to apply it.[4]

* Decrees and orders are frequently founded, either wholly *1008 or partially upon admissions of facts, consents, submissions, undertakings, or waivers of claim: entered into or made by the parties, or some of them, by their counsel at the bar, or by their solicitors in applications at Chambers. In such cases, the admissions, consents, submissions, undertakings or waivers should be inserted in the decree or order: immediately before the ordering part, if they relate to the

[1] Ord. XXIII. 8. For a form, see Seton, 205, No. 11.

[2] See forms in Seton, 83. The expression ordinarily used now is "subject to duty."

[3] Ord. XXIII. 9; and see 16 & 17 Vic. c. 51, § 53; Reg. Regul. 15 March, 1860, r. 18, *post*, 907; and Seton, 82 *et seq.*

[4] Seton, 84. For forms of orders to raise and pay legacy or succession duty, see *ib.* 82, 83, Nos. 1, 2, 3. See *post*, Chap. XLI., *Payment out of Court.*

whole decree or order; and if not, immediately before the part to which they relate.[1]

Every decree or order is to be distinguished by having written or stamped upon its first page the year, letter, and number of the cause in the cause-books kept by the Clerks of Records and Writs: who are to enter, in the same books, the date of the decree or order, and a reference to the date and folio of the Registrars' book in which the decree or order has been entered.[2]

In any decree or order, the words "the Judge" are to mean, the Judge to whose Court the cause or matter wherein such decree or order is made is for the time being attached;[3] the words "the Taxing Master" are to mean the Taxing Master in rotation, or, in case any previous reference has been made, the Taxing Master to whom the cause or matter has been referred;[4] and the words "the Clerk of Records and Writs" are to mean the Clerk of Records and Writs in whose division the cause or matter wherein such order is made, is.[5]

Section III. — *Drawing up*,[6] *Passing, and Entering Decrees and Orders.*

When a decree or order is pronounced by the Court,[7] a note of it is taken down by the Registrar in attendance: from which minutes of the decree or order are afterwards prepared, and copies issued to the solicitors of the parties.[8] The party entitled to the carriage of the decree or order should, immediately after it is pronounced, leave his *1009 papers with the assistant clerk to the Registrar * who was in Court on the day when it was made, to enable the Registrar to draw up the decree or order; and should duly proceed therein: otherwise the Registrar may draw it up at the instance of any other party, and deliver it to him.[1] The solicitors of the other parties should

[1] Bartlett *v.* Wood, 9 W. R. 817, L. C.; Seton, 21. For a form, see *ib.* 23. [See Moss *v.* Bainbrigge, 6 De G., M. & G. 335; and, as to the effect of an order by consent permitting a supplemental complaint to be filed for personal demands arising after suit brought for a strict foreclosure of a land contract, Turner *v.* Pierce, 31 Wis. 342.]

[2] Ord. I. 48, 49, 50. These rules do not apply to causes commenced before the 1st day of Michaelmas Term, 1852. Ord. I. 51.

[3] See Ord. VI. 1; *ante*, p. 398.

[4] See *post*, Chap. XXXI. § 5, *Method of Taxation of Costs.*

[5] Ord. XXIII. 1.

[6] See Rogers *v.* Rogers, 2 Paige, 473. [The solicitor of the party obtaining an order, or in whose favor a decision is made, draws up the order or decree, or procures it to be drawn up, and, after submitting it to the opposing solicitor, delivers it to the clerk to be entered. Whitney *v.* Belden, 4 Paige, 140; Crow *v.* Blythe, 3 Hayw. 236; Stevens *v.* Coffeen, 39 Ill. 148; Schneider *v.* Seibert, 50 Ill. 285.]

[7] Orders made at Chambers are either drawn up there, or a note of their purport is indorsed on the summons and signed by the Chief Clerk, and transmitted to the Registrar; to be drawn up by him, in the manner explained in the text.

[8] Seton, 1137; as to the mode of copying minutes and decrees and orders, see Ord. 28 Nov., 1743; Sand. Ord. 565, 566; Seton, 4; and as to passing, entering, and rectifying decrees, generally, see Seton, 1137 *et seq.* If the minutes of the order have not been taken down by the Registrar, counsel's notes of it may be acted on. Anderton *v.* Yates, 15 Jur. 833, V. C. K. B.

[1] Seton, 1137.

forthwith bespeak copies of the minutes, if they require them. A full draft of the decree or order is usually prepared for the party drawing it up; and copies of the minutes for the other parties.[2]

Every decree or order must be bespoken, and the necessary documents left with the Registrar, within seven days[3] after the decree or order is pronounced, or finally disposed of, by the Court;[4] and if this is not done, the Registrar may decline to draw up the decree or order without the leave of the Court.[5]

At the time of bespeaking a decree or order, the party[6] bespeaking the same must leave with the Registrar his counsel's brief, and such other documents as may be required by the Registrar, for the purpose of enabling him to draw up the same.[7] The documents required by the Registrar are as follows:[8]

Generally. — Any documents or evidence required to be produced to the Court.[9]

Whenever any fund in Court is to be dealt with. — The Accountant-General's certificate, and, if the funds are restrained by an order, the restraining order, or an office copy.[10]

Where payment out of Court is ordered to legal personal representatives. — The probate or letters of administration, stamped for a sufficient amount.[11]

Legacy or Succession Duty. — Orders for payment of specified sums to the Receiver-General of Inland Revenue, for legacy and succession duty, will not be drawn up until the calculation has been examined at the legacy and succession duty department, and a certificate obtained of the proper amount payable for duty.[12]

Reference to the Record. — The reference to the record is to be * inscribed or stamped on some document in the cause, or on *1010 the brief.[1]

Lower Scale of Fees. — If the fees of Court are payable according to the lower scale (except on orders on petition or summons, other than summons originating proceedings in Chambers), a copy of the certificate

2 *Ibid.*

3 Exclusive of vacations. Prel. Ord. 10 (11), in cases where the decree or order is not made in vacation.

4 Ord. I. 21.

5 Ord. I. 22. As to the drawing up a decree, where a defendant had died before it was pronounced, but his death was then unknown, see Rucker *v.* Scholefield, 1 N. R. 180, V. C. W.; see also Davies *v.* Davies, 9 Ves. 461; Belsham *v.* Percival, 8 Hare, 157; 2 C. P. Coop. t. Cott. 176; Collinson *v.* Lister, 20 Beav. 355; 1 Jur. N. S. 835; Boucicault *v.* Delafield, 9 Jur. N. S. 1283; 12 W. R. 101, V. C. W.; Seton, 1139.

6 The word "party" in Ord. I. 20–32, means, any person appearing at the hearing of the cause, or of the application respectively, as the case may be. Prel. Ord. 10 (11).

7 Ord. I. 20.

8 Reg. Regul. 15 March, 1860, rr. 15–36; Seton, 1140 *et seq.* On bespeaking or applying for orders made in any *ex parte* matter, solicitors should inquire for the same by the title under which it appeared in the Court paper. Reg. Regul. 15 March, 1860, n.

9 Reg. Regul. 15 March, 1860, r. 15.

10 *Ib.* r. 16.

11 *Ib.* r. 17.

12 *Ib.* r. 18; see *ante*, p. 1007; and *post*, Chap. XLI., *Payment out of Court.*

1 Ord. I. 48; Reg. Regul. 15 March, 1860, r. 19; *ante*, p. 1008. If the cause was commenced before the 1st day of Michaelmas Term, 1852, the reference is unnecessary; but the solicitor must indorse a certificate on the brief that the cause was so commenced. See Ord. I. 51. Reg. Regul. 15 March, 1860, r. 19. For a form of certificate, see Vol. III.

for paying the lower scale of Court fees, duly marked by the Clerk of Records and Writs.[2]

In all cases of Non-Appearance. — If any party or person served does not appear at the hearing, an affidavit of service on such party or person.[3]

On bespeaking Minutes of Decrees. — Counsel's brief, and a print of the bill, with the reference to the record marked thereon, and the correct title of the cause, with the names of the guardians of any infant defendants inserted, and a print of the answer. Where printed copies of the bill and answer have been left with the Usher of the Judge, for the use of the Registrar in attendance in Court, it will not be necessary to leave others, on bespeaking the decree.[4]

If any Admissions are to be entered as read. — The original paper of admissions, signed by the parties or their solicitors, is to be indorsed by the Registrar. The admissions, when so indorsed, are to be filed in the Report office, before the decree is left to be passed, and a memorandum thereof is to be made on the decree by the Clerk of Reports.[5]

If a Memorandum has been entered, of service of a copy of the bill on any Defendant. — The order to enter the memorandum of service, with the Record and Writ Clerk's certificate of the entry thereof, and of no appearance by the defendant so served.[6]

If a Traversing Note has been filed, and the Defendant does not appear at the hearing. — The Record and Writ Clerk's certificate that the note has been filed, and an affidavit of service of a copy of it, and of the *subpœna* to hear judgment.[7]

If the Bill has been taken *pro confesso*. — The stamped copy of the bill read at the hearing, and any previous orders as to the contempt.[8]

*1011 * If any affidavits have been read at the Hearing. — The office copies of such affidavits, and any exhibits therein referred to.[1]

If any Documents have been proved at the Hearing *vivâ voce* or by Affidavit. — The order authorizing them to be so proved, with the office copies of the affidavits, if any, and the documents proved.[2]

On bespeaking Minutes of Orders on further Consideration. — Counsel's brief, the original decree or the last order on further consideration, and any subsequent orders to revive or carry on the proceedings, and the office copy of the Chief Clerk's certificate and office copies of any affidavits, and any exhibits or other evidence used at the hearing.[3]

If the Order deals with any Purchase-money. — A consent brief for

2 Ord. XXXIX. 2, 3; Regul. to Ord. III. 3; Reg. Regul. 15 March, 1860, r. 20; see *post*, Chap. XXXI. § 5, *Method of Taxation of Costs*.

3 Reg. Regul. 15 March, 1860, r. 21.

4 *Ib.* r. 22; Reg. Regul. 23 Nov., 1861.

5 Ord. I. 44; XXIII. 23; Reg. Regul. 15 March, 1860, r. 23; *ante*, pp. 847, 849.

6 Reg. Regul. 15 March, 1860, r. 24; and see Ord. X. 12; *ante*, pp. 430, 431.

7 Reg. Regul. 15 March, 1860, r. 25; *ante*, pp. 514, 515.

8 Reg. Regul. 15 March, 1860, r. 26; Ord. 13 July, 1861; *ante*, pp. 518, 526.

1 Reg. Regul. 15 March, 1860, r. 27; *ante*, pp. 896, 899.

2 Reg. Regul. 15 March, 1860, r. 28; *ante*, p. 819.

3 Reg. Regul. 15 March, 1860, r. 29; see *post*, Chap. XXX., *Further Consideration*.

the purchaser, or an affidavit of notice to him of the intended application of the purchase-money, and that the conveyance has been executed and delivered to him.[4]

On bespeaking Minutes of Orders on Motions. — Counsel's brief, with his indorsement of the order made, the notice of motion, if any, annexed, and office copies of any affidavits, and any exhibits or other evidence used at the hearing of the motion.[5]

On bespeaking Minutes of Orders on Petition. — The original petition and counsel's brief, with his indorsement of the order made, and any decree, or order, or the office copy of any certificate, on which the petition is founded, and office copies of any affidavits, and any exhibits or other evidence used at the hearing.[6]

On bespeaking Minutes of Orders under the Settled Estates Acts. — In addition to the last-mentioned documents, the newspapers containing the advertisement of the petition, and any interlocutory orders that may have been made relating thereto.[7]

On bespeaking Minutes of Orders under Acts authorizing Public Works. — Where the order deals with any money paid into Court by the promoters of any public undertaking to the credit of such undertaking, not standing to any separate account: the Accountant-General's certificate of the payment into Court of the sum sought to be dealt with, and also the Accountant-General's certificate of the fund in Court to the credit of the undertaking; and when the order directs the carrying over of the money to a separate account, or payment of the same out of Court to any person entitled thereto: an affidavit of the petitioner verifying the petition, * and negativing any adverse right *1012 or claim; and all other evidence used at the hearing.[1]

On bespeaking Minutes of Orders for Winding-up Companies. — In addition to the documents usually required on orders on petitions, the affidavit of the service of the petition, and the London Gazette and newspapers containing the advertisement thereof.[2]

On bespeaking Minutes of Orders vacating Receivers' Recognizances. — An office copy of the receiver's recognizance from the office of the Clerk of Enrolments.[3]

At the time of delivering out the draft of any decree or order which requires to be settled by the Registrar in the presence of the parties,[4] the Registrar delivers out to the party on whose application the draft has been prepared, an appointment in writing of a time for settling the

[4] Reg. Regul. 15 March, 1860, r. 30; see *post*, Chap. XXX., *Further Consideration*.

[5] Reg. Regul. 15 March, 1860, r. 31; see *post*, Chap. XXXV. § 2, *Motions*.

[6] Reg. Regul. 15 March, 1860, r. 32; see *post*, Chap. XXXV. § 3, *Petitions*.

[7] Reg. Regul. 15 March, 1860, r. 33; see *post* Chap. XLV., *Statutory Jurisdiction* (*Settled Estates Acts*).

[1] Reg. Regul. 15 March, 1860, r. 34; Ord. XXXIV. 3; see *post*, Chap. XLI., *Payment out of Court*, and Chap. XLV., *Statutory Jurisdiction* (*Lands Clauses Consolidation Acts*).

[2] Reg. Regul. 15 March, 1860, r. 35; and see *ib.* r. 32, *ante*, p. 1011.

[3] *Ib.* r. 36; and see *post*, Chap. XXXIX. § 7, *Discharge of Receivers*.

[4] See Ord. I. 32; and see Hart *v.* Tulk, 6 Hare, 611, 616.

same.[5] A copy of such appointment must be served on the opposite parties one clear day at least before the time fixed thereby for settling the draft decree or order, by leaving such copy of such appointment at, or sending it by post to, the place for service of such party;[6] and the party serving such copy, and the party so served, must attend such appointment, and produce to the Registrar their briefs, and such other documents as may be necessary, to enable him to settle the draft.[7] The original appointment, with a memorandum indorsed thereon of the service of a copy thereof on the opposite party, signed by the person by whom such service was effected, must be delivered to the Registrar, in order that he may be satisfied that service has been duly effected; but he may require such service to be verified by affidavit.[8]

If any party fails to attend the Registrar's appointment for settling the draft, or fails to produce his briefs, and such other documents as the Registrar may require, to enable him to settle such draft, the Registrar may proceed to settle it in his absence; and the Registrar may dispense with the production of counsel's briefs, and act upon such evidence as he may think fit of the actual appearance by counsel of the party failing to attend or to produce such documents or papers as aforesaid, or may require the matter to be mentioned to the Court.[9]

The Registrar may adjourn any appointment for settling the *1013 *draft of any decree or order, to such time as he may think fit; and the parties who attended the appointment are bound to attend the adjournment without further notice.[1]

If, upon perusing the minutes, or draft of the decree or order, it appears that any thing is doubtfully expressed, or contrary to the plain sense and meaning of the Court, or that any thing has been omitted in them which ought to have been inserted, and the Registrar refuses to make an alteration in them,[2] an application must be made to the Court to vary the minutes. This application was formerly made by petition, stating the specific matter to be added or altered;[3] but it is now usually made by motion: of which notice must be given.[4] The notice must

[5] Ord. I. 23. For form of appointment, see Ord. I. 29; and Vol. III.

[6] Ord. I. 25; and see *ante*, p. 1009, n.

[7] Ord. I. 24.

[8] Ord. I. 26.

[9] Ord. I. 28. Party not producing briefs, ordered to do so within a limited time; in default order to be drawn up without production of them. Yeatman *v.* Read, 14 W. R. 123, V. C. K.

[1] Ord. I. 31.

[2] As to the power and duties of the Registrar, in drawing up decrees, see Davenport *v.* Stafford, 8 Beav. 503, 511, 513; 9 Jur. 801.

[3] Grey *v.* Dickenson, 4 Mad. 464; and see Stewart *v.* Forbes, 16 Sim. 433.

[4] Webber *v.* Hunt, 1 Mad. 13; Punderson *v.* Dixon, 5 Mad. 121; [Tennant *v.* Trenchard, L. R. 4 Ch. App. 537;] Clark *v.* Hall, 7 Paige, 382; Murray *v.* Blatchford, 2 Wend. 221; Rogers *v.* Rogers, 1 Paige, 188. A motion to rectify the minutes of a decree may be sustained at any time before the decree is recorded. Gibson *v.* Crehore, 5 Pick. 146; Park *v.* Johnson, 7 Allen, 381, 382, and may be argued, if the Court think proper. Gibson *v.* Crehore, 5 Pick. 146. But the Court may, in the exercise of its discretion, refuse to receive such motion, if there has been any improper and injurious delay in bringing it forward. *Ibid.* By the 85th Equity Rule of the United States Courts it is provided, that "clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the Court or a Judge thereof, upon petition, without the form or expense of a rehearing." See Pingree *v.* Coffin, 12 Gray, 288.

specify the particular matter to be added or altered,[5] and the Registrar should be previously informed of the application.[6]

All applications to vary the minutes of decrees must be made to the Court by which the decree was pronounced. The Lord Chancellor has no power to alter a decree made by an inferior Judge, although he himself was that Judge; and, therefore, where a decree had been made by Lord Cottenham, when Master of the Rolls, an application to him, after he was Lord Chancellor, to vary the minutes of the decree, and which was not consented to, was refused.[7]

Sometimes, at the hearing of the cause, or on a special application to the Court after the hearing,[8] leave is given that the cause be put in the paper, "to be spoken to upon the minutes:" in which case, the application to have the cause put in the paper should be made within a fortnight at the utmost.[9] In *Prince* v. *Howard*,[10] Sir John Romilly M. R. said that, unless the Court, at the hearing, allows a cause to be afterwards spoken to on the minutes, the whole matter must be considered as concluded when the decree or order is pronounced; and the parties must then go before the * Registrar, and it is his duty to *1014 prepare the decree or order to the best of his ability; and until this has been done, the Court will not entertain any application to alter the minutes, unless in cases of difficulty, when the Registrar himself requires the matter to be mentioned to the Court. When the minutes have been prepared by the Registrar, if any party feels dissatisfied, and wishes to bring the matter before the Court, he must, at his own peril, give a notice of motion, specifying the matters he complains of in the proposed decree or order, as settled by the Registrar.

Motions of this nature will, in general, be permitted, provided the decree remains in minutes.[1] Strictly speaking, questions of importance ought not to be discussed upon applications to vary minutes; but this rule is not always adhered to, and discussions of great moment have sometimes been permitted.[2]

Where a variation is made by the Court in the minutes or draft settled by the Registrar, the variation is embodied in the decree or order originally made, and, except when the costs of the application are ordered to be paid, no fresh order is drawn up.[3]

To avoid questions on the minutes, the Court sometimes requires the counsel on both sides to sign draft minutes, to be handed in to the Registrar; and where orders are taken by arrangement between

[5] Prince *v.* Howard, 14 Beav. 208; Hood *v.* Cooper, 26 Beav. 373; Seton, 1142. For form of notice, see Vol. III.

[6] Seton, 1142.

[7] Reece *v.* Reece, 1 M. & C. 372.

[8] Seton, 1142. Such an application, according to the present practice, is seldom granted.

[9] Hood *v.* Cooper, *ubi sup.*; Seton, 1143.

[10] 14 Beav. 208; see also Hood *v.* Cooper, *ubi sup.*

[1] 1 Turn. & Ven. 319; [*ex parte* Pulbrook, 17 W. R. 1075;] Seton, 1142.

[2] Perry *v.* Phillips, 1 Ves. J. 251, 252; Bootle *v.* Blundell, 1 Mer. 193, 202. An application to vary the order cannot be made, on the mere ground that a decision which is in point was not prominently brought to the attention of the Court. *Re* Vicar of St. Sepulchre, 11 W. R. 456, V. C. K.

[3] Seton, 1142. For form of order, see *ibid.*

the parties, the minutes should always be signed by the respective counsel.[4]

The Registrar, upon consent of the parties, may allow such alterations to be made in the decree as his knowledge and experience teach him would be sanctioned by the Court if mentioned thereto.[5] After a decree or order has been settled by the Registrar, it cannot be altered in the absence of any of the parties interested.[6]

When the draft decree or order has been settled by the Registrar, he names a time in the presence of the several parties, or else delivers out an appointment in writing, of a time for passing the decree or order; and, in the latter case, such appointment must be served on the opposite party, in like manner as an appointment to settle a draft decree or order;[7] and the original appointment, together with a memorandum indorsed thereon of the service of a copy thereof on the opposite party, and signed by the person by whom such service has been *1015 effected, must be delivered to the * Registrar, in order that he may be satisfied that service has been duly effected; but the Registrar may require such service to be verified by affidavit.[1]

The decree or order, having been prepared from the draft, is delivered, together with the draft, to the party bespeaking it: by whom it should be carefully compared with the draft.[2] If the party, having thus received the original decree or order, neglects to return it to the Registrar, in order that it may be passed and entered, he will, on motion, of which notice must be given, be ordered to do so.[3] If any party fails to attend the Registrar's appointment for passing any decree or order, or fails to produce his briefs and such other documents as the Registrar may require for that purpose, the Registrar may proceed to pass the same in his absence, and may dispense with the production of counsel's briefs, and act upon such evidence as he may think fit of the actual appearance by counsel of the party failing to attend, or to produce such documents or papers as aforesaid, or may require the matter to be mentioned to the Court.[4]

The Registrar may adjourn any appointment for passing any decree or order to such time as he may think fit; and the parties who attended the appointment are bound to attend the adjournment, without further notice.[5]

[4] Seton, 1143.

[5] Davenport *v.* Stafford, 8 Beav. 503, 511; 9 Jur. 801; Seton, 1142.

[6] Major *v.* Major, 13 Jur. 1, L. C.

[7] See Ord. I. 24, 25; *ante*, p. 1012.

[1] Ord. I. 27. For form of appointment, see Ord. I. 29; and Vol. III.

[2] The following fees on decrees or orders drawn up by the Registrars are payable, in Chancery fee fund stamps, impressed on or affixed to the original decree or order; for every decree or decretal order made by the Court on a special case, or on the original hearing of a cause, or on motion for a decree, and on further consideration not made on summons adjourned from Chambers, 3*l.* higher scale, 1*l.* lower scale; for every order on petition or motion of course, 5*s.* higher scale, 1*s.* lower scale, and for every other order 1*l.* higher scale and 10*s.* lower scale. Regul. to Ord. Sched. 4; and see Reg. Regul. 15 March, 1860, r. 37. As to the fees payable on orders drawn up in Chambers, see Regul. to Ord. Sched. 4; and *post*, Chap. XXIX., *Proceedings in Chambers.*

[3] Seton, 1139; Robinson *v.* Manuelle, 14 Jur. 583, Lds. Com.; Clifford *v.* Turrill, 2 De G. & S. 1; 12 Jur. 428. For form of notice, see Vol. III.

[4] Ord. I. 28.

[5] Ord. I. 31.

A decree or order is said to be passed when the Registrar has inserted his initials in the margin, at the foot of the last page, as an authority to the clerk of entries to enter it in the Registrars' books.[6]

The Registrar's appointments, with the indorsements, if any, thereon, are filed by the Registrar.[7]

The practice in all cases, except orders of course, and orders of a simple kind, in which the parties cannot be injured by the order as drawn up,[8] is as before stated; but the Registrar has power, in any case in which he thinks it expedient, to settle and pass the decree or order, without making any appointment for either purpose, and without notice to any party.[9]

*When passed, the decree or order is left by the Registrar *1016 with the entering clerks to the Registrars, to be entered in the Registrars' book.[1]

Upon every decree or order so entered, one of the entering clerks will, at the request of the party leaving the same, mark the day of the month and year on which the same is so left for entry;[2] and no writ of *fieri facias* or *elegit* can be sued out upon such decree or order, unless the date of such entry is so marked thereon.[3]

It is the duty of the entering clerk to enter the decrees and orders left for entry, without abbreviations, and in a clear and legible hand, under the direction of the Senior Registrar, within one clear day, and after examining such entry, to mark the same with his initials, to denote such examination.[4] No proceedings can be taken upon a decree or order not entered; and if any are taken, they are irregular and voidable: even though the omission to enter the decree or order has been occasioned by the mistake of the entering clerk, and not through any neglect of the party.[5]

All decrees and orders made in Michaelmas and Hilary Terms, and the vacations following, are to be entered before the first day of Michaelmas Term following; and all decrees and orders of Easter and Trinity Terms, and the vacations following, are to be entered before the first day of the ensuing Easter Term; or else the party must obtain an

6 Seton, 1139.

7 Ord. I. 30.

8 Hart *v.* Tulk, 6 Hare, 611, 616.

9 Ord. I. 32; see, for cases before this order, Hargrave *v.* Hargrave, 3 M'N. & G. 348; Smith *v.* Acton (No. 2), 26 Beav. 559.

1 18 & 19 Vic. *c.* 134, § 6; Ord. I. 18, 19; Regul. to Ord. Sched. 2; Seton, 1139; see Whitney *v.* Belden, 4 Paige, 140.

2 In Massachusetts, every order and decree shall bear date as of the day when the same is actually entered by the clerk, and the date be noted upon the order or decree and upon the docket by the clerk at the time of entering the same. Genl. Sts. c. 113, § 16. But no decree can be said to be entered of record until it is formally drawn out and filed by the clerk. A mere order for a decree before it is extended in due form and in apt and technical language cannot be held to be a complete record of the judgment of the Court. Bigelow C. J. in Thompson *v.* Goulding, 5 Allen, 84, 85.

3 Ord. XXIX. 7: see *post*, § 7, *Enforcing Decrees and Orders*.

4 Ord. I. 18. The charge for entry is included in the fee payable on the decree or order. Regul. to Ord. Sched. 4, *ante*, p. 1015, n. The decree or order when entered, is returned by the entering clerk to the assistant clerk to the Registrar; by whom it is then delivered out to the solicitor having the carriage of it. Reg. Regul. 15 March, 1860, n.

5 Tolson *v.* Jervis, 8 Beav. 364, 366.

order to enter them *nunc pro tunc*:[6] without which, a decree, not entered within the time prescribed by the Court, cannot be entered.

An order to enter a decree or order, *nunc pro tunc*, may be obtained, upon application by motion of course, or by petition of course at the Rolls;[7] and, when passed, must be left with the *1017 *entering clerk, at the Registrars' Office, as his authority to enter the decree or order.

Orders to enter decrees, *nunc pro tunc*, will be made after a very long interval has elapsed from the time of pronouncing the decree; and even where the original decree has been lost, the Court has permitted it to be entered *nunc pro tunc*, from the office copy, after the lapse of twenty-three years.[1]

In *Jesson* v. *Brewer*,[2] where the pleadings in the cause as well as the original decree (which was pronounced seventy-nine years before the application) were lost, a paper, purporting to be a copy of the decree, was allowed to be entered as the decree, and enrolled: it appearing

[6] Tolson *v.* Jervis, *ubi sup.*; Ord. 4 Dec., 1691; Sand. Ord. 394. This order is considered to be kept on foot by Prel. Ord. r. 5, and it is still the practice in the Registrars' office to require that decrees and orders shall be entered within the above time. Seton, 1137; and see *ib.* 3.

[7] Seton, 1137. Where one of the defendants dies after the argument of a cause, and before judgment, the decree will be entered so as to have relation back as of the day of the final hearing. Campbell *v.* Mesier, 4 John. Ch. 334; Benson *v.* Wolverton, 1 C. E. Green, 110; Durnham *v.* Dalling, 1 C. E. Green, 310; Bank of United States *v.* Weisiger, 2 Peters, 481. Where the plaintiff died after the entry of an appeal from the decision of a Vice-Chancellor, and after the cause was ready for a hearing upon the appeal, but the fact of his death being unknown to the counsel, the cause was afterwards heard and decided by the Chancellor upon the appeal; it was held, that the decree upon the appeal might be entered *nunc pro tunc* as of a day previous to the death of the plaintiff and after the entering of the appeal. Vroom *v.* Ditmas, 5 Paige, 528; see Wood *v.* Keyes, 6 Paige, 478; [Emery *v.* Parrott, 107 Mass. 104.] An order for that purpose is necessary. Burnham *v.* Dalling, 1 C. E. Green, 310. [And this order was made where a decree, drawn in accordance with the opinion and special directions of one Chancellor, was signed by his successor, and acted upon by the parties until after decree confirming the Master's report thereon. Ruckman *v.* Decker, 12 C. E. Green, 244.] The Court will direct a decree to be made up from the Registrar's notes, and entered *nunc pro tunc*, on the application of a third person. Stoney *v.* Saunders, 1 Hayes & J. 341; but not after a long lapse of time. Witby *v.* Norton, 4 Y. & C. 266. An enrolment made *nunc pro tunc* will have relation back to the time of the decree, and protect an intermediate sale. Goelet *v.* Lansing, 6 John. Ch. 75. But a decree cannot be entered *nunc pro tunc*, so as to affect by relation the rights of persons other than parties, or their immediate representatives, acquired before the decree was actually pronounced. Dawson *v.* Scriven, 1 Hill Ch. 177; see McConnel *v.* Smith, 23 Ill. 611.

A decree *nunc pro tunc* is always admissible where a decree was ordered or intended to be entered, and was omitted to be entered only by the inadvertence of the Court; but a decree, which was not actually meant to be made in a final form, cannot be entered in that shape, *nunc pro tunc*, in order to give validity to an act done by a judicial officer under a supposition that the decree was final instead of interlocutory. Gray *v.* Brignardello, 1 Wallace U. S. 627. [Whenever by any accident there has been an omission by the proper officer to enter any proceeding of a Court of Record, the Court has the power, and it is its duty, on the application of any person interested, to have such proceeding recorded as of its proper date. And it is no ground for refusing such amendment that the rights of third persons will be injuriously affected thereby. Foster *v.* Woodfin, 65 N. C. 29. And see, for instances of orders *nunc pro tunc*, United States *v.* Gomez, 1 Wall, 690; Supervisors *v.* Durant, 9 Wall, 736; Newland *v.* Gaines, 1 Heisk. 720. But where, after the decree was orally pronounced, the record was destroyed by the great fire of 1871 in Chicago, it was held error to refuse a motion to postpone the final decree until the evidence was supplied. Hughes *v.* Washington, 65 Ill. 245. A decree was also held invalid which was rendered before supplying a lost supplemental bill on which it was based. Groch *v.* Stenger, 65 Ill. 481. But see Randall *v.* Payne, 1 Tenn. Ch. 137.] For form of order, see Seton, 1137; and for forms of motion paper and petition, see Vol. III.

[1] Lawrence *v.* Richmond, 1 J. & W. 241; Donne *v.* Lewis, 11 Ves. 601.

[2] 1 Dick. 370.

from the minute-book of the Registrar that such a decree was pronounced at the time, and, from a Master's report that it had been acted upon. And where an order which had been passed nine years before, but not entered, could not be found, the Court allowed it to be re-issued.[3]

It seems, that an order to enter a decree *nunc pro tunc* may be made, although the suit has abated.[4] And so, when the suit has abated between the hearing and judgment, the decree may still be drawn up.[5]

The decree or order having been passed, any party may obtain an office copy: which, when signed by the Registrar, and marked by the entering clerk, will be as effective, for every purpose of proceeding in the cause, as the original decree or order;[6] and may be given in evidence, instead of the original.[7]

* Proper calendars or indexes of the entries in the Registrars' *1018 books are to be made by the entering clerks, so that the same may be conveniently referred to when required; and such calendars or indexes, and the books in which such entries are made, are, when completed, to be transmitted to the Report office to be there preserved under the direction of the Clerks of Records and Writs, and are to be at all times during office hours, accessible to the public, on payment of the usual fee.[1] Office copies of decrees and orders are usually obtained from the Report office: which is now conducted under the superintendence and control of the Clerks of Records and Writs;[2] and no such office copy is to be delivered out of their office, or be capable of being used in Court, or in the Judges' Chambers, unless it is signed by one of the Clerks of Records and Writs; and no costs of any such copy not so signed are to be allowed on any taxation of costs.[3]

The effect on decrees and orders of the stat. 1 & 2 Vic. c. 110, and later Acts, will be considered hereafter.[4]

Section IV. — *Enrolment of Decrees and Orders.*

A decree does not, strictly speaking, become a record of the Court until it has been enrolled,[5] and, although the Court itself, after it has

[3] Russell *v.* Tapping, 3 W. R. 379, V. C. K. [See *ex parte* Dean, &c. of St. Pauls, 18 W. R. 724.]

[4] Seton, 1139; and see Willimott *v.* Ogilby, there cited; *contra* Bertie *v.* Lord Falkland, 1 Dick. 25; but see, as to the latter case, 2 C. P. Coop. t. Cott. 37.

[5] Davies *v.* Davies, 9 Ves. 461; Belsham *v.* Percival, 8 Hare, 157; 2 C. P. Coop. t. Cott. 176; Collinson *v.* Lister, 20 Beav. 355; 1 Jur. N. S. 835; Seton, 1139; and see Boucicault *v.* Delafield, 9 Jur. N. S. 1282; 12 W. R. 101, V. C. W.; Rücker *v.* Scholefield, 1 N. R. 180, V. C. W.

[6] A fee of 1*l.* higher scale, and 10*s.* lower scale, is payable, in Chancery fee fund stamps, for every office copy of a decree or order so taken. Regul. to Ord. Sched. 4.

[7] See 14 & 15 Vic. c. 99, § 14; *ante*, p. 864.

[1] Ord. I. 19. A fee of 6*d.* is payable, by a fee fund stamp, upon every application for a search in the Report office. Regul. to Ord. Sched. 4. As to the mode of keeping and referring to the Registrars' books, see Seton, 2.

[2] 18 & 19 Vic. c. 134, § 6.

[3] Ord. XXXVI. 1, 2. The charge for such copies is 4*d.* per folio, payable in fee fund stamps. Regul. to Ord. Sched. 4; but see as to paupers, *ante*, p. 44.

[4] See *post*, p. 1039 *et seq.*

[5] Where the decree is final as to any branch of the cause, or as to any of the parties thereto, it must be enrolled before a deed can be executed on a sale under the decree,

been duly passed and entered, treats it as a foundation for ulterior proceedings, it is not considered of a sufficiently permanent nature to entitle it, in other Courts, to the same attention that is paid by one Court of Record to the records of other Courts of the same nature.

*1019 * In fact, till a decree has been enrolled, and thereby become a record, it is liable to be altered by the Court itself, upon a rehearing;[1] whilst a decree, which has been enrolled, is not susceptible of alteration, except by the House of Lords, or by bill of review.[2] For this reason it is, that a decree, which has not been enrolled, although it is, in its nature, a final decree, is considered merely as interlocutory, and cannot be pleaded in bar to another suit for the same matter.[3] The advantage, therefore, to be obtained by the enrolment of a decree is: to prevent its being the subject of a rehearing, and to enable the party benefited by it to plead it in bar to any new bill which may be filed against him, for any of the matters embraced by the bill upon which the decree is founded.[4] No appeal to the House

and before an execution can be issued to enforce a performance of such decree. Minthorne *v.* Tomkins, 2 Paige, 102. This decision was under a rule in Chancery heretofore existing in New York. Decrees should be enrolled in all cases where a decree has been rendered, or an order of dismissal had, or any order in the nature of a decree, which determines the suit, whether such suit concerns real or only personal estate. Halst. Dig. 176. So in all cases where there are proceedings subsequent to a final decree, which go to alter such decree, the proceedings should be enrolled, but not where such proceedings do not alter the decree. Halst. Dig. 175.

In Massachusetts, there is no proceeding in Equity such as the signing and enrolling of a decree in the English Court of Chancery. Clapp *v.* Thaxter, 7 Gray, 386. But a final decree formally drawn out and filed by the clerk, thereby becomes a record of the Court. Thompson *v.* Goulding, 5 Allen, 84, 85; Clapp *v.* Thaxter, 7 Gray, 386. [So, in Tennessee, when entered on the minutes of the Court, and signed by the Judge. Carson *v.* Richardson, 3 Hayw. 231. Though signature is not, in all cases, indispensable. Jackson *v.* Jackson, 2 Leg. Rep. 275.] In Bates *v.* Delavan, 5 Paige, 299, it was decided that the formal enrolment of a decree is not indispensable to its validity as evidence.

In Maryland, a decree is to be taken and considered as enrolled, when it is signed by the Chancellor, and filed by the Registrar, and the term during which it was made has elapsed. Burch *v.* Scott, 1 Gill & J. 398; Pfeltz *v.* Pfeltz, 1 Md. Ch. Dec. 455. [And see, to same effect, Sagory *v.* Bayless, 13 Sm. & M. 153. See also Ruckman *v.* Decker, 12 C. E. Green, 244. Chancery Rule, N. J. 101.]

[1] Coleman *v.* Franklin, 26 Geo. 368.

[2] Ord XXXI. 9; Clapp *v.* Thaxter, 7 Gray, 385; Story Eq. Pl. § 403; Thompson *v.* Goulding, 5 Allen, 82. "The well-settled rule of Chancery practice is, that, after a decree has been enrolled, that is, after it has become matter of record, there can be no rehearing, either on motion or petition." Bigelow C. J. in Thompson *v.* Goulding, 5 Allen, 82; McMicken *v.* Perin, 18 How. U. S. 507. A decree obtained by fraud, can be set aside only by original bill. Colwell *v.* Giles, Riley Ch. 120; Burch *v.* Scott, 1 Bland, 112; Wright *v.* Miller, 1 Sandf. Ch. 103; Davoue *v.* Fanning, 4 John. Ch. 199; Sanford *v.* Head, 5 Cal. 297. [*Infra*, 1584.]

[3] *Ante*, p. 660; Clapp *v.* Thaxter, 7 Gray, 385, 386.

[4] Story Eq. Pl. § 790; Mitf. Eq. Pl. by Jeremy, 237; Neafie *v.* Neafie, 7 John. Ch. 1; Pearse *v.* Dobinson, L. R. 1 Eq. 241. Although a decree in a former suit to which the plaintiff and defendant were parties cannot be pleaded in bar until it is signed and enrolled, it may be insisted on by way of answer. Davoue *v.* Fanning, 4 John. Ch. 199. It will not be allowed at the hearing, unless set up in the answer, or, if enrolled, pleaded. Lyon *v.* Tallmadge, 14 John. 501.

In Clapp *v.* Thaxter, 7 Gray, 384, 386, Thomas J. said: "There is no proceeding under our practice, such as the signing and enrolling of a decree in the English Court of Chancery. But that which is equivalent thereto is the entry of a final decree and judgment thereon as of the last day of the term, or, by the express order of the Court, at an earlier day; or when the cause has been continued *nisi* from any Law term, a judgment entered by order of the Court as of the then last term of the Court in the county where the action is pending. Genl. Sts. c. 133, § 1, c. 112, § 31; Herring *v.* Polley, 8 Mass. 113. Though judgments, in Courts of Law, and final decrees in Equity are, in this country, matters of record, they are deemed to be recorded as of the term of the Court in which they are passed, though not then actually spread upon the record. In substance and effect they are deemed to be enrolled as of that term. Whiting *v.* Bank of U. States, 13

of Lords can take place, unless the decree appealed against has been enrolled.[5]

* Where it is intended to enrol a decree or order, it must be so *1020 enrolled within six calendar months after it has been pronounced or made; and cannot be enrolled at any time after, without special leave of the Court.[1]

Where any party is desirous to enrol a decree or order after the expiration of six calendar months, and within five years from the time the same has been made, he must apply by motion to the Judge to whose Court the cause is attached, for an order for that purpose; and such order, unless made by consent of the opposite party, or on notice to all the parties, is a conditional order in the first instance, but it becomes absolute without further order, unless cause is shown against it within twenty-eight days after service.[2]

The application for leave to enrol a decree, after the expiration of six months should be made to the Judge who first pronounced the decree: although such decree has been reversed on appeal.[3] The burden of showing that the enrolment of a decree ought not to be allowed, after the expiration of six months, is on the party resisting the enrolment.[4] The party applying for the indulgence must pay the costs of the application; but he is not bound first to pay the costs of an unsuccessful appeal in the Court of Chancery.[5]

Peters, 6; Dexter *v.* Arnold, 5 Mason, 303; Story Eq. Pl. § 403;" Thompson *v.* Goulding, 5 Allen, 83; Simms *v.* Thompson, 1 Dev. Ch. 197; McMicken *v.* Perin, 18 How. U. S. 507; Allen *v.* Barksdale, 1 Head (Tenn.), 238; Newland *v.* Glenn, 2 Md. Ch. Dec. 368; Husley *v.* Robinson, 16 Ala. 793.

But in Massachusetts, by statute 1859, c. 237, substantially re-enacted in Genl. Sts. c. 113, a system was established based upon the theory, that the Court of Chancery is always open, and capable of transacting business without the formality of a stated term or session. Under this system full power was conferred upon the Supreme Judical Court and upon the Justices thereof, to make and enter all decrees in Equity, either interlocutory or final, at any time, irrespective of the regular terms established by law for the transaction of business on the common-law side of the Court; and decrees, so entered, must be operative from the time when they are entered of record. They then become the definitive judgment of the Court, — a record in a strict sense, by which the rights of the parties in controversy are finally adjudged. To a decree so entered, the fiction of law by which a term of a Court is held to be an entirety, or one session, so that all judgments, unless otherwise specially ordered, are deemed to be rendered as of the first day of the term, and until the final adjournment to be within the control of the Court, does not apply. Per Bigelow C. J. in Thompson *v.* Goulding, 5 Allen, 84.

[5] Andrews *v.* Walton, 8 Cl. & F. 457; 6 Jur. 519; Broadhurst *v.* Tunnicliff, 9 Cl. & F. 71; see Wellesley *v.* Wellesley, 3 De G. & J. 164; and S. C. *nom.* Beavan *v.* Mornington, 8 H. L. Ca. 525; 6 Jur. N. S. 1123; Monypenny *v.* Dering, 4 De G. & J. 175; 5 Jur. N. S. 661. As to appeals to the House of Lords, see *post*, Chap. XXXII. § 3. *Rehearings and Appeals.* Decrees of a single Justice of the Supreme Judicial Court of Massachusetts, whether final or interlocutory, may be appealed from; and there is no proceeding under the practice in that State, such as the signing and enrolling of a decree in the English Court of Chancery. Genl. Sts. c. 113, §§ 8, 10; Clapp *v.* Thaxter, 7 Gray, 386. But that which is equivalent thereto is the entry of a final decree and judgment thereon. 7 Gray, 386.

[1] Ord. XXIII. 25. The effect of this order is to abolish the practice, which existed before it was promulgated, of enrolling decrees *nunc pro tunc*.

[2] Ord. XXIII. 26. See Smith *v.* Whitmore, 11 L. T. N. S. 507, L. JJ., as to service, where one of the parties has been found a lunatic since the decree. For forms of orders, conditional and absolute, see Seton, 1145, Nos. 1, 2; and for forms of motion paper and notice of motion, see Vol. III.

[3] Webb *v.* Direct London and Portsmouth Railway Company, 10 Hare Ap. 16; Butchardt *v.* Dresser, Kay Ap. 27; see, however, *Re* Sea, Fire, and Life Assurance Company, 3 W. R. 228, L. C.

[4] Kay *v.* Smith, 7 De G., M. & G. 383, 385.

[5] Butchardt *v.* Dresser, *ubi sup.*; [Chapman *v.* Brown, 15 W. R. 474].

Where an application to enroll a decree, after the expiration of the six months, is made on notice, and any party appears and signifies his intention to appeal therefrom, the practice of the Court appears to be, to make an order directing an enrolment, unless a petition of appeal shall be presented within twenty-eight days.[6]

If all parties appear and consent, or if all parties have been served, and neglect to appear, the enrolment will be ordered at once.[7]

No enrolment of any decree or order is allowed after the expiration of five years from the date thereof, unless it is directed by the *1021 Lord Chancellor or Lords Justices; and it may be so directed * by him or them on motion, of which notice must be given to all parties, where it appears to him or them, under the peculiar circumstances of the case, to be just and expedient to enlarge that period.[1]

Where no mistake or surprise was alleged, in support of a motion to enroll a decree more than five years after its date, and the only object of the application appeared to be to induce the House of Lords, upon an appeal being entered, to suspend the standing orders and hear an appeal from another decree in the same cause, already enrolled: it was held, that it was not just or expedient to accede to the application.[2] And the Court was of the same opinion, where the costs of an infant defendant, in a suit in which there had been a great amount of litigation, and in which he was unsuccessful, were ordered to be paid out of the estate, on the understanding that no further litigation should take place, and the infant, having attained twenty-one two months before the expiration of the five years within which the decree might have been enrolled, applied for leave to enroll two years after the expiration of that period.[3]

All decrees and orders, not made as of course, may be enrolled.[4] It has been said, that mere interlocutory orders, made upon motion or petition, which do not decide any of the merits of the cause, and only relate to the proceedings in it, cannot be the subject of enrolment; but this notion seems to be unfounded;[5] and such orders have often been enrolled.[6] It seems, however, to be doubtful whether the enrolment

[6] Sherwin *v.* Shakespeare, 18 Beav. 527; Davison *v.* Robinson, 4 K. & J. 754.

[7] Harrison *v.* Corporation of Southampton, 2 W. R. 183, L. JJ. For forms of affidavit of service of notice of motion, and of conditional order, see Vol. III.

[1] Ord. XXXIII. 28. In Beavan *v.* Mornington, 8 H. L. Ca. 525; 6 Jur. N. S. 1123, it was held that this order was not *ultra vires*, although it has the effect of abridging the power of appealing to the House of Lords. For form of notice of motion, see Vol. III.

[2] Wellesley *v.* Wellesley, 3 De G. & J. 164; S. C. *nom.* Beavan *v.* Mornington, 8 H. L. Ca. 525; 6 Jur. N. S. 1123.

[3] Monypenny *v.* Deering, 4 De G. & J. 175; 5 Jur. N. S. 661.

[4] Braithwaite's Pr. 443; and see 13 & 14 Vic. c. 35, § 33, as to orders on special cases; 15 & 16 Vic. c. 80, § 15, as to orders in Chambers; and Parker *v.* Downing, 1 M. & K. 634, as to orders directing accounts. As to orders of the Court of Chancery in Ireland, and of the Court of the Vice-Warden of the Stannaries, see *post*, § 7, *Enforcing Decrees and Orders*.

[5] Williams *v.* Page, 1 De G. & J. 561, 564.

[6] M'Gregor *v.* Topham, 4 Hare, 162; Williams *v.* Page, *ubi sup.*; Braithwaite's Pr. 444; and see Ord. XXIII. 24. In Massachusetts, decrees, interlocutory or final, may be made by a single Justice of the Supreme Judicial Court, subject, however, in either case, to appeal to the full Court. Genl. Sts. c. 113, §§ 6, 8, 10.

In Vermont, the Supreme Court cannot make a final decree in a suit in Chancery, but must remand the case to the Court of Chancery, to be there proceeded with according to the mandate of the Supreme Court.

of such an order prevents a rehearing.[7] A part only of a decree or order cannot be enrolled; but an order * directing additional *1022 accounts and inquiries may be enrolled by itself.

A decree may be enrolled by a defendant, as well as by a plaintiff;[1] and, subject to the above rules, it may be done at any time, and notwithstanding an abatement of the suit. Thus, where a decree was made in a cause and cross-cause, but was not signed or enrolled till after the death of a party who was plaintiff in the original cause and a defendant in the cross-cause, upon a petition being presented to vacate the enrolment, on the ground of its having been made pending the abatement, it was held, by Lord Hardwicke, that the decree had been properly signed and enrolled.[2]

For the purpose of enrolling a decree or order, the solicitor of the person desiring to enroll the same prepares, in the first place, a docket of enrolment.[3] No part of the statements or allegations contained in any bill, answer, petition, notice of motion, affidavit, report, or certificate, should be recited or stated in any enrolment of a decree or order; but it is sufficient to state, in such enrolment, the filing of the bill or petition, or service of the notice of motion, with the names of the parties thereto, together with the prayer of the bill or petition, or the object of the notice of motion, the filing of the several answers and other pleadings or proceedings, and the short purport or effect of any decree or order made, had, put in or taken, before the date of the decree or order enrolled and leading thereto.[4] It is, however, unnecessary again to set forth, in the docket, any of the proceedings in the cause which have been recited in the docket of a decree or order already enrolled therein.[5]

The docket must be written upon brief paper, the adjudicatory portion of the decree or order being set forth in words at length.[6] It must then be taken, with the originals or office copies of any orders or proceedings (other than the pleadings) recited therein, to the Clerk of Records and Writs: who will inspect the docket, and will indorse a

Downer *v.* Dana, 22 Vt. 337; Van Namee *v.* Groot, 40 Vt. 74, 80. In this State, each Judge of the Supreme Court acts as a Chancellor in any county in the State; but when any one does so act, it is as Chancellor of the Court in and for the county in which he is, for the time, acting. The Court of Chancery in each of the counties is the Court of Chancery of the State of Vermont, in and for that particular county in which the Court is at the time sitting and acting. See Cheever *v.* R. & B. R.R. Co., 39 Vt. 654, 674.

[7] Attorney-General *v.* Mayor of Wigan, 5 De G., M. & G. 52; 18 Jur. 299. [See Randall *v.* Peckham, 11 R. I. 600.]

[1] Gartside *v.* Isherwood, 2 Dick. 612; Gore *v.* Purdon, 1 Sch. & Lef. 234; and see Mann *v.* Ricketts, 9 Jur. 543.

[2] Sheffield *v.* Duchess of Buckingham, Rep. t. Hardwicke, 673; S. C. *nom.* Duchess of Bucks *v.* Sheffield, Amb. 556; and see Williams *v.* Page, 1 De G. & J. 561; Wyatt's P. R. 155.

[3] In Mississippi, according to the practice in Equity, a decree is usually drawn out by counsel, and submitted to the Chancellor for his signature. When it is signed and placed upon the records of the Court, it is then to be considered as enrolled. Sagory *v.* Bayless, 13 Sm. & M. 153. [*Ante*, 1018, n. 5; 1019, n. 4.]

[4] Ord. XXIII. 24. For forms of dockets of enrolments, and observations as to the preparation thereof, see Vol. III.

[5] See Braithwaite's Pr. 448; and forms of dockets in Vol. III.

[6] Braithwaite's Pr. 448. A Chancery fee fund stamp of 3*l.*, for examining and signing the enrolment, must be impressed on or affixed to the first sheet. *Ibid.*; Regul. to Ord. Sched. 4.

certificate thereon that the statement of the pleadings, decrees, orders, reports, certificates and proceedings therein contained is correct; *1023 without which certificate no decree or order * will be enrolled.[1]

If the enrolment is after the expiration of the six months, the order for leave to enroll must be left with the docket; and, if such order is conditional in form, there must also be an affidavit of service thereof.[2]

The Record and Writ Clerk,[3] unless a *caveat* has been entered against the enrolment,[4] will then obtain the signature of the Lord Chancellor to the docket. If the decree or order to be enrolled was pronounced by the Lord Chancellor alone, or by him and the Lords Justices, or one of them, sitting together, or by the Lords Justices alone,[5] or by one of the Vice-Chancellors, the docket may be presented to the Lord Chancellor at once;[6] but if by the Master of the Rolls, his signature must be procured to the docket, before it is presented to the Lord Chancellor. The signature of the Master of the Rolls is obtained by his secretary, on the docket being left with him for that purpose, by the Record and Writ Clerk, and provided no *caveat* has been entered with the secretary.[7] In all cases, however, the decree or order, if made by a Vice-Chancellor, is considered as the Lord Chancellor's decree or order, and must be signed by him, as well as the docket, before it is enrolled.[8]

As soon as the docket has been signed by the Lord Chancellor, it will be returned by the Record and Writ Clerk, on application, together with any papers left therewith, to the solicitor or party seeking the enrolment; after which, such solicitor or party must forthwith have the docket engrossed in proper form,[9] namely, upon parchment rolls, except the date, signature of the Judge, and Record and Writ Clerk's certificate, which are to be omitted.[10] The Rolls are to consist of long slips of parchment, about eight inches wide, affixed to each other, in one continuous roll; and the roll must be indorsed, on the open part, with the short title of the cause, the word "order," or "decree," as the case may be, and the name of the solicitor or party enrolling it.[11] The roll and docket must then be taken forthwith to the Public Record office, in Rolls Yard.[12]

A decree or order thus enrolled is pleadable; and can only be *1024 * reversed, altered, or explained (except as to clerical errors),[1]

[1] Ord. XXIII. 24; and see Braithwaite's Pr. 448, 449. For form of certificate, see Vol. III.

[2] Braithwaite's Pr. 448, 449. For form of affidavit, see Vol. III.

[3] See 15 & 16 Vic. c. 87, § 23.

[4] See *post*, p. 1024.

[5] 14 & 15 Vic. c. 83, §§ 1, 11, 13.

[6] M'Dermott *v.* Kealy, 1 Phil. 267, 269; 7 Jur. 163.

[7] See *post*, p. 1024.

[8] 3 Geo. II. c. 30; 53 Geo. III. c. 24, § 2; 5 Vic. c. 5, §§ 19, 22; 14 & 15 Vic. c. 4, § 1; 15 & 16 Vic. c. 80, § 52; Braithwaite's Pr. 450. Although the L. C., from interest, is unable to hear the cause, he may enroll the decree. Dimes *v.* Grand Junction Canal Company, 3 H. L. Ca. 769; 17 Jur. 73. In Texas, it is not necessary that a decree of the District Court should have the signature of the presiding Judge. Cannon *v.* Hemphill, 7 Texas, 184.

[9] Ord. XXIII. 29. But this order is abrogated by Ord. 7 May, 1866, and the Record and Writ Clerks are to cause the docket to be engrossed, and transmit it to the Record office in Chancery Lane.

[10] Braithwaite's Pr. 450.

[11] *Ibid.*

[12] *Ibid.*; Ord. XXIII. 29.

[1] *Post*, p. 1029.

upon appeal to the House of Lords, or upon a bill of review.[2] Any party, therefore, who is dissatisfied with the decision and wishes to have it reheard, either before the Judge who pronounced it, or before the Lord Chancellor, or Lords Justices, by way of appeal, must take the proper precautions to prevent the enrolment.

An enrolment may be prevented by the opposite party taking the necessary steps for a rehearing: for if, previously to the enrolment being completed, an order to set down an appeal be served upon the party proceeding to enroll, then an enrolment subsequent to such service will be irregular; but neither the mere presentation of a petition of appeal, nor notice of the order to set it down having been made, nor even obtaining such order, will be sufficient, unless service of the order be effected upon the other side.[3] To prevent the enrolment being completed, before service of an order to set down an appeal can be effected, a *caveat* may be entered against the enrolment.[4] If the decree or order is made by a Vice-Chancellor, the *caveat* is entered at the Record and Writ Clerks' Office; if by the Master of the Rolls, it is entered with his secretary.[5]

The effect of the *caveat* is to stay the signing of the docket of the enrolment of the decree or order for twenty-eight days, reckoned from the time of the docket being left to be signed with the proper officer; but if the *caveat* be not prosecuted with effect within that period, the docket may, immediately after the expiration of the time, be presented to be signed, as if no *caveat* had been entered.[6] These twenty-eight must be clear days.[7]

* Upon the presentation of the docket for signature, notice to *1025
prosecute the *caveat* with effect is given, by the officer with whom it has been entered,[1] to the solicitor or party who entered it.

If the *caveat* be not duly prosecuted, the Record and Writ Clerk, on

[2] Ord. XXXI. 9; Hinde, 444.

[3] Dearman *v.* Wych, 4 M. & C. 550; 4 Jur. 66; Groom *v.* Stinton, 2 Phil. 384, 387; 11 Jur. 895.

[4] This difficulty is avoided in Massachusetts, by the provisions of the statute, that, "From final decrees made by a single Justice of the Supreme Judicial Court, any party aggrieved may, within thirty days after the entry thereof, claim an appeal, to be entered on the Clerk's docket; and thereupon all proceedings under such decree shall be stayed, and such appeal be thereupon pending before the full Court," &c. And "no process for the execution of a final decree, made by such single Justice, shall issue until after the lapse of thirty days from the date of the entry thereof, unless all parties, against whom such decree is made, waive an appeal by an entry on the Clerk's docket, or by a writing filed in the cause." Genl. Sts. c. 113, §§ 8, 17.

In New Jersey, no final decree shall be enrolled by the Clerk, nor shall the enrolment be signed by the Chancellor, nor any process be issued thereon, until the expiration of ten days after pronouncing the same, without the special order of the Court therefor. Chancery Rule, 101. If a petition for a rehearing shall be presented to the Chancellor within ten days after pronouncing any final decree, and a *caveat* against enrolling and signing the same shall be filed with the Clerk of the Court, such final decree shall not be enrolled and signed, nor any process issued thereon, until the application shall be finally disposed of. Chancery Rule (N. J.), 144.

[5] Braithwaite's Pr. 526, 527. Where the *caveat* is entered with the Record and Writ Clerk, a fee of 5*s.* is payable by a Chancery fee fund stamp impressed or affixed thereon. Regul. to Ord. Sched. 4. For form of *caveat*, see Vol. III.

[6] Ord. XXIII. 27; Attorney-General *v.* Conservators of the River Thames, 9 Jur. N. S. 588; 11 W. R. 408, L. C.

[7] Robinson *v.* Newdick, 3 Mer. 13, 15; and see Ord. XXXVII. 9; Tray *v.* Drew, 11 Jur. N. S. 612; 13 W. R. 797, L. C.

[1] Braithwaite's Pr. 449, 527, 528; Burnet *v.* Theobald, 1 P. Wms. 609.

being apprised thereof by the solicitor or party prosecuting the enrolment, will, at the end of the time allowed, procure the Lord Chancellor's signature to the docket.[2] No proof is required that the *caveat* has not been prosecuted.[3] On the other hand, if the *caveat* has been prosecuted, the docket will, at the expiration of the twenty-eight days, be returned by the Record and Writ Clerk to the solicitor or party, on application.[4]

Where the party who had entered the *caveat* merely obtained and served an order to set down an appeal within the twenty-eight days, but did not within that time actually set it down, and give notice thereof, it was held that the *caveat* had not been prosecuted with effect within the twenty-eight days.[5]

No period appears to be limited, by the practice of the Court, within which a *caveat* may be entered; but a party, dissatisfied with the decision of the Court, should lose no time, after the decree has been pronounced, in entering his *caveat*, to prevent the other party from enrolling the decree. The *caveat*, however, will be in time if entered at any time before the docket has been left at the Record and Writ Clerks' office, or, where the decree or order has been made by the Master of the Rolls, with his secretary.[6] It is the delivery of the docket for the purpose of the Lord Chancellor's signature being obtained thereto, which completes the enrolment; and a *caveat*, entered after that has taken place, will be useless, even though the signature should not be actually affixed at the time of its entry.[7]

If any irregularity has occurred in the enrolment of a decree or order, or in the proceedings to accomplish that object, the Court will, upon application by motion, order it to be vacated.[8] Thus, the enrolment was vacated where due notice of passing and entering the decree had not been given, under circumstances which amounted to sur-
*1026 prise;[9] and where the notice from the Record * and Writ Clerks' office stated that the docket would be presented for signature, unless an appeal was lodged, and the order to set it down was served, within twenty-eight days, although it was held that the appeal ought to have been actually set down to constitute a prosecution of the *caveat* with effect, yet the Court considered the party had been misled, and was entitled, as an indulgence, to have the enrolment vacated.[1]

[2] Braithwaite's Pr. 449.

[3] See *ibid.*

[4] *Ibid.*

[5] Pearce *v.* Lindsay, 4 De G. & J. 211; 5 Jur. N. S. 661; Attorney-General *v.* Conservators of the River Thames, 9 Jur. N. S. 588; 11 W. R. 408, L. C.

[6] Braithwaite's Manual, 25.

[7] Ricketts *v.* Martin, 2 De G., F. & J. 163; Barnes *v.* Wilson, 1 R. & M. 486, 491; Wickenden *v.* Rayson, 1 Jur. N. S. 945, L. C.

[8] Parker *v.* Downing, 1 M. & K. 634, 637; Robinson *v.* Newdick, 3 Mer. 13; Woods *v.* Woods, 12 Jur. 662, L. C.; Barnes *v.* Wilson, *ubi sup.* For form of order to vacate enrolment, see Seton, 1149; and for form of notice of motion, see Vol. III.

[9] Hargrave *v.* Hargrave, 3 M'N. & G. 348, 351; see also Anon., 1 Ves. S. 326; Belt's Sup. 158; Fray *v.* Drew, 11 Jur. N. S. 612; 13 W. R. 797, L. C.; Stewart *v.* Beard, 3 Md. Ch. Dec. 227; Barry *v.* Barry, 1 Md. Ch. Dec. 20. [So, where the enrolment has been made against a right or interest not heard or protected, without laches or fault in the party who applies. Brinkerhoff *v.* Franklin, 6 C. E. Green, 334; Cawley *v.* Leonard, 1 Stew. Eq. 467.]

[1] Pearce *v.* Lindsay, 4 De G. & J. 211; 5 Jur. N. S. 661; and see S. C. *supra*; but see Attorney-General *v.* Conservators of the River Thames, 9 Jur. N. S. 588; 11 W. R. 408, L. C.

It seems, also, that where the case has not been heard upon its merits, the Court will exercise a discretionary power of vacating an enrolment and of giving the party an opportunity of having the merits of his case discussed.[2] Thus, the enrolment was vacated where a decree of dismissal was made by default, owing to the neglect of the plaintiff's solicitor in providing counsel to attend at the hearing.[3] So, in *Benson* v. *Vernon*,[4] where a bill had been taken *pro confesso*, for want of an answer, and it was proved that the defendant was in an unsound state of mind, and had omitted, from that circumstance, to put in an answer, the House of Lords ordered the enrolment of the decree to be vacated. The same principle was also acted upon by Lord Hardwicke, in *Kemp* v. *Squire*,[5] who said that the above cases proved it to be discretionary in the Court (he did not mean it arbitrarily so) to exercise the power if it sees fit. In *Pickett* v. *Loggon*,[6] however, the Court refused to act upon this discretion. And it is to be observed that, in all those cases where it has been exercised, the merits of the cause had not been discussed before the decree was pronounced; and that, where such has been the case, the Court has refused to exercise its discretionary power,[7] unless there has been something in the nature of a surprise upon the party affected: as in the anonymous * case which has been *1027 before referred to,[1] or as in *Stevens* v. *Guppy*,[2] where the enrolment of a decree was set aside, because made a few days after a conversation had taken place between the solicitor for the plaintiff and the solicitor for the defendant, in which the former had informed the latter that a petition for a rehearing was prepared, to which the latter an-

2 Where the House of Lords considered that all the necessary parties had not been before the Court, an appeal was ordered to stand over, in order that application might be made to the Court below to vacate the enrolment. Trevillian *v.* Knight, L. R. 1 H. L. Ca. 30.

3 Robson *v.* Cranwell, 1 Dick. 61; cited 1 Ves. S. 205; Tripp *v.* Vincent, 8 Paige, 176; Parker *v.* Grant, 1 John. Ch. 630. [Erwin *v.* Vint, 6 Munf. 267. And the decree may be opened even after a sale by the Master under it, where the complainant himself became the purchaser. Millspaugh *v.* McBride, 7 Paige, 509. Or where the purchaser had notice of the applicant's right. Cawley *v.* Leonard, 1 Stew. Eq. 467.] In Robertson *v.* Miller, 2 Green Ch. 453, 454, the Chancellor said: "There is a clear distinction between a decree *nisi* for default, according to the English practice, and a final decree after an order that the bill be taken *pro confesso*, and reference to a Master to take an account, according to our practice. Applications to open the one are treated with indulgence, attempts to set aside the other are more strictly scrutinized." "The whole current of authorities goes to show that there is a difference between decrees by default, orders that the bill be taken *pro confesso*, and actual decrees *pro confesso*. The last are considered, when compared with the others, as sacred, and to be disturbed only for weighty reasons." See Lansing *v.* McPherson, 3 John. Ch. 424; 1 Hoff. Ch. Pr. 551; Wooster *v.* Woodhull, 1 John. Ch. 541; Knight *v.* Young, 2 V. & B. 184.

4 3 Bro. P. C. ed. Toml. 626; cited 1 Ves. S. 206.

5 1 Ves. S. 205, 207.

6 5 Ves. 702, 705.

7 Charman *v.* Charman, 16 Ves. 115. The enrolment can only be vacated on account of the act of the party enrolling; therefore, where a *caveat* had not been prosecuted with effect in consequence of illness, or the non-payment of the deposit, the application to vacate the enrolment was refused. Fray *v.* Drew, 11 Jur. N. S. 672; 13 W. R. 797, L. C.; *post*, 1030, note.

1 1 Ves. S. 326; Hargrave *v.* Hargrave, 3 M'N. & G. 348, 351; see also Pearce *v.* Lindsay, 4 De G. & J. 211; 5 Jur. N. S. 661; Hill *v.* South Staffordshire Railway Company, 10 Jur. N. S. 531; 12 W. R. 699, L. JJ.; 2 De G., J. & S. 230.

2 T. & R. 178; see also Parker *v.* Dee, 2 Cha. Ca. 200; 1 Rep. t. Finch, 123; 3 Swanst. 529, n. (*a*); Anon., 1 Vern. 131; Enraght *v.* Fitzgerald, 1 Dr. & War. 72; Fryer *v.* Davies, L. R. 1 Ch. Ap. 390, L. JJ., where the enrolment was vacated because the order had been delivered to the wrong party by the entering clerk. *Post*, 1031, note.

swered by desiring that no time ought to be lost in presenting it.[3] It seems that, if the party enrolling the decree has said or done something, which would induce his opponent to believe the decree would not be enrolled, approaching deception or *mala fides*, it is a ground for vacating the enrolment, but not otherwise.[4] It was, therefore, held, by Lord Brougham, in *Balguy* v. *Chorley*,[5] that the mere circumstance of its having been intimated, on the part of the defendant, to the plaintiff's solicitor, that it was the intention of the defendant to appeal forthwith, and of the plaintiff's solicitor saying in answer, that he was open to any fair offer of arrangement to prevent the necessity of an appeal, did not amount to such a surprise as would induce the Court to vacate the enrolment. This is in accordance with what was laid down by Lord Lyndhurst, in *Barnes* v. *Wilson*,[6] where his Lordship held, that a party was not bound to communicate his intention to enrol a decree to his adversary, because the latter informs him of his intention to appeal against it.[7]

The enrolment of an order absolute of foreclosure does not, any more than the enrolment of the decree of foreclosure, preclude the
*1028 * Court from again enlarging the time in a proper case, and upon the usual terms.[1]

Where a bill has been ordered to be taken *pro confesso*, and a decree has been made which is not absolute in the first instance, and the defendant petitions for leave to answer the bill, the Court may, as we have seen, if it thinks fit, and upon such terms as seem just, vacate the enrolment.[2]

The Lords Justices have jurisdiction to vacate an enrolment;[3] but the Vice-Chancellors have not.[4]

It appears that the enrolment of an order subsequent to a decree,

[3] Applications to open decrees address themselves to the sound discretion of the Court. They should be listened to generally with great caution, and should not be granted when the result would be injurious to the plaintiff who has conformed himself to the law of the Court. A final decree will not be opened, on the application of the defendant, five and a half years after the decree was made, and four and a half years after it came to the knowledge of the defendant, upon the ground of the pecuniary inability of the defendant to make the application at an earlier day. Robertson *v.* Miller, 2 Green Ch. 451. [Nor after a delay of eleven months. Doubleday *v.* Sherman, 6 Blatchf. 513. Nor will a decree after replication be opened, to allow defendant to prove matter of avoidance in his answer. Roberts *v.* Birgess, 5 C. E. Green, 139. Nor where there was no personal decree against the applicant. Embury *v.* Bergamini, 9 C. E. Green, 227. *Infra*, 1031, n. 6.] Where the facts are all before the Court, application to vacate a decree or set aside an order may be made upon motion merely. It is not necessary to file a petition. Collins *v.* Taylor, 3 Green Ch. 163. A decree will not be opened on the unsupported affidavit of a defendant, that the plaintiff agreed not to prosecute the action. Marsh *v.* Lasher, 2 Beasley, 253.

[4] Wardle *v.* Carter, 1 M. & C. 283, 285; Lewis *v.* Hinton, 11 Jur. 255, L. C.; Wickenden *v.* Rayson, 1 Jur. N. S. 945, L. C.; Williams *v.* Page, 1 De G. & J. 561; Backhouse *v.* Wylde, 3 Jur. N. S. 398, L. C.; Wildman *v.* Lade, 4 De G. & J. 401, 405; Hill *v.* South Staffordshire Railway Company, *ubi sup.*; and see Whitaker *v.* Leach, and Richards *v.* Wood, cited 1 Smith's Pr. 707; Hill *v.* Curtis, L. R. 1 Ch. Ap. 425; 12 Jur. N. S. 444, L. C.

[5] 1 M. & K. 640.

[6] 1 R. & M. 486, 493.

[7] Where a party enrolled a decree as quickly as the practice of the Court allows, his knowledge that the other party intended to appeal is not a ground for vacating the enrolment. Hill *v.* Curtis, L. R. 1 Ch. Ap. 425. [And see Ollerenshaw *v.* Harrop, L. R. 9 Ch. Ap. 480.]

[1] Ford *v.* Wastell, 2 Phil. 591, 593; Thornhill *v.* Manning, 1 Sim. N. S. 451.

[2] Ord. XXII. 16; *ante*, p. 529.

[3] Hill *v.* South Staffordshire Railway Company, 10 Jur. N. S. 531; 12 W. R. 699, L. JJ.; 2 De G., J. & S. 230.

[4] See Ford *v.* Wastell, 11 Jur. 537, V. C. W.

reciting the decree, is not, *per se*, an enrolment of the decree; although such was not formerly the opinion of the Clerks of Records and Writs; but the enrolment of an order subsequent to a decree will prevent a rehearing of the decree, if the variations sought to be made in the decree are inconsistent with the enrolled order.[5]

The costs of enrolling a decree or order will not be allowed, on taxations as between party and party.[6]

Section V. — *Rectifying Decrees and Orders.*

We have seen before[7] that, as long as the decree or order remains in the shape of minutes, that is, till it has been passed by the Registrar and entered, it may be rectified, upon application to the Court, or by having it put into the cause paper, "to be spoken to;" but that, after a decree or order has been passed and entered, the Court will not entertain any application to vary it, unless in respect of matters which are quite of course. The proper method of having a decree or order rectified, in other matters, is by applying to have the cause reheard.[8]

Clerical mistakes in decrees or orders, or errors arising from any accidental slip[9] or omission, may, at any time before enrolment, be corrected, upon motion or petition, without the form and expense of a rehearing.[10] Thus, the omission of a direction to *settle *1029 the conveyance,[1] or of a reference as to title, in a decree for specific performance,[2] or of a direction to take the accounts of the personal estate, in a creditors' suit,[3] may be thus supplied.[4]

It is, nevertheless, a principle of the Court, that no alteration can be

[5] M'Dermott *v.* Kealy, 1 Phil. 267, 270, 271; 7 Jur. 163; Beavan *v.* Mornington, 8 H. L. Ca. 525; 6 Jur. N. S. 1123.

[6] Clark *v.* Malpas, No. 1, 31 Beav. 554; 9 Jur. N. S. 612.

[7] *Ante*, p. 1013.

[8] Harr. by Newl. 322; see *post*, Chap. XXXII., *Rehearings and Appeals;* and see on this subject, Seton, 1143; Gardner *v.* Dering, 2 Edw. Ch. 131; Bennett *v.* Winter, 2 John. Ch. 205; Clark *v.* Hall, 7 Paige, 382; Hendrick *v.* Robinson, 2 John. Ch. 484.

[9] Turner *v.* Hodgson, 9 Beav. 265; [Pepper *v.* Pepper, W. N. (1868) 104; *Re* Great Eastern R. Co., 16 W. R. 661; Williams *v.* Carmarthen, &c. R. Co., 17 W. R. 346; Andrews *v.* Bohannon, W. N. (1869) 80. Decretal orders have been, it seems, corrected when ambiguous. Union Sugar Ref. *v.* Mathiesson, 3 Cliff. 146; Campbell *v.* Crutcher, 3 Tenn. Ch. 253.]

[10] Ord. XXIII. 21; see Lawrence *v.* Cornell, 4 John. Ch. 546; Thompson *v.* Goulding, 5 Allen, 82; Peaslee *v.* Barrey, 1 Chip. 331; Gibson *v.* Crehore, 5 Pick. 146; Equity Rules of the United States Courts, 85, stated *ante*, 1013, note; Pingree *v.* Coffin, 12 Gray, 288, 289; Clark *v.* Hall, 7 Paige, 382; Murray *v.* Blatchford, 2 Wend. 221; Rogers *v.* Rogers, 1 Paige, 188; Sheppard *v.* Starke, 3 Munf. 29; Laverty *v.* Moore, 33 N. Y. 658; Loyd *v.* Hicks, 31 Geo. 140. Where the defective order has been made at Chambers, the application to correct it is usually made by summons. For forms of notice of motion, petition, and summons, see Vol. III.

[1] Trevelyan *v.* Charter, 9 Beav. 140, 142.

[2] Hughes *v.* Jones, 26 Beav. 24.

[3] Pickard *v.* Mattheson, 7 Ves. 293.

[4] For other cases, see Wallis *v.* Thomas, 7 Ves. 292; Newhouse *v.* Mitford, 12 Ves. 456; Lane *v.* Hobbs, *ib.* 458; Skrymsher *v.* Northcote, 1 Swanst. 573, n.; Tomlins *v.* Palk, 1 Russ. 475; Hawker *v.* Buncombe, 2 Mad. 391; Windsor *v.* Cross, 9 Hare Ap. 44; Cradock *v.* Owen, 2 Sm. & G. 241. So, a decree will be amended, where, through inadvertence, costs have been given by it, to a party in the case, where he was not entitled to them. Murray *v.* Blatchford, 2 Wend. 221. A decree may also be amended or corrected on motion or petition, not only as to mere clerical errors, but by the insertion of any provision or direction, which would have been inserted as a matter of course, if the same had been asked for at the hearing, as a necessary or proper clause to carry into effect the decision of the Court. Clark *v.* Hall, 7

made in a decree on motion,[5] without a rehearing, except in a matter of clerical error or of form, or where the matter to be inserted is clearly consequential on the directions already given.[5] Upon this ground, where the decree directed a commission to ascertain the boundaries of prebendal lands, a motion, that the decree might be extended to copyhold as well as to freehold lands, which was opposed, was refused.[6] So, where an ejectment was ordered to be brought, without restraining the defendant from setting up an outstanding term, the introduction of such a restraint was not permitted.[7] In *Colman* v. *Sarell*,[8] Lord Thurlow would not allow a decree to be varied, by giving costs to a defendant who was a mere trustee, and, as such, would have been entitled to them if they had been asked for at the hearing. And, in *Brookfield* v. *Bradley*,[9] Sir John Leach V. C. declined to correct a decree, in which the error was apparent, because the alteration proposed would require new directions upon the corrected part. Where the decree expressed that the parties had consented that the matters in question should be decided by the Court, without directing an issue, the Court refused to vary it, by expressing that the parties had not asked for an issue.[10]

It seems that the Court will, in this manner, supply what may *1030 * be necessary to make an existing direction complete; but will not make a new direction; and therefore, where a decree directed an account of the real estates of a testator, sold since his death, but omitted to direct an account of the moneys received from the sale of such as had been sold, the Court refused to rectify the decree, by directing such account to be taken.[1] Now, however, where, in the prosecution of a decree or order it appears expedient that further accounts should be taken or inquiries made, the Judge may order the

Paige, 382; see Jenkins *v.* Eldredge, 1 Wood. & M. 63. [The decree will be amended by giving a personal decree against one of the defendants which would have been of course at its rendition. Sprague *v.* Jones, 9 Paige, 395; Jarmon *v.* Wiswall, 9 C. E. Green, 68. And in other respects to conform to the Chancellor's written opinion. Dorsheimer *v.* Rorback, 9 C. E. Green, 33, citing a number of cases. It would be otherwise, if the amendment was not of course, and there was no written opinion to sustain the application. Brookfield *v.* Bradley, 2 S. & S. 64; Gardner *v.* Dering, 2 Edw. 131; Burns *v.* Mayor of Edgefield, 3 Tenn. Ch. 137. And see Elliot *v.* Cochran, 1 Coldw. 389, where an error in the decree, made obvious by the opinion delivered, was corrected at a subsequent term. See also Crutchfield *v.* Stewart, 1 Humph. 380, a law case. The House of Lords will, on petition, discharge or revoke a decree improperly obtained. White *v.* Tommey, 4 H. L. C. 313. But not after the cause has been heard on its merits, and remitted to the Court below. King *v.* Ruckman, 7 C. E. Green, 551.]

[5] King *v.* Savery, 8 De G., M. & G. 311; 2 Jur. N. S. 431. Although the Chancellor has no authority to set aside a decree final in its nature, in respect to the subject-matter of it, on account of any error in fact or Law, yet he may suspend the execution of it for matter arising subsequently, which would render its execution oppressive. Spann *v.* Spann, 2 Hill Ch. 152.

[6] Willis *v.* Parkinson, 3 Swanst. 233.

[7] Brackenbury *v.* Brackenbury, 2 J. & W. 391, 393, 396.

[8] 2 Cox, 206.

[9] 2 S. & S. 64.

[10] Stewart *v.* Forbes, 16 Sim. 433; 13 Jur. 5. An order or decree, by consent, cannot be varied or modified in a material part, without the assent of both parties to the same. But the Court, upon the application of either party, may give such further directions as shall become necessary for the purpose of carrying such order or decree into effect according to its spirit and intent. Leitch *v.* Cumpston, 4 Paige, 476; see Jenkins *v.* Eldredge, 1 Wood. & M. 61. [And see in a partition case, where the decree was not executed. Edgerton *v.* Muse, 2 Hill. Ch. 51.]

[1] Whitehead *v.* North, C. & P. 78; see also Bird *v.* Heath, 6 Hare, 236; 12 Jur. 861; Fyler *v.* Fyler, 1 Coll. 93; 8 Jur 211.

same to be taken or made accordingly.[2] The order for this purpose is usually made on summons at Chambers.[3]

Where the title of an order was erroneous, leave was given to amend it: although the effect of the alteration was to charge a surety, who had been sued at law under the order, and, relying upon the mistake in the title, had pleaded that there was no such order.[4]

The rectification of a decree or order is usually made by an alteration of the decree or order itself;[5] but where this cannot conveniently be done, a supplemental order will be made.[6]

A decree may be varied in this manner, at any time, until enrolment; thus, a decree has been altered, although it had been pronounced seven years before, and the cause had been heard on further directions.[7]

The Court will, in some cases, extend the indulgence of rectifying decrees in which there have been clerical mistakes, to decrees which have been actually enrolled.[8] Thus, in cases of miscasting where the matter demonstratively appears upon the decree itself * to *1031 have been mistaken, it may be explained and rectified by order; so, likewise, if some part of the decree be omitted in the enrolment, it may be inserted upon motion to the Court. It is to be observed, that, under the denomination of miscasting, is not to be included any pretended miscasting or misvaluing, but only error in auditing and numbering.[1] In *Weston* v. *Haggerston*,[2] Lord Eldon held, that all errors on

[2] Ord. XXXV. 19.

[3] See *post*, Chap. XXIX., *Proceedings at Chambers*.

[4] Spearing *v.* Lynn, 2 Vern. 376; Prec. in Ch. 115; 1 Eq. Ca. Ab. 30, pl. 6. [*Re* Tiel, 3 De G., J. & S. 426; Williams *v.* Carmarthen &c. R. Co., 17 W. R. 346.]

[5] Seton, 1143; Hawker *v.* Buncombe, 2 Mad. 391; Skrymsher *v.* Northcote, 1 Swanst. 573, n.; Tomlins *v.* Palk, 1 Russ. 475; Hughes *v.* Jones, 26 Beav. 24; Bird *v.* Heath, *ubi sup.*

[6] Wallis *v.* Thomas, 7 Ves. 292; Lane *v.* Hobbs, 12 Ves. 458; Needham *v.* Needham, 1 Hare, 633; 7 Jur. 336; Anon., 1 Jur. N. S. 973, V. C. W. Where the alteration sought is merely consequential upon the decree itself, or the addition of some direction which has been omitted, the omission will be supplied by a distinct order, without ordering or interlining the decree itself. Clark *v.* Hall, 7 Paige, 382.

[7] Askew *v.* Peddle, 14 Sim. 301. As to the time within which application should be made to rectify a decree, see Rogers *v.* Rogers, 1 Paige, 188, where leave to amend a decree was refused to a party, who had delayed a year and six months in applying to the Chancellor to correct a mistake in drawing up a decree. See also Bramblett *v.* Pickett, 2 A. K. Marsh. 11, and Burch *v.* Scott, 1 Bland, 120, where it was held that a decree may be altered or amended by motion or petition, only during the term: afterwards the application to amend should be by bill; but see Irwin *v.* Vint, 6 Munf. 267.

[8] Thompson *v.* Goulding, 5 Allen, 82; Clark *v.* Hall, 7 Paige, 382; Beekman *v.* Peck, 3 John. Ch. 415. But, generally, a decree which has been regularly obtained and enrolled, cannot be altered except by bill of review. Bennett *v.* Winter, 2 John. Ch. 205; Wiser *v.* Blackley, 2 John. Ch. 488; Mead *v.* Arms, 3 Vt. 148; Dexter *v* Arnold, 5 Mason, 303; Jenkins *v.* Eldredge, 1 Wood. & M. 61; Clapp *v.* Thaxter, 7 Gray, 384, 386; Carpenter *v.* Muchmore, 2 McCarter (N. J.), 123; see Millspaugh *v.* McBride, 7 Paige, 509; Beekman *v.* Peck, 3 John. Ch. 415; Ray *v.* Conner, 3 Edw. Ch. 478; Burch *v.* Scott, 1 Bland, 112.

[1] See Seton, 1144. Enrolled decree amended by substituting Master of the Rolls for Vice-Chancellor Wood. Attorney-General *v.* Greenhill, 34 Beav. 174. In Miller *v.* Rushforth, 3 Green Ch. (N. J.) 174, a final decree after enrolment and execution issued thereon, and after the lapse of nearly three years from the date of the decree, was opened for the purpose of correcting a plain and gross mistake in the Master's report, although the defendant appeared and demurred to the bill, and afterwards suffered a decree *pro confesso* to be taken against him, and an *ex parte* report to be made by the Master.

[2] G. Coop. 134; see also Yow *v.* Townsend, 1 Dick. 59; Fearson *v.* Desbrisay, 21 L. J. Ch. 511, M. R.; [Attorney-General *v.* Greenhill, 34 Beav. 174; Fox *v.* Charlton, 6 N. R. 352.]

the face of the schedules could be rectified, even after enrolment, but that there could be no correction except of such apparent errors; and he, therefore, held that no affidavit introducing a new fact, could be permitted after enrolment.[3]

The general orders, however, provide that no decree which has been signed and enrolled shall be reversed, altered, or explained, but upon bill of review.[4]

Where the plaintiff's costs of two motions were reserved to the hearing, and were then, by mistake, omitted to be provided for by the decree, which had been enrolled, the Court, on petition, made a separate order for their payment.[5]

It is an established principle of the Court, that every order and decree, however erroneous, is good until it is discharged.[6]

Section VI.—*Effect of the Acts relating to Judgments.*

Formerly, a decree in a Court of Equity, unless it was for land,[7] operated only *in personam*;[8] and the only method of enforcing it *1033 * was by means of what is termed process of contempt, against

[3] A decree against several defendants will be opened in favor of him only who asks it. Hodges *v.* Mullikin, 1 Bland, 507.

[4] Ord. XXXI. 9.

[5] Viney *v.* Chaplin, 3 De G. & J. 282.

[6] Chuck *v.* Cremer, 2 Phil. 113, 115; 1 C. P. Coop. t. Cott. 338, 342; Sanders *v.* Gatewood, 5 J. J. Marsh. 328. *Vacating decrees. Ante*, 1025–1028, notes. The Court has power, at its discretion, after enrolment, to vacate a decree, entered *pro confesso*, to allow a defence upon the merits when it has been omitted through mistake, accident, or even negligence. Carpenter *v.* Muchmore, 2 McCarter (N. J.), 123; Hall *v.* Lamb, 28 Vt. 85; Disbrow *v.* Johnson, 3 C. E. Green, 36. But, in order to open a decree regularly entered, it is necessary that it appear that the defendant has some good defence, and what that defence is. Disbrow *v.* Johnson, *ubi supra*. [The application is addressed to the discretion of the Court. Bull *v.* Nims, 51 Ill. 171. And must be accompanied by an affidavit explaining the delay, and an answer showing merits. Norton *v.* Hixon, 25 Ill. 440; Stockton *v.* Williams, Harring. Ch. 241; Gwin *v.* Harris, 1 Sm. & M. Ch. 528; Lewis *v.* Simonton, 8 Humph. 185. Evidence competent on the original hearing will not be rendered incompetent by subsequently permitting the defendant to make defence. Bruner *v.* Battell, 83 Ill. 317.] As to the authority of the Court over a decree by consent, see White *v.* Walker, 5 Florida, 478. A Court of Chancery has jurisdiction to set aside decrees obtained by fraud, on an original bill filed for that purpose. Sanford *v.* Head, 5 Cal. 297; Patch *v.* Gray, L. R. 3 Ch. Ap. 203, 206. [*Ante*, 1026, n. 3, and 1027, n. 3.]

[7] 1 Spence Eq. Jur. 392.

[8] Chapman J. in Richmond *v.* Gray, 3 Allen, 27. Where lands lie within the reach of the process of the Court, Courts of Equity will not exclusively rely on proceedings *in personam*, but will put the successful party in possession of the lands, if the other party remains obstinate, and refuses to comply with the decree. Story Eq. Pl. § 744; Buffum's Case, 13 N. H. 14. A decree in Equity cannot *per se* divest a title at Law, but can only compel the person who has the title, and who is mentioned in the decree, to convey. Proctor *v.* Ferebee, 1 Ired. Eq. 146. A decree of the Circuit Court of the United States, directing a conveyance of land in Ohio, does not itself pass a title (as decrees of the Courts of Ohio do) under the statutes of Ohio, but a deed has to be actually made. Shephard *v.* Ross County, 7 Ohio, 271. A decree in Virginia cannot operate on a title to land in Kentucky. But having jurisdiction of the person, the Court may enforce its decree. Carrington *v.* Brents, 1 M'Lean, 167; see Watts *v.* Waddle, *ib.* 200; 2 Story Eq. Jur. §§ 743, 744. It is sufficient, that the parties to be affected by the decree are resident within the State or country where the suit is brought; for in all suits in Equity, the primary decree is *in personam* and not *in rem*. 2 Story Eq. Jur. § 744; Johnson *v.* Petrie, 10 Sumner's Ves. 164, note; Wharton *v.* May, 5 *ib.* 71, note (*a*); Wood *v.* Warner, 2 McCarter (N. J.), 81; Massie *v.* Watts, 6 Cranch, 148, 158; Ward *v.* Arredondo, 1 Hopk. 213; Mead *v.* Merritt, 2 Paige, 402; Dehon *v.* Foster, 4 Allen, 545; Mitchell *v.* Bunch, 2 Paige, 615; Sutphen *v.* Fowler, 9 Paige, 282; Great Falls Manuf. Co. *v.* Worster, 23 N. H. 462; Stephenson *v.* Davis, 56 Maine, 75. In relation to the effect of a decree as a lien on property, see *post*, 1033, note.

the party disobeying it: under which the party, if arrested, might be kept in prison till he obeyed.[1] It was also competent to the party claiming the benefit of the decree, where the disobedient person either could not be arrested upon the process, or, having been arrested, remained in prison without paying obedience to the Court, to issue a writ of sequestration, directing the commissioners therein named to sequester the personal property of the defendant, and the rents and profits of his real estates, and to keep him from the enjoyment of them, till he had cleared his contempt: in the same manner as in the case of a defendant who had committed a contempt, by not appearing to and answering the bill.[2] Originally, this process was merely used as a means of coercing the defendant, by keeping him out of possession of his property; and the practice of applying the money received by the sequestrators, in satisfaction of the sum decreed to be paid, is of comparatively modern origin.[3] This, however, as we shall see in the next section, has become the usual course of proceeding; and the Court will now, where a sequestration has been issued to enforce a decree for the payment of money, order the sequestrators to apply what they have received, by virtue of the sequestration, in satisfaction of the duty to be performed. Still, however, this is only a personal proceeding, and does not alter the nature of the decree: which, being *in personam*, abates by the death of the individual charged, and does not affect his property further than by enabling the party claiming the benefit of it to come in *pari passu* with the other creditors, against the personal estate. A sequestration may certainly be revived against the personal representative * of the party, but it cannot be revived against his *1033 heir, unless the real estate is the subject of the suit;[1] so that, after the death of the defendant, the proceeding by sequestration may be a very inefficient means of enforcing the demand, and certainly is not equal in effect to a judgment at Law. It is true, that a decree has the same authority to bind the personal assets as a judgment at Law;[2] but as the *lien* of the judgment came in by the Statute of Westminster, 13 Edw. I. c. 18, which only gives an *elegit* for a moiety of the land in satisfaction of the debt, that statute could give no authority to lay a sequestration on the real estate for a mere personal duty, where the heir is not bound in the covenant:[3] so that, in cases where the land is not

But a decree in Equity substantially of the nature of a decree of foreclosure, is not an absolute decree *in personam*, which will merge the original debt, or support an action of debt. Manley *v.* Slason, 28 Vt. 346. No personal decree can be made against an absent debtor, unless he appears. If he does appear, there may be a personal decree, and a decree subjecting the attached effects. O'Brien *v.* Stephens, 11 Gratt. (Va.) 610.

1 Gilb. For. Rom. 86.

2 *Ibid.*

3 See Wharam *v.* Broughton, 1 Ves. S. 182.

1 Gilb. For. Rom. 86.

2 Morrice *v.* Bank of England, ca. t. Talb. 218, 222; 3 P. Wms. 401, n. (F); 3 Swanst. 573, 576; Martin *v.* Martin, 1 Ves. S. 214; Joseph *v.* Mott, Prec. in Cha. 79; Bishop *v.* Godfrey, *ib.* 179; Searle *v.* Lane, 2 Vern. 37, 88, 89; Freem. 103; Grey *v.* Chiswell, 9 Ves. 125.

3 Gilb. For. Rom. 87; Bligh *v.* Lord Darnley, 2 P. Wms. 621; Astley *v.* Powis, 1 Ves. S. 496; Mildred *v.* Robinson, 19 Ves. 585, 588.

the subject-matter of the suit, a decree in Equity would not, according to the Law as it existed before the 1 & 2 Vic. c. 110, have the same effect as a judgment at Law, in binding the real estate. The Law, in this respect, has, however, been altered by the above statute:[4] under which, decrees and orders in Chancery, and orders in lunacy, whereby any sum of money, or any costs, charges, or expenses are payable to any person, have the effect of judgments in the Superior Courts of common law;[5] and the persons to whom any such moneys are payable, are deemed judgment creditors within the meaning of the Act.[6] But the Act directs that no decree or order shall, by virtue of that Act, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name and usual or last known place of abode, and the title, *1034 trade, or profession of * the person whose estate is intended to be affected thereby, and the Court and title of the cause or matter in which such decree or order shall have been obtained or made, and the date of such decree or order, and the account of the debt, damages, costs, or moneys thereby recovered or ordered to be paid, has been left with the Senior Master of the Court of Common Pleas at Westminster: who is directed forthwith to enter the same in a book, in alphabetical order, by the name of the person whose estate is intended to be affected thereby.[1]

Later statutes provide: that every such registered decree or order shall, after the expiration of five years from the entry thereof, be void against lands, tenements, or other hereditaments, as to purchasers, mortgagees, or creditors, unless a like memorandum is again left with the Senior Master within five years before the execution of the convey-

[4] Sect. 18; Sugd. V. & P. 524; Shelford's R. P. Acts, 579; 1 Prideaux Conv. 107.

[5] Thompson *v.* Brown, 4 John. Ch. 636. Decrees, in New York, are liens on real estate only from the time of being docketed, not from the period of enrolment. Norton *v.* Talmadge, 3 Edw. Ch. 310; see Dawson *v.* Scriven, 1 Hill Ch. (S. C.) 177.

A decree for alimony, to be paid in instalments, does not operate as a lien upon the real estate of the defendant in Ohio, unless made a charge thereon by the decree itself. Olin *v.* Hungerford, 10 Ohio, 268.

A decree in one State cannot operate upon the title to land in another State; but having jurisdiction of the person, the Court may enforce its decree. Carrington *v.* Brents, 1 M'Lean, 167; Watts *v.* Waddle, 1 M'Lean, 200; 2 Story Eq. Jur. §§ 734, 735; Willis *v.* Cowper, 2 Ohio, 124; Henry *v.* Doctor, 9 Ohio, 49; [Olney *v.* Eaton, 66 Mo. 563.]

South Carolina. A decree in Equity for the payment of money, constitutes a lien on land, similar to that of a judgment at Law, so as to bind it in the hands of a purchaser, who has not gained a title under the Statute of Limitations. Blake *v.* Heywood, 1 Bailey Eq. 208; Woddrop *v.* Price, 3 Desaus. 206. The lien of such decree commences from the day on which it is delivered to the commissioner, and is filed by him. Dawson *v.* Scriven, 1 Hill Ch. 177.

[In Tennessee, by statute, a decree in Equity has the force of a judgment at Law, and is enforced by process against the person and property in the same way: Code, § 2970, 3104, 4478; and may divest and vest title to property. § 4484. See also §§ 4485 to 4488; Battle *v.* Bering, 7 Yerg. 529; *Infra*, 1042, n. 7; 1061, n. 6.]

[6] The 25th section of the Probate Acts (20 & 21 Vic. c. 77) does not constitute an order of the Probate Court, for payment of money, a judgment debt. Pratt *v.* Bull, 1 De G., J. & S. 141; 9 Jur. N. S. 239; 4 Giff. 117; 9 Jur. N. S. 40. Nor does the 52d section of the Divorce Act (20 & 21 Vic. c. 85) so constitute an order of the Divorce Court. *Ex parte* Holden, 13 C. B. N. S. 641; 9 Jur. N. S. 948.

[1] 1 & 2 Vic. c. 110, § 19; Beavan *v.* Earl of Oxford, 6 De G., M. & G. 492; 1 Jur. N. S. 1121; Hargrave *v.* Hargrave, 23 Beav. 484; Sugd. V. & P. 528; Shelford's R. P. Acts, 591; 1 Prideaux's Conv. 108.

ance or other instrument vesting or transferring the legal or equitable right or interest in or to any such purchasers or mortgagees for valuable consideration, or, as to creditors, within five years before their rights accrued, and so *toties quoties*, at the expiration of every succeeding five years;[2] that, as against purchasers and mortgagees without notice thereof, no such decree or order shall bind or affect any lands, tenements, or hereditaments, further or otherwise, although duly registered, than a duly docketed judgment would have bound them, before the Statute 1 & 2 Vic. c. 110;[3] and that no decree or order, by virtue of that Act, or which might be registered thereunder, shall affect any lands, tenements, or hereditaments at Law or in Equity, as to purchasers, mortgagees, or creditors, unless and until the memorandum therein mentioned is left with the proper officer: any notice of any such decree or order notwithstanding.[4]

If the decree or order has been made since the 23d of July, 1860, a *bonâ fide* purchaser for valuable consideration, or a mortgagee, and whether with or without notice, will not be affected, unless a writ or other process of execution has also been issued and registered, and executed and put in force within three calendar months from the time when it was registered;[5] such registry is to * be made by a *1035 memorandum referring to the decree or order already registered, so as to connect the registry of the writ or process therewith; the memorandum must be left with the Senior Master: who will forthwith enter the particulars in a book, in alphabetical order, by the name of the creditor, and also the date of leaving the memorandum.[1]

Where, however, the decree or order has been made since the 29th of July, 1864, no land will be affected by it, until such land has been actually delivered in execution by virtue of a writ of *elegit* or otherwise, in pursuance thereof; and every writ or other process of execution must be registered in the manner provided by the Stat. 23 & 24 Vic. c. 38; but in the name of the debtor, instead of the creditor; and no other or prior registration of the decree or order is to be necessary for any purpose; and no reference to any such prior registration is required to be made in the memorandum to be left for registry with the Senior Master.[2]

[2] 2 & 3 Vic. c. 11, § 4. By 18 & 19 Vic. c. 15, § 6, the circumstance that more than five years have expired since the last previous registration is rendered immaterial as to purchasers, mortgagees, and creditors, becoming such within five years from the registration. See Sugd. V. & P. 528; Shelford's R. P. Acts, 590, 605; 1 Prideaux's Conv. 108, 109.

[3] 2 & 3 Vic. c. 11, § 5; Sugd. V. & P. 533; Shelford's R. P. Acts, 594; 1 Prideaux's Conv. 109.

[4] 3 & 4 Vic. c. 82, § 2; 18 & 19 Vic. c. 15, §§ 4, 5; Sugd. V. & P. 533, 534; Shelford's R. P. Acts, 601, 605; 1 Prideaux's Conv. 109.

[5] 23 & 24 Vic. c. 38, §§ 1, 2, 5; Sugd. V. & P. 529; Shelford's R. P. Acts, 610; 1 Prideaux's Conv. 110. By § 3, provision is made for the protection of heirs, executors, and administrators against unregistered judgments; but it has been held, that judgments against executors or administrators retain priority, although not registered under this Act. Jennings *v.* Rigby, 33 Beav. 198; 9 Jur. N. S. 1144. The 23 & 24 Vic. c. 38 is not retrospective so as to vary antecedently existing rights. Evans *v.* Williams, 2 Dr. & Sm. 324.

[1] 23 & 24 Vic. c 38, § 2; Sugd. V. & P. 530; Shelford's R. P. Acts, 611; 1 Prideaux's Conv. 111.

[2] 27 & 28 Vic. c. 112, §§ 1–3; see *Re* Isle of Wight Ferry Company, 11 Jur. N. S. 279, V. C. W.; Thornton *v.* Finch, 4 Giff. 515:

To obtain the registry or re-registry of a decree or order, or the registry of a writ of execution, under the provisions of the before-mentioned Acts, a memorandum, containing the particulars thereby required, must be prepared by the party seeking registration or his solicitor, and be engrossed on parchment.[3] The memorandum must then be left with the Senior Master of the Court of Common Pleas;[4] and the person leaving it will be required to sign an acknowledgment of having left it, and to take a receipt for it.[5] A separate memorandum is required for every defendant or other person whose estate is intended to be affected.[6]

A satisfaction or discharge of the registry of any decree, order, or writ of execution may be procured, in the manner before explained in treating of a *lis pendens*.[7]

In order that decrees and orders in Chancery may operate as judgments, they must be strictly decrees and orders for payment of a *1036 sum of money: which must be ordered to be paid to some * person; therefore, an order that, in taking the account against an executor, he should be charged with a sum of money, was held not to operate as a judgment.[1] And so, the certificate of a Judge's Chief Clerk of an amount due, does not operate as a judgment, although the certificate has been approved by the Judge.[2] So also a decree for an account of what is due in respect of an annuity, and for payment of the amount found due, does not operate as a judgment.[3] But where, in a suit for specific performance, a decree was made, directing the amount of interest to be computed, and the costs to be taxed, and the payment of the purchase-money, with interest and costs, when ascertained, it was held that it operated as a judgment.[4] A decree, directing payment to the credit of a cause, is not a decree for payment of a sum of money, within the Act.[5] Where, therefore, it is desired in such a case, to register the decree as a judgment, the form of the decree should be to order payment to the plaintiff, or some other party to the cause, and that he pay the money, when received, into Court.[6]

A judgment duly entered up against any person, in any of her Majes-

Thomas *v.* Cross, 11 Jur. N. S. 384; 13 W. R. 647, V. C. K.; 2 Dr. & Sm. 423; [*Re* Cowbridge R. Co., L. R. 5 Eq. 413; Guest *v.* Cowbridge R. Co., L. R. 6 Eq. 619; *Re* Bailey, 17 W. R. 393; Mildred *v.* Austin, L. R. 8 Eq. 220.]

[3] For form of memorandum, see Vol. III.

[4] At his office in Rolls Garden.

[5] Pask, 12.

[6] *Ibid.* A fee of 5*s.* is payable for every original entry of a decree or order. 1 & 2 Vic. c. 110, § 19; and 1*s.* for every re-entry thereof; 2 & 3 Vic. c. 11, § 4. The fee for the registry of a writ of execution is 5*s.*; 23 & 24 Vic. c. 38, § 2. The fee for a search is 1*s.*; 1 & 2 Vic. c. 110, § 19; 18 & 19 Vic. c. 15, § 13; 23 & 24 Vic. c. 38, § 2; see Proctor *v.* Cooper, 18 Jur. 444, V. C. K., as to notice acquired by search.

[7] *Ante*, pp. 400, 401. For forms of acknowledgment, petition, and consent, see Vol. III.

[1] Garner *v.* Briggs, 4 Jur. N. S. 230; 6 W. R. 378, V. C. K.

[2] Earl of Mansfield *v.* Ogle, 4 De G. & J. 38; see also Shaw *v.* Neale, 20 Beav. 157, 174; 1 Jur. N. S. 666; 6 H. L. Ca. 581; 4 Jur. N. S. 695.

[3] Chadwick *v.* Holt, 8 De G., M. & G. 584; 2 Jur. N. S. 918.

[4] Duke of Beaufort *v.* Phillips, 1 De G. & S. 321.

[5] Ward *v.* Shakeshaft, 1 Dr. & S. 269, 272; 8 W. R. 335.

[6] Wand *v.* Docker, 5 Jur. N. S. 1287, V. C. W.; and Thompson *v.* Walker, V. C. W., 11 May, 1859, there cited.

ty's Superior Courts at Westminster, operates as a charge upon all lands, tenements, and hereditaments (including lands and hereditaments of copyhold or customary tenure), to which such person is, at the time of entering up such judgment, or at any time afterwards becomes, entitled, for any estate or interest whatever, at Law or in Equity, or over which such person, at the time of entering up such judgment has, or at any time afterwards shall have, any disposing power which he might, without the assent of any other person, exercise for his own benefit; and is binding as against the person against whom judgment is so entered up, and against all persons claiming under him after such judgment: and is also binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest, in or out of any of the said lands, tenements, and hereditaments; and every judgment creditor has such and the same remedies in a Court of Equity, against the hereditaments so charged, or any part thereof, as he would be entitled to, in case the person against whom such judgment has been so entered up had power to charge the same hereditaments, and had, by writing under his hand, *agreed *1037 to charge the same, with the amount of such judgment debt and interest thereon; but no judgment creditor is entitled to proceed in Equity, to obtain the benefit of such charge, until after the expiration of one year from the time of entering up such judgment; and no such charge operates to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment has been entered up, unless such judgment has been entered up one year at least before the bankruptcy; but the doctrine of Courts of Equity, whereby protection is given to purchasers for valuable consideration without notice, is not altered or affected.[1]

A judgment creditor may enforce his equitable charge twelve months after the judgment has been entered up, although twelve months have not elapsed since its registration.[2] He may also take proceedings to protect his interest in the mean time; thus, he has been held entitled

[1] 1 & 2 Vic. c. 110, § 13; and see Carlon *v.* Farlar, 8 Beav. 525; Clare *v.* Wood, 4 Hare, 81; Thomas *v.* Cross, 11 Jur. N. S. 384; 13 W. R. 647, V. C. K.; 2 Dr. & Sm. 423; Sugd. V. & P. 523; Shelford's R. P. Acts, 565–572; and see Seton, 452; and 27 & 28 Vic. c. 112, *ante*, p. 1035.

[2] Derbyshire, &c. Railway Company *v.* Bainbrigge, 15 Beav. 146. As to the necessity of previously issuing a writ of *elegit*, see Ld. Red. 126; Neate *v.* Duke of Marlborough, 3 M. & C. 407, 415; Smith *v.* Hurst, 10 Hare, 30; 17 Jur. 30; Godfrey *v.* Tucker, 33 Beav. 280; 9 Jur. N. S. 1188. [Previous to the Acts of 1 and 2 Vic. c. 110 and 27 & 28 Vic. c. 112, the jurisdiction of Equity in aid of a judgment creditor was merely to remove an impediment to a legal right. Neate *v.* Duke of Marlborough, 3 M. & C. 407. Equity would not interfere to subject property which could not be reached by execution, if the impediment were removed. Dundas *v.* Dutens, 1 Ves. Jr. 198; Edgell *v.* Haywood, 3 Atk. 352. The American cases are in conflict on this point, but the weight of authority seems to be that the jurisdiction of Equity, beyond the English rule, is purely statutory. Donovan *v.* Finn, Hopk. 59; Erwin *v.* Oldham, 6 Yerg. 185; Hardenburgh *v.* Blair, 3 Stew. Eq. 645; Creswell *v.* Smith, 2 Tenn. Ch. 416; Nichols *v.* Eaton, 91 U. S. 716; Nichols *v.* Levy, 5 Wall. 441; Williams *v.* Thorn, 70 N. Y. 270; Hooberry *v.* Harding, 3 Tenn. Ch. 677. The judgment creditor is still entitled to a receiver in such cases. Anglo-Italian Bank *v.* Davies, 9 Ch. Div. 275; Hatton *v.* Haywood, L. R. 9 Ch. App. 229. And the right is extended under the Judicature Act. Bryant *v.* Bull, 10 Ch. Div. 153.]

to have the life-interest of his debtor in lands, at once impounded for his protection.[3]

It has recently been also enacted, that every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any judgment, and whose writ or other process of execution shall be duly registered,[4] shall be entitled forthwith, or at any time afterwards while the registry of such writ or process continues in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the Court is to direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as appear to be necessary or proper: and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the Court with respect to sales of real estates of deceased persons for the payments of debts is to be adopted and followed, so far as the same may be found conveniently applicable.[5] If it shall appear, on making *1038 such inquiries, that any * other debt due on any judgment, statute, or recognizance is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) is to be served with notice of the order for sale, and after such service is to be bound thereby, and is to be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale are to be distributed among the persons who may be found entitled thereto, according to their respective priorities,[1] and every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, is to be bound by every such order for sale, and by all the proceedings consequent thereon.[2]

If any person against whom any judgment shall have been entered up in any of her Majesty's Superior Courts at Westminster, is interested in any government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not,[3]) standing in his own name in his own right, or in the name of any person in trust for him, or in the name of the Accountant-General of the Court of Chancery, or is interested in the interest, dividends, or annual produce thereof,[4] a Judge of one of the Superior Courts may, on the application of any judgment creditor, order that such stock,

[3] Yescombe *v.* Lander, 28 Beav. 80; 5 Jur. N. S. 780; Reece *v.* Taylor, 5 De G. & S. 480; Partridge *v.* Foster, 10 Jur. N. S. 741, M. R.; 34 Beav. 1.

[4] See *ante*, p. 1034.

[5] 27 & 28 Vic. c. 112, § 4; the term "Judgment" in this Act, includes registered decrees and orders; *ib.* § 2. These provisions only apply to judgments subsequent to the Act. *Re* Isle of Wight Ferry Company, 11 Jur. N. S. 279, V. C. W. For form of order, see *Re* Ventnor Harbor Co., 1 W. N. 9, V. C. W.; *Re* Hull & Hornsea Railway Co., L. R. 2 Eq. 262, V. C. W.; *Re* Bishop's Waltham Railway Co., 14 W. R. 1008, M. R.; 15 W. R. 96, L. JJ.

[1] 27 & 28 Vic. c. 112, § 5.

[2] *Ib.* § 6.

[3] Macintyre *v.* Connell, 1 Sim. N. S. 225; 15 Jur. 529. [For order charging shares in a public company, see *Re* Connell, 25 L. J. Ch. 649; *Re* Imperial Mercantile Credit Association, W. N. (1868) 80.]

[4] 3 & 4 Vic. c. 82, § 1.

funds, annuities, or shares, or the interest, dividends, or annual produce thereof,[5] or such of them, or such part thereof respectively, as he thinks fit, shall stand charged with the payment of the amount for which judgment has been so recovered and interest thereon; and such order entitles the judgment creditor to all such remedies as he would have been entitled to if the charge had been made in his favor by the judgment debtor; but no proceedings can be taken to have the benefit of the charge, until after the expiration of six calendar months from the date of the order.[6]

In order to prevent any person, against whom judgment has been obtained, from transferring, receiving, or disposing of any stock, funds, annuities, or shares, thereby authorized to be charged for the benefit of the judgment creditor, the order will be made, in the first instance, *ex parte*, and without any notice to the judgment debtor, and is an order to show cause only: and where any government stock, funds, or annuities, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by the order, it restrains * the Bank of England from permitting a *1039 transfer of such stock, or payment of the interest, dividends, or annual produce thereof in the mean time, and until such order is made absolute or discharged; and where any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by the order, it in like manner restrains such public company from permitting a transfer thereof.[1] If, after notice of the order to the person or persons to be restrained thereby, or, in case of corporations, to any authorized agent of such corporation, and before the same order is discharged or made absolute, the corporation or person or persons permit any such transfer to be made, then and in such case the corporation or person or persons, so permitting such transfer, will be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and no disposition of the judgment debtor, in the mean time, will be valid or effectual as against the judgment creditor; and unless the judgment debtor, within a time to be mentioned in the order, shows sufficient cause to the contrary, the order will, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute; and the Judge has, upon the application of the judgment debtor, or any person interested, full power to discharge or vary the order, and to award such costs, as he may think fit.[2]

Where a charging order on a fund of personalty, whether in Court or not, is sought for the purpose of giving effect to a decree or order made

[5] 1 & 2 Vic. c. 110, § 14; 3 & 4 Vic. c. 82, § 1; see Shelford's R. P. Acts, 572–575, 601.

[6] 1 & 2 Vic. c. 110, § 14; 3 & 4 Vic. c. 82, § 1

[1] 1 & 2 Vic. c. 110, § 15; 3 & 4 Vic. c. 82, § 1.

[2] 1 & 2 Vic. c. 110, § 15; Shelford's R. P. Acts, 576, 577; and as to the effect of §§ 14, 15, see Warburton v. Hill, Kay, 470.

in Chancery, such order may be made by the Court of Chancery,[3] or by any Judge thereof, whether the cause or matter in which the decree or order has been made is attached to his Court or not, and although the suit has abated; and the application need only be entitled in the matter of the Act or Acts under which the application is made.[4]

If the charging order is required to give effect to a judgment at Law, upon a fund in Court, it should be made by a Common Law Judge at Chambers:[5] the Court of Chancery having no jurisdiction to make such an order.[6] As, however, the Accountant-General, being merely *1040 the agent of this Court, does not admit any * other notice than an order thereof,[1] an application should be made, in such case, to the Court for a stop order upon the fund, as auxiliary to the charging order.[2] Where, therefore, a charging order on a fund in Court, in favor of a judgment creditor, had been made absolute at Law, a second charging order, which had been obtained from the Court of Chancery, was set aside as irregular: the proper course, in such case, being to apply for a stop order.[3]

Where the fund sought to be charged is in Court, a stop order must be obtained, to complete the creditor's title:[4] notice of the charging order to the Accountant-General being of no avail against a stop order afterwards obtained by a subsequent purchaser without notice.[5] An equitable assignee of a trust fund, will, although no notice of the assignment has been given to the trustees, have priority over a judgment creditor of the assignor, who has obtained a charging order subsequently to the assignment; for, as between the assignor and assignee, the title of the latter is complete without notice, and only the interest which the debtor had at the date of the order can be charged.[6] A solicitor's lien for his costs, upon a fund in Court which has been recovered by his exertions, has priority over a charging order obtained by a judgment creditor of his client.[7] Where the charging order is made by the Court of Chancery, the stop order may, it would appear, be added to the orders *nisi* and absolute.[8]

An application for a charging order is usually made by petition; but has sometimes been entertained on summons. The application, is, as we have seen,[9] made *ex parte* in the first instance; and should be sup-

[3] See Stanley *v.* Bond, 7 Beav. 386; Seton, 955, No. 3; Bristed *v.* Wilkins, 3 Hare, 235; Reece *v.* Taylor, 5 De G. & S. 480; Westby *v.* Westby, *ib.* 516; Seton, 954, No. 1; 955, No. 2; Chadwick *v.* Holt, 8 De G., M. & G. 584; 2 Jur. N. S. 918; Wells *v.* Gibbs, 22 Beav. 204; Attorney-General *v.* Corporation of Thetford, 8 W. R. 467; Seton, 955, No. 5, V. C. W.

[4] Lord Hastings *v.* Beavan, 10 W. R. 206, L. JJ.; [Bagnall *v.* Carlton, 6 Ch. Div. 130.]

[5] Chitty's Arch. 539.

[6] Miles *v.* Presland, 4 M. & C. 431; 2 Beav. 300.

[1] See Warburton *v.* Hill, Kay, 470.

[2] Hulkes *v.* Day, 10 Sim. 14; 4 Jur. 1125, Courtoy *v.* Vincent, 21 L. J. Ch. 291, M. R.

[3] *Re* Nowell, 9 Jur. N. S. 788; 11 W. R. 896, V. C. K.

[4] Miles *v.* Presland, and Hulkes *v.* Day, *ubi sup.*; Whitfield *v.* Pricket, 13 Sim. 259; Watts *v.* Jefferves, 3 M'N. & G. 372, 375; 15 Jur. 783; Warburton *v.* Hill, and Lord Hastings *v.* Beavan, *ubi sup.*; Thomas *v.* Cross, 2 Dr. & Sm. 423; 11 Jur. N. S. 384.

[5] Warburton *v.* Hill, *ubi sup.*

[6] Scott *v.* Lord Hastings, 4 K. & J. 633; 5 Jur. N. S. 240; and see Brearcliff *v.* Dorrington, 4 De G. & S. 122; 14 Jur. 1101; Lane *v.* Jackson, 20 Beav. 535; Day *v.* Day, 23 Beav. 391; 3 Jur. N. S. 403; 1 De G. & J. 144; 3 Jur. N. S. 782.

[7] Haymes *v.* Cooper, 10 Jur. N. S. 303; 12 W. R. 539, M. R., 33 Beav. 431.

[8] Seton, 954, No. 1, 958.

[9] *Ante*, p. 1038.

ported by affidavit or other evidence of the title of the applicant to the debt, and of the debtor's title to or interest in the property sought to be charged.[10] If the fund is in Court, the Accountant-General's certificate thereof will also be required. The order made on such application usually directs, that the fund in question stand charged with the payment to the applicant of the debt and interest: unless the debtor, within the time therein specified after service of the order,[11] shows good cause to the contrary; * and it restrains, in the mean time, any *1041 dealing with the fund, without notice to the applicant if the fund is in Court, or absolutely if it is not.[1] The order *nisi*, when passed and entered, should be served on the debtor, his attorney, or agent;[2] and be lodged with the Accountant-General, if it affects a fund in Court; and be served upon the Chief Accountant of the Bank of England, if it affects any government stock not in Court; and where it affects stocks or shares of any public company, it should be served on the authorized agent thereof.[3]

At the time limited for showing cause against the order, if the debtor appears, the order may be discharged,[4] or made absolute;[5] if he does not appear, it will be made absolute, on production of an affidavit of due service thereof;[6] and the order absolute must be served in like manner as the order *nisi*.

A stop order, in aid of a charging order at Law, may be applied for by summons, if the debtor joins in, or will appear and consent to the application;[7] otherwise, the application must be made by special petition,[8] which must be served on the debtor;[9] but not on parties to the cause, or persons interested in parts of the funds not sought to be affected.[10] The application must be supported by production of the charging order absolute, and by an affidavit or other evidence showing the debtor's title to or interest in the fund,[11] and the Accountant-General's certificate of the fund being in Court. If the debtor does not appear, an affidavit of service of the petition will be required.[12] The order, when completed, or an office copy, should be lodged with the Accountant-General: until this is done, the stop order does not take effect.[13]

Although a judgment creditor cannot proceed in Equity to obtain the benefit of his charge on a fund until after the expiration of six calendar

[10] See Wood *v.* Vincent, 4 Beav. 419; Quarman *v.* Williams, 5 Beav. 133; Lambert *v.* Hutchinson, 13 L. J. Ch. 336, M. R.

[11] In Bloxam *v.* Hopkinson, 7 W. R. 606, M. R., cause was directed to be shown on the first seal after the expiration of two clear days from the service of the order.

[1] For forms of order *nisi*, see Seton, 954, No. 1; 955, Nos. 3, 5; 956, No. 6; and for forms of petition, summons, and affidavit, see Vol. III.

[2] 1 & 2 Vic. c. 110, § 15, *ante*, p. 1039; *Re* Paragon and Spero Mining Company, 8 Jur. N. S. 11; 10 W. R. 76, V. C. W.; *Re* East of England Bank, 6 N. R. 81, V. C. K.

[3] 1 & 2 Vic. c. 110, § 15, *ante*, p. 1039.

[4] See Stanley *v.* Bond, 8 Beav. 50; Seton, 955, No. 4.

[5] For form of order absolute, see Seton, 955, No. 2.

[6] For form of affidavit, see Vol. III.

[7] Seton, 953.

[8] For forms of summons and petition, see Vol. III.

[9] Parsons *v.* Groome, 4 Beav. 521.

[10] Ord. XXVI. 2.

[11] Wood *v.* Vincent, 4 Beav. 419; Quarman *v.* Williams, 5 Beav. 133; Lambert *v.* Hutchinson, 13 L. J. Ch. 336, M. R.

[12] For form of affidavit, see Vol. III.

[13] Seton, 953; and see *post*, Chap. XXXVII. § 3, *Stop Orders*.

months from the date of the charging order,[14] he may take proceedings to protect his interest in the mean time.[15] Thus, he has been held entitled to an order in the mean time to restrain the debtor from receiving the dividends on the fund charged.[16] The Court will not, on *1042 the petition of a judgment * creditor who has obtained a charging order, direct the fund to which it has been applied to be paid out to him, without the judgment debtor's consent.[1]

A judgment creditor who has obtained a judgment at Law, loses the benefit of his charge by arresting the defendant;[2] but an arrest, under an attachment in Chancery, has not the same effect.[3]

Every judgment debt carries interest, at the rate of *4l. per cent per annum*, from the time of entering up the judgment, until the same is satisfied; and the interest may be levied under a writ of execution on the judgment.[4]

Section VII. — *Of Enforcing the Execution of Decrees and Orders.*

All decrees and orders may, as we have seen,[5] be enforced by process of contempt. Such as direct payment of a sum of money or costs may also be enforced, under the Act considered in the last section,[6] by writs of *fieri facias* and *elegit*.[7]

[14] 1 & 2 Vic. c. 110, § 14, *ante*, p. 1038.

[15] Bristead *v.* Wilkins, 3 Hare, 235, 239; Reece *v.* Taylor, 5 De G. & S. 480; Watts *v.* Jefferyes, 3 M'N. & G. 422, 424; 15 Jur. 435.

[16] Watts *v.* Jefferyes, *ubi sup.*

[1] Whitfield *v.* Prickett, 13 Sim. 259.

[2] 1 & 2 Vic. c. 110, § 16; Shelford's R. P. Acts, 578.

[3] Roberts *v.* Ball, 3 Sm. & G. 168; 1 Jur. N. S. 585; and see O'Brien *v.* Lewis, 4 Giff. 396; 9 Jur. N. S. 620; *ib.* 764; 11 W. R. 973, L. JJ.

[4] 1 & 2 Vic. c. 110, § 17; Shelford's R. P. Acts, 578, 579.

[5] *Ante*, p. 1032.

[6] 1 & 2 Vic. c. 110, § 20; Ord. XXIX. 6–13. As to the registry of writs and other process of execution, see *ante*, pp. 1034, 1035.

[7] It is a general rule that Courts of Chancery have the power to issue all process that may be necessary to carry their decrees into effectual execution. Ludlow *v.* Lansing, 1 Hopk. 231; Charles River Bridge *v.* Warren Bridge, 6 Pick. 395; Jones *v.* Boston Mill Corp., 4 Pick. 509; Grew *v.* Breed, 12 Metcalf, 363, 370, 371; Scott *v.* Jailer, 1 Grant's Cases (Penn.), 237; White *v.* Hampton, 13 Iowa, 259.

To enforce the execution of a decree for the payment of money, and also for indemnification, in Maryland, the plaintiff may have a *ca. sa.* and an attachment at the same time. Bryson *v.* Petty, 1 Bland, 183; see Brockway *v.* Copp. 2 Paige, 578; Patrick *v.* Warner, 4 Paige, 397; People *v.* Bennett, *ib.* 282; 2 Hoff. Ch. Pr. 92; Minthorne *v.* Tompkins, 2 Paige, 102; Hall *v.* Dana, 2 Aiken, 381; Wallen *v.* Williams, 7 Cranch, 602; Kershaw *v.* Thompson, 4 John. Ch. 609; Richardson *v.* Jones, 3 Gill & J. 163.

But a decree in Equity for the payment of money due upon a contract, cannot be enforced by attachment, in Pennsylvania, since the Act of July 12, 1842, abolishing imprisonment for debt. Scott *v.* Jailer, 1 Grant's Cases (Penn.) 237.

In Massachusetts, "the Court may issue writs of seisin and execution in common form when such process appears to be an appropriate method of enforcing a decree in Equity." Genl. Sts. c. 113, § 23.

By the 8th Equity Rule of the United States Courts, "Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at Common Law in actions of assumpsit." An additional rule, made April 18, 1864, provides that in suits in Equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any of the Courts of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the 8th rule above stated, where the decree is solely for the payment of money. 1 Wallace U. S. Rep. Before this last rule, execution could not issue in such a case. Orchard *v.* Hughes, 1 Wallace U. S. 73; Noonan *v.* Lee, 2 Black U. S. 499; *ante*, 1033, n. 5.

Under the original jurisdiction of the Court of Chancery, no compulsory process issued against any party until he had been * served with a mandate under the Great Seal, called a writ of *1043 execution, commanding him to do what the Court required of him: for the offence committed was, the not paying obedience to the Great Seal;[1] and consequently, the mere service of a copy of the decree or order was not sufficient. Under the present practice, this writ is not necessary, and will not be issued; but the person required by any decree or order to do any act is, upon being duly served with such decree or order, bound to do such act in obedience thereto.[2]

No decree or order made in any suit or matter, requiring any person to do an act thereby ordered, can be enforced by attachment: unless such decree or order states the time, or the time after service[3] of the decree or order, within which the act is to be done: and unless, upon the copy of the decree or order served upon the person required to obey the same, there is indorsed a memorandum in the words or to the effect following, *viz.*: "If you, the within-named A. B., neglect to obey this decree (or, order) by the time therein limited, you will be liable to be arrested, under a writ of attachment issued out of the High Court of Chancery, or by the Sergeant-at-Arms attending the same Court; and also be liable to have your estate sequestered, for the purpose of compelling you to obey the same decree (or, order)."[4]

If, however, the decree or order omits to fix a time, it is not thereby rendered ineffectual, but the Court will, upon motion for that purpose, of which notice must be given, make a supplemental order, fixing a time for the performance of the act.[5] When the * decree *1044

[1] Gilb. For. Rom. 166.

[2] Ord. XXX. 4. By the 10th Equity Rule of the United States Courts it is provided that "Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order, as if he were a party in the cause."

[3] The time is frequently limited thus: "On or before the — day of —, or within — days after service;" or, "on or before the — day of —, or thereafter, within — days after service." The latter form is preferable.

[4] Ord. XXIII. 10. When there was a mistake in the indorsement, an attachment founded on service thereof was discharged. Hinde *v.* Blake, 5 Beav. 431; and see *Re* Bowen, 9 Jur. N. S. 612; 11 W. R. 607, M. R. The indorsement is not required, where the service is made to ground a writ of assistance; see *post*, p. 1061. For protection given by the Court to persons acting under irregular process, see *ante*, p. 511. This and the 11th Order on the next page have been held to apply to a cause only, and not to a matter. See the note to *Re* Minter, 19 Beav. 34. By the 8th Equity Rule of the United States Courts, if the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivery up of deeds, or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound to take notice without further service; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon the special order of the Court or of a Judge thereof, upon motion, and affidavit, enlarging the time for the performance thereof.

[5] Needham *v.* Needham, 1 Hare, 633; 7 Jur. 336; and see S. C. 1 Phil. 640; Morley *v.* Clavering, 30 Beav. 108; Urmston *v.* Singleton, Seton, 615. The application is sometimes made by summons; and should be so made, where the defective order was obtained at Chambers. For forms of notice of motion and summons, see Vol. III.

or order names a specific day for doing the act, and does not merely limit a time after service for that purpose, it must be served before the day named;[1] or if the service cannot be effected before that day, an application must be made by special motion or summons, for an order enlarging the time,[2] or fixing a new period, where the time appointed has expired. A copy of such supplemental or further order must be indorsed and served, in like manner as in the case of the original order.[3]

In the case of a peer, member of the House of Commons, or corporation aggregate, the indorsement to be made on the copy to be served of a decree or order must be varied, by omitting the words "you will be liable to be arrested under a writ of attachment issued out of the High Court of Chancery, or by the Sergeant-at-Arms attending the same Court, and also be liable to have your estate sequestered," and substituting for them, in the case of a peer or member of the House of Commons, the words "you will be liable to have your estate sequestered;" and, in the case of a corporation, the words "you will be liable to have your lands and tenements, goods and chattels, distrained upon, and to have your estate sequestered."[4]

The service of the decree or order must (unless otherwise authorized by the Court), be personal;[5] and is effected, by delivering to, and leaving with the person required to do the act, a true copy of the order, indorsed in the manner before mentioned, and at the same time producing and showing to the person served the original order, as duly passed and entered; or an office copy thereof, duly sealed with the seal of the Report office, and signed by one of the Clerks of Records and Writs.[6]

Although personal service is, in general, requisite, yet the Court will sometimes, under the particular circumstances of the case, allow substituted service to be effected.[7] Thus, where the party absconded to avoid service,[8] or was not to be found,[9] or kept his door locked,[10] *1045 the Court has ordered substituted service upon his * solicitor to be good service. The reason for requiring personal service, previously to the issuing of process of contempt, is chiefly to prevent surprise; and, therefore, wherever it can be shown that the party is not likely to be taken by surprise, the Court will order substituted service

[1] Adkins *v.* Bliss, 2 De G. & J. 286; 4 Jur. N. S. 1162.

[2] Duffield *v.* Elwes, 2 Beav. 268; Braithwaite's Pr. 166. For forms of notice of motion and summons, see Vol. III.

[3] Braithwaite's Pr. 135, 167; and see Adkins *v.* Bliss, *ubi sup.*

[4] Braithwaite's Pr. 358, n. (*e*); Braithwaite's Manual, 53.

[5] *Re* Lloyd, 10 Beav. 451, and cases in reporter's note; Whistler *v.* Aylward, Dru. 1; *Re* Wisewold, 16 Beav. 357; Gooch *v.* Marshall, 8 W. R. 410, V. C. W.; *Re* Paragon and Spero Mining Company, 8 Jur. N. S. 11; 10 W. R. 76, V. C. W.; Pycroft *v.* Williams, 5 W. R. 464, V. C. W.; Parrott *v.* Quernan, Halst. Dig. 178.

[6] Braithwaite's Pr. 166, 167; Braithwaite's Manual, 175, n. (73); and see *ante*, p. 1018.

[7] As to substituted service generally, see *ante*, p. 446 *et seq.*

[8] Edwards *v.* Poole, cited 12 Ves. 205; Skegg *v.* Simpson, 2 De G. & S. 454; Burlton *v.* Carpenter, 11 Beav. 33; *Re* Mourilyan, 13 Beav. 84; and see *Re* Dufaur, 16 Beav. 113.

[9] Wyatt's P. R. 207, 250; Hunter *v.* ——, 6 Sim. 429.

[10] Henley *v.* Brooke, cited 12 Ves. 204.

to be good service. Thus, where a defendant was present in Court when the decree was pronounced, and afterwards kept out of the way, the Court ordered substituted service of the decree upon her solicitor;[1] and so, in *De Manneville* v. *De Manneville*,[2] where the party had declared that he would not obey the order.

Where the person required to do the act resided permanently abroad, on her Majesty's service, substituted service on his solicitor was ordered, without proof of any attempt to serve him personally.[3]

The order for substituted service is obtained on an *ex parte* application;[4] which is made, by summons in causes and matters originating in Chambers or for the purpose of proceedings pending there, in other cases by motion in Court.[5] The application must be supported by affidavit showing why personal service cannot be effected, and upon whom the substituted service is proposed to be made.[6]

If substituted service is permitted, the service must be effected strictly in accordance with the terms of the order directing such service, and a copy of such order must also be, at the same time, served in the same manner.[7]

Where any person is by any decree or order directed to pay any money, or deliver up or transfer any property real or personal to an other, it is not necessary to make any demand thereof; but the person so directed is bound to pay or deliver over the same upon being duly served with the decree or order, without demand; and process of contempt may issue accordingly to enforce performance thereof.[8] The Court or Judge will, however, in a proper case, extend the time for such payment or delivery, on a special application by motion or summons, with notice to the person entitled to enforce the decree or order.[9]

If the person directed by a decree or order, made in any suit or matter, to pay money, or do any other act within a limited time, refuses or neglects, after due service of such decree or order, to obey
* the same according to the exigency thereof, the person prose- *1046
cuting such decree or order is, at the expiration of the time limited for the performance thereof, entitled to a writ or writs of attachment against the disobedient person.[1]

[1] Rider *v.* Kidder, 12 Ves. 202.

[2] *Ib.* 203, 205.

[3] Griffiths *v.* Cowper, 2 De G., F. & J. 208; 6 Jur. N. S. 718; 2 Giff. 230.

[4] Danford *v.* Cameron, 8 Hare, 329; Reed *v.* Barton, 4 W. R. 793, V. C. W.

[5] Seton, 1212. For form of order, see *ibid.*; and for forms of summons and motion paper, see Vol. III.

[6] Seton, 1212. For form of affidavit, see Vol. III.

[7] Braithwaite's Pr. 167. Where an order is made for substituted service on a solicitor, service on his clerk is irregular. Tweedie *v.* Phelps, 1 W. N. 231, M. R.

[8] Ord. XXIX. 1.

[9] For forms of notice of motion and summons, see Vol. III.

[1] Ord. XXIX. 3; see Armstrong *v.* Beaty, Cam. & Nor. 33; Birchett *v.* Balling, 5 Munf. 442; Gilmore *v.* Gilmore, 40 Maine, 50, 53, 54; Androscoggin & Kennebec R. R. Co. *v.* Androscoggin R. R. Co., 49 Maine, 392; Maine Chancery Rule, 28; 37 Maine, 592; 49 Maine, 402; Stimpson *v.* Putnam, 41 Vt. 238. Where however, a peer, M. P., or corporation disobeys a decree or order, the process is different; see *post*, p. 1065 *et seq.* As to the writs of *fieri facias* and *elegit*, see *post*, p. 1062 *et seq.* As to the process to enforce payment of costs, see *post*, Chap. XXXI., *Costs*.

The form of the writ of attachment is the same as that on *mesne process*;[2] but the indorsement (which should strictly follow the language of the decree or order) recites so much of the mandatory part of the decree or order as directs payment of the money or performance of the act, and explains the purpose for which it is issued.[3]

The writ will be issued by the Record and Writ Clerk, upon his being satisfied by affidavit[4] of the due service of the decree or order, and that it has not been obeyed. When the act to be done is the payment of money into Court, the non-payment is proved by the Accountant-General's certificate of default.[5] The writ is prepared, directed, made returnable, delivered, executed, and returned, and the return enforced in the same manner as an attachment in *mesne process*.[6] Previously to the writ being issued, a *præcipe*, which should follow the language of the decree or order, must be filled up and entered at the entering seat in the Registrars' office, and be marked and filed in the manner before explained.[7]

An attachment for non-performance of a decree or order is not, like an attachment for not appearing or not answering,[8] a bailable process; and the person, if taken upon it, must be committed to, or detained in, prison, and not suffered to go at large. It seems that, formerly, where the sheriff, after arresting any person upon an attachment for not obeying a decree or order for payment of money, suffered him to go at large, the sheriff himself was ordered, upon motion, to pay the money;[9] and in *Solly* v. *Greathead*,[10] a similar order was made by Lord Eldon; who ordered the sheriff not only to pay the money for which the at-
*1047 tachment was issued, * but the cost of the contempt incurred by the party, and of the application. Under the present practice, the sheriff is only liable to the extent of the loss actually suffered by his neglect; and this loss is ascertained by the Court of Chancery, and not by a Common Law Court.[1] Where the sheriff improperly takes bail, the remedy against the disobedient person is an order of the Court for a messenger to arrest him, and bring him to the bar of the Court; the order is obtained on an *ex parte* motion.[2]

If there is any irregularity in the order, or the affidavit on which the attachment is issued, it will be set aside.[3]

2 *Ante*, p. 462 *et seq.*

3 Braithwaite's Pr. 167. For forms of indorsement, see Vol. III.

4 For forms of affidavit, see Vol. III.

5 The affidavit of personal service of the order need not state where the service was effected. *Re* Job, 27 Beav. 32. The service in that case was of a balance order under the Winding-up Acts; but see now, in cases under the Companies Act, Ord. 11 Nov., 1862, Sched. 3, No. 42; 8 Jur. N. S. Pt. 2, 527.

6 *Ante*, pp. 462–467.

7 *Ante*, p. 464 *et seq.*; Braithwaite's Pr. 169; and see Seton, 1240, 1241, for tables of proceedings to enforce decrees and orders. For form of *præcipe*, see Vol. III.

8 *Ante*, p. 467.

9 Levett *v.* Letteney, Beames on Costs, Ap. 235; cited 11 Ves. 170; see, however, Thomas *v.* Hall, 2 De G. & S. 264.

10 Beames on Costs, Ap. 235; S. C. as Anon., 11 Ves. 170.

1 5 & 6 Vic. c. 98, § 31; Moore *v.* Moore, 25 Beav. 8; 4 Jur. N. S. 250; Sugden *v.* Hull, 28 Beav. 263; *ante*, p. 468; and see Chitty's Arch. 693, 795.

2 Anon., Prec. in Cha. 331; Cowdray *v.* Cross, 24 Beav. 445; *ante*, p. 468. For form of motion paper, see Vol. III.

3 Mackenzie *v.* Mackenzie, 5 De G. & S. 338; *Re* Reynolds, 10 W. R. 709, V. C. S.

It may be here mentioned, that an order for protection or discharge under the Bankruptcy Acts, is a sufficient return by the sheriff to an attachment for non-payment of money or costs;[4] and that where the sum, for non-payment of which the person is in custody, is under 20*l*., the Court of Chancery has power to discharge him.[5]

If the sheriff finds the disobedient person, he must either send him to prison, or, if already in prison, lodge a detainer against him, and make his return to that effect;[6] and the person prosecuting the decree or order may leave him there until he has cleared his contempt, by performing the act required of him, and paying the costs of the contempt.[7] In addition to this, the person prosecuting the decree or order, is upon the sheriff's return that the disobedient person has been so taken or detained, entitled to a commission of sequestration against his estate and effects.[8] The writ of sequestration will be ordered to issue on motion[9] of * course, supported by the production of the sher- *1048 iff's return to the attachment.[1]

If the sheriff makes the return *non est inventus* to the writ of attachment, the person prosecuting the decree or order is entitled, at his option, either to a commission of sequestration in the first instance, or to an order for the Sergeant-at-Arms, and to such other process as he was formerly entitled to, upon a return *non est inventus*, made by the commissioners named in a commission of rebellion issued for the non-performance of a decree or order.[2] If, upon the return *non est inventus* by the sheriff, application is made in the first instance for a sequestration, the order may be obtained upon motion of course, supported by the production of the attachment with the sheriff's return.[3] As a general

[4] Wyllie *v.* Green, 1 De G. & J. 411; 3 Jur. N. S. 1046; but see Wenham *v.* Bowman, 11 Beav. 138, 140; 12 Jur. 687. For a form of special return in such case, see Vol. III.

[5] See 48 Geo. III. c. 123; 1 & 2 Vic. c. 110, § 18; Lister *v.* Lister, 14 Jur. 300, L. C.; Tolson *v.* Dykes, 1 Phil. 439; 8 Jur. 565; and see Wenham *v.* Bowman, *ubi sup.*

[6] *Ante*, pp. 470, 471. The writ, when returned, is filed at the Record and Writ Clerks' office, and an office copy thereof may be obtained therefrom. For form of return, see Vol. III. Braithwaite's Pr. 271.

[7] Braithwaite's Pr. 284; the costs are 13*s.* 8*d.* *Ibid.*

[8] Ord. XXIX. 3. A sequestration is proper, if the defendant obstinately lie in jail to save his estate, or exhaust it in paying other creditors, to the injury of the plaintiff. Ross *v.* Colville, 3 Call, 382. So, it may issue where the defendant is about to remove, to avoid a decree, which he expects will be made against him. Anon., 1 Hayw. 347. But it will not be ordered upon an unsupported affidavit, that the defendant is wasting his effects. Spiller *v.* Spiller, 1 Hayw. 482. The affidavit on which an order of sequestration is awarded, should state positively the existence of the facts on which the application is granted, or, if only matter of belief, the grounds of belief should be stated. Edwards *v.* Massey, 1 Hawks, 359. Where a party perseveres in his refusal to deliver over property to a receiver, the property may be sequestered, and his servants and agents, &c., will be prohibited from delivering it to him or applying it to his use, on pain of contempt. People *v.* Rogers, 2 Paige, 103. Upon a decree for dower, there can be no sequestration of the two-thirds to satisfy the claim for rents and profits of the dower. Chase's Case, 1 Bland, 372.

[9] Harr. by Newl. 138.

[1] Braithwaite's Pr. 285. For form of order, see Seton, 1214; and for forms of motion paper and writ, see Vol. III.

[2] Ord. XXIX. 3. Writs of rebellion are no longer issued. Ord. XXX. 5. By the 8th Equity Rule of the United States Courts, "If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon a return of *non est inventus*, to compel obedience to the decree."

[3] Braithwaite's Pr. 287, 288. Where the defendant is out of the jurisdiction, and has been served by substitution, a sequestration will be issued without a writ of attachment. *Re* East of England Bank, 10 Jur. N. S. 1093; 13 W. R. 128, V. C. K.; 2 Dr. & Sm. 284. For form of order, see Seton, 1214; and for forms of motion paper and writ, see Vol. III.

rule, a sequestration will not be ordered if there has been any irregularity in the attachment; but where the attachment had been issued into a wrong county, and the defendant was abroad, the Court ordered the writ of sequestration to issue, without a fresh attachment.[4] And it seems that, where the defendant is abroad, no attachment need be issued in order to found a sequestration.[5]

If, upon the return *non est inventus*, the person prosecuting the decree or order desires an order for the Sergeant-at-Arms, such an order may be obtained upon an *ex parte* application by motion, supported by the production of the attachment and the sheriff's return.[6] The Registrar will, upon request, draw up the order, and deliver it to the Sergeant-at-Arms or his deputy: who, thereupon, procures the Lord Chancellor's warrant to execute the decree or order, and will endeavor to apprehend the person prosecuted, and bring him into Court to answer his contempt, if he can; but if he cannot, the order for the Sergeant-at-Arms will not be discharged, nor the contempt thereon, without a certificate, under the hand of the Sergeant-at-Arms, that his fees have been paid; and after the order has been drawn up and passed, no private or other agreement can be made between the party prosecuting the contempt, and the person standing in contempt, or on their behalf, for a compromise *1049 * of the suit, or a discharge of the contempt, unless such satisfaction be made to the Sergeant-at-Arms, and a certificate thereof be produced in Court.[1]

If the Sergeant-at-Arms apprehends the disobedient person,[2] he brings him to the bar of the Court, and he will be thereupon, on the motion of the person prosecuting the decree or order, turned over to Whitecross Street Prison;[3] and upon proof of such committal, that is, by production of the keeper's certificate, the person prosecuting the decree or order may obtain, upon motion of course, an order for a sequestration.[4] And the person so brought up will not be released, until he has performed the decree or order in all things that are to be immediately performed, and given such security as the Court shall direct to perform the other parts of the decree or order (if any), at the future days and times thereby appointed.[5]

If the Sergeant-at-Arms finds the disobedient person already in prison, he lodges a detainer against him, and makes a return accordingly; and thereupon the person prosecuting the decree or order is entitled, upon production of such return, to an order for a writ of *habeas corpus cum causis*, directed to the keeper of the prison, or other officer in whose

[4] Hodgson *v.* Hodgson, 23 Beav. 604; and see Butler *v.* Matthews, 19 Beav. 549; and *Re* East of England Bank, *ubi sup.*

[5] See *ibid.*; and Seton, 1222.

[6] Braithwaite's Pr. 286, 288. For form of order, see Seton, 1222; and for form of motion paper, see Vol. III.

[1] Ord. XXX. 2. As to the Sergeant-at-Arms, see *ante*, p. 494.

[2] Where the Sergeant-at-Arms suffers the contemnor to escape, a second order for a Sergeant-at-Arms must be applied for. Morris *v.* Smith, 8 Sim. 33.

[3] 25 & 26 Vic. c. 104; Braithwaite's Pr. 288. For form of order, see Seton, 1223, No. 1.

[4] Braithwaite's Pr. 288. For form of order, see Seton, 1224; and for form of motion paper, see Vol. III.

[5] Ord. XXIX. 4.

custody the disobedient person is, commanding him to bring the latter to the bar of the Court.[6] The order will be made on motion of course, or on petition of course at the Rolls;[7] and the writ will be sealed at the Record and Writ Clerks' office, on production of such order. The writ must be made returnable on a day certain; and one of the days appointed for hearing motions is usually selected.[8] On being brought up to the bar of the Court, an order will be made, on motion of course of the party prosecuting the decree or order, turning the disobedient person over to Whitecross Street Prison,[9] or remanding him thereto, if already imprisoned or detained there.[10] An order may then be obtained for a sequestration, on motion of course, supported by the keeper's certificate of the disobedient person being in his custody.[11] If the Sergeant-at-Arms cannot find the disobedient person, he makes the return *non est inventus;* and * thereupon the person prosecuting *1050 the decree or order may obtain, upon motion, as of course, supported by production of the return of the Sergeant-at-Arms, an order for a sequestration.[1]

No particular time is limited, within which the person prosecuting the decree or order is to take the several before-mentioned proceedings, upon the return *non est inventus.*[2]

The person against whom a sequestration has issued may, by his conduct, waive his right to object to it, on the ground of irregularity.[3]

The process of sequestration on final p ocess[4] is a writ or commission directed to certain persons nominated by the person prosecuting the decree or order, empowering them to enter upon the real estate of the disobedient person, and to receive, sequestrate, and take the rents and profits thereof, and also his personal estate, and keep the same under sequestration in their hands until he shall have performed the act required, and cleared his contempt.[5]

Sequestrations are stated to have been first introduced in Sir Nicholas Bacon's time, and were then but sparingly used in process, and after a decree to sequester the thing in demand only.[6] It is said, that the first instance of a sequestration after a decree was in *Sir Thomas Read's* case, in Lord Coventry's time;[7] another was issued in *Lake* v. *Meares*,[8] 11 Jac., and in the case of *Hide* v. *Petit*, in 1666:[9] which was affirmed in

[6] See Const *v.* Barr, 2 S. & S. 452; 2 Russ. 161; Seton, 1224; Braithwaite's Pr. 224, 288.

[7] For forms of motion paper and petition, see Vol. III.

[8] See *ante*, p. 491.

[9] See 25 & 26 Vic. c. 104, § 2.

[10] See Davies *v.* Nixon, cited Seton, 1263. For forms of order, see Seton, 1223, No. 1. The return to the *habeas* should be filed in the Record and Writ Clerks' office. Oldfield *v.* Cobbett, 2 Phil. 289.

[11] Braithwaite's Pr. 239, 288. For form of order, see Seton, 1224; and for forms of motion paper, see Vol. III.

[1] Braithwaite's Pr. 288. For form of order, see Seton, 1225.

[2] Braithwaite's Pr. 288.

[3] Const *v.* Barr, 2 Russ. 161, 168.

[4] As to sequestration on *mesne process*, see *ante*, pp. 472, 478, 495.

[5] See Hinde, 138; Aug. & Ames Corp. § 670; and form of writ in Vol. III.

[6] Earl of Kildare *v.* Eustace, 1 Vern. 421; 3 Bla. Com. 444.

[7] North's Life of L. K. Guilford, vol. 2, p. 73.

[8] Tothill, 175.

[9] 1 Cha. Ca. 91, 93; Freeman, 125, 168; Beddingfield *v.* Zouch, *ib.* 168.

part;[10] the same process appears to have been adopted by the Court of Exchequer in *Guavus* v. *Fontaine*, 1687,[11] and in the case of *Witham* v. *Bland*,[12] in Lord Shaftesbury's time.[13]

There appear, however, to have been great struggles between the Courts of Common Law and Courts of Equity before this process was established: the former holding that a Court of Conscience could only give remedy *in personam* and not *in rem*, and that sequestrators were trespassers, against whom an action at Law would lie;[14] and to such an extent does the objection of the Courts of Law to this process appear to have been carried, that, according to a case cited by Lord Nottingham, in *Colston* v. *Gardiner*,[15] a question was entertained upon an indictment for murder, where one was killed for laying on a sequestration, *1051 * whether the homicide was justifiable or not.[1] But the process has become, by long use and acquiescence, the legal and ordinary process of the Court.[2]

A sequestration is usually directed to four sequestrators; and care ought to be taken that the persons named are able to answer for what shall come to their hands, in case they should be called upon to account.[3] The writ is to a great extent a recital of the order for the sequestration; the form must, therefore, be varied to meet the circumstances of each particular case.[4]

A commission of sequestration is prepared by the solicitor of the party prosecuting the contempt; it must be engrossed on parchment,[5] and be indorsed with the name and usual place of business of such solicitor and of his agent if any, or with the name and place of residence of the party prosecuting the contempt, where he acts in person, and, in either case, with the address for service, if any.[6] The commission will be issued at the Record and Writ Clerks' office, upon production of the order for the writ, and leaving a *præcipe* there to be filed.[7]

The return to a writ of sequestration is indorsed on the commission; but it is not the practice to file it.[8]

The person prosecuting the decree or order must, if he wishes to have another sequestration, or any further remedy, after the return of *nulla bona*, apply specially to the Court.[9]

If the sequestrators return that the person is a beneficed clerk and

10 See 3 Swanst. 295, n. (*c*).
11 See *Ib.* 296, n.; 297, n. (*a*).
12 Cited 2 Ch. Ca. 46.
13 Hinde, 128.
14 Brograve *v.* Watts, Cro. Eliz. 651.
15 2 Ch. Ca. 44; 3 Swanst. 279, n.
1 Gilb. For. Rom. 78; Hinde, 128.
2 Hinde, 128.
3 Harr. by Newl. 143; Ang. & Ames Corp. § 670; see Ammant *v.* New Alexandria, &c. Turnp. Co., 13 Serg. & R. 210. It is not essential that the commissioners should be professional persons. Braithwaite's Pr. 240.
4 Braithwaite's Pr. 240. For form of the writ, see Vol. III.
5 A Chancery fee fund stamp of 20*s.* must be affixed to the writ. Regul. to Ord. Sched. 4.
6 Ord III. 2, 5; *ante*, pp. 453, 454.
7 Braithwaite's Pr. 240. For forms of writ, indorsement, and *præcipe*, see Vol. III.
8 Goldsmith *v.* Goldsmith, 5 Hare, 123, 129; 10 Jur. 561; Braithwaite's Pr. 291. For form of return *nulla bona*, see Vol. III.
9 Braithwaite's Pr. 291; and see Wright *v.* Wellesley, 1 Smith's Pr. 201; Knott *v.* Coitee, 19 Beav. 470; Ang. & Ames Corp. § 670.

has no lay property, an application must be made for a writ of *sequestrari facias de bonis ecclesiasticis*, directed to the bishop of the diocese: under which his benefice may be sequestered.[10]

When a sequestration is to be executed, it should be delivered, to the sequestrators, by the solicitor, with proper instructions for carrying it into effect.[11]

There is a difference between a sequestration upon *mesne process*, and a sequestration to compel the payment of money under a decree or order: for, in the latter case, after the process has been executed, and goods and estate sequestered under it, the person prosecuting the decree or order may have them applied to satisfy *his de- *1052 mand: which will not be done if the sequestration was upon *mesne process*.[1] It is said, however, in the books, that even in the case of a sequestration upon *mesne process*, the Court has the whole under its power, and may do therein as it pleases, and as best meets the justice of the case;[2] and in *Maynard* v. *Pomfret*,[3] where a defendant, in contempt for want of answer, had stood out the whole process to a sequestration, whereupon the bill was taken *pro confesso* against him, and a decree made *ad computandum*, Lord Hardwicke refused to discharge the sequestration on the defendant's paying the costs on contempt only, but kept it on foot as a security for his appearing to account.

It should be noticed that, in the last case, the material part of it, as against the defendant, was the discovery to be elicited from him by his answer, and that the object of keeping the sequestration on foot was merely to compel him to submit to examination, as to the same points as those to which the discovery from him by answer, was material; but in *Shaw* v. *Wright*,[4] Lord Rosslyn appears to have considered the case of *Maynard* v. *Pomfret* as going the whole length of proving, that though the sequestration issued as *mesne process* to compel an answer, yet it should remain if there were any duty to be performed; and to have acted upon that view.

The sequestrators, under a sequestration, may take all the goods and chattels in the possession of the disobedient person, or which they can come at without suit or action.[5] With respect to *choses in action* in the hands of a third person, it seems doubtful whether they can be taken under a sequestration, without the consent of the party in whose hands they are.[6] The result of the cases appears to be that where a *chose in*

[10] Allen *v.* Williams, 2 Sm. & G. 455; Norton *v.* Pritchard, *ib.* n.: Seton, 1215. As to this writ, *see post*, p. 1064.

[11] 1 Turn. & Ven. 122.

[1] Davis *v.* Davis, 2 Atk. 24.

[2] Hinde, 139.

[3] 3 Atk. 468.

[4] 3 Ves. 22; and see the form of the order in that case, Reg. Lib. 1795, B. 652.

[5] The Court of Chancery can, through a sequestration, lay hold of property of every description, anywhere within its jurisdiction, belonging to a party in contempt for not obeying a decree, and it has, also, power to apply it in satisfaction. And where the delay of an attachment and sequestration would jeopard the rights of the opposite party, the latter may, in the first instance, file a fresh bill, thereby restraining the property and the party in contempt, and thus obtain the effect of the former decree. White *v.* Geraerdt, 1 Edw. Ch. 336.

[6] Wilson *v.* Metcalf, 1 Beav. 263, 270; Francklyn *v.* Colhoun, 3 Swanst. 276, 311; Lord Pelham *v.* Duchess of Newcastle, *ib.* 290, n.; Johnson *v.* Chippindall, 2 Sim. 55, 64.

action is in the hands of a third person, who is willing to abide by the order of the Court, or who admits it to belong to the party against whom the sequestration has issued, the Court will consider it liable to the sequestration, and will order it to be paid into Court. The difficulty with regard to the effect of a sequestration upon a *chose in action* arises, where the individual, in whose hands it is, disputes either the amount, or the title of the party whose property is sequestered, as to the manner in which the sequestration is to be made available to *1053 reach *such property. That the Court cannot, in such a case, make an order upon an unwilling party, is clear from the cases above referred to.[1]

A pension from the Crown may be sequestered;[2] but the salary of an equerry,[3] or a pension for past services,[4] or the half-pay of an officer in the army or navy,[5] cannot be either assigned or attached. This distinction arises from principles of public policy: which consider half-pay as intended to provide decent maintenance for experienced officers, both as a reward for their past services, and to enable them to preserve such a situation that they may be always ready to return into actual service.[6]

The question, whether the commissioners, under a writ of sequestration upon *mesne process*, can seize the books and papers of a corporation, was discussed in *Lowten* v. *The Mayor of Colchester;*[7] but was not decided: although Lord Eldon expressed strong doubts as to the existence of such a power.

It appears from the last-mentioned case, that Lord Eldon was of opinion that sequestrators have the power of breaking open doors in the

[1] See Seton, 1216; Simmonds *v.* Lord Kinnaird, 4 Ves. 735; see Hales *v.* Shaftoe, 1 Sumner's Ves. 86, Mr. Hovenden's note (2); Dundas *v.* Dutens, *ib.* 196, note (*b*), 200, Mr. Hovenden's note (2).

Mr. Hoffman in his Chancery Practice, vol. 1, pp. 157, 158, remarks, that "it is a question of great difficulty whether the sequestrators, on this process, can sequester a *chose in action*. I think it may be stated as a matter of strict authority to be the result of all the English cases, that if the party indebted or holding the *chose in action* resists, no order can be made upon him. But there is a great deal of authority, even in England, in support of the power, and the principles of our decisions in other cases to sanction it." See the cases in notes to 1 Hoff. Ch. Pr. 158–160. In White *v.* Geraerdt, 1 Edw. Ch. 340, the Vice-Chancellor observes, that "although it has sometimes been questioned, whether *choses in action* are liable to a sequestration, there can be no objection to it on principle. It is analogous to the power which this Court now constantly exercises over the equitable interests and things in action of the debtor, where a judgment at Law has been recovered, and proves unavailing upon a writ of *fieri facias*. The same reason exists, for aiding the creditor by decree; and surely this Court will go as far in that case as in the other, in order to compel satisfaction out of a species of property which cannot be reached by ordinary execution."

In Grew *v.* Breed, 12 Met. 363, Wilde J. said: "The objection is, that a *chose in action* is not subject to the process of sequestration. But on examining the English authorities we do not find it so settled." He then refers to the cases cited in the text, and says: "The doctrine maintained by these cases seems to us to be well founded upon principle; and it is sustained in the case of White *v.* Geraerdt, 1 Edw. Ch. 336, and in Devoe *v.* Ithaca & Oswego R. R. Co., 5 Paige, 211." See also Hosack *v.* Rogers, 11 Paige, 603.

[2] M'Carthy *v.* Goold, 4 Ball & B. 387.

[3] Fenton *v.* Lowther, 1 Cox, 315.

[4] Lloyd *v.* Cheetham, 3 Giff. 171; 7 Jur. N. S. 1272; but see Carew *v.* Cooper, 10 Jur. N. S. 11; 12 W. R. 198, V. C. S.; 10 Jur. N. S. 429; 12 W. R. 586, 767, L. C.; 4 Giff. 619; [Knight *v.* Bulkley, 4 Jur. N. S. 527, 817; Dent *v.* Dent, L. R. 1 P. & M. 366.]

[5] M'Carthy *v.* Goold, *ubi sup.*; Stone *v.* Lidderdale, 2 Anst. 533, 539; Collyer *v.* Fallon, T. & R. 459, 467.

[6] Per L. C. B. Macdonald, 2 Anst. 541; and see Spooner *v.* Payne, 1 De G., M. & G. 383, 388; 16 Jur. 367.

[7] 2 Mer. 395, 397; see now 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 16, *post*, p. 1056.

execution of their duty ;[8] and in *Lord Pelham* v. *The Duchess of Newcastle*,[9] the sequestrators were allowed to open boxes and rooms that were locked, if the keys were denied them, and to schedule the goods in them ; but to remove nothing from the house without the special order of the Court.

*The latter part of the order in the above case, which pro- *1054
hibits the sequestrators from removing any thing from the house is consistent with the ordinary practice of the Court ; which, considering goods taken upon sequestrations on *mesne process* as in the nature of a pledge to answer the contempt, merely gives the sequestrators power to take the property from the defendant, and to prevent his enjoyment of it till he has cleared his contempt. And it seems that, if the sequestrators take upon themselves to remove the defendant's property, they will be liable to an attachment.[1]

If, under a sequestration, a sale is wanted, application should be made to the Court for permission to sell ; but an order for the sale of goods taken upon *mesne process*, will not be made : except for the purpose of raising money to pay the expenses.[2] In the case, however, of sequestrations to enforce decrees or orders, the Court will order the sale of goods : such as rents paid in kind, or the natural produce of a farm,[3] or household goods and furniture,[4] or the reversionary interest in a fund in Court, standing to the credit of another cause.[5]

The Court will not sell terms of years, or leasehold estates, or any property which passes by title and not by delivery, although it will direct the profits to be applied : because sequestrators can give no warranty for title, the property not being vested in them.[6]

The application for a sale may be made by motion, upon notice.[7]

Besides the effect which a sequestration has upon the goods and chattels of the disobedient person, the writ authorizes the sequestrators to enter upon all his messuages, lands, tenements, and real estate, and to collect, take, and get into their hands the rents and profits thereof.[8] Under this authority, the sequestrators may enter into the possession of such parts of the real estate as are in the occupation of the disobedient person, whether freehold or copyhold ;[9] and may also enter into the receipt of the rents and profits of such estates as are in the occupation of tenants.[10]

[8] See 2 Mer. 397.

[9] 3 Swanst. 290, n.

[1] Desbrow *v.* Crommie, Bunb. 272; Hales *v.* Shaftoe, 1 Ves. J. 86.

[2] Goldsmith *v.* Goldsmith, 5 Hare, 123, 129; 10 Jur. 561; Wilcocks *v.* Wilcocks, Amb. 421; see, however, Shaw *v.* Wright, 3 Ves. 22, 24.

[3] Shaw *v.* Wright, *ubi sup.*

[4] Wharam *v.* Broughton, 1 Ves. S. 180, 184; Belt's Sup. 108; Mitchell *v.* Draper, 9 Ves. 208; Cavil *v.* Smith, 3 Bro. C. C. 362.

[5] Cowper *v.* Taylor, 16 Sim. 314; Knight *v.* Knight, 4 W. R. 771, V. C. K. For form of order for sale, see Seton, 1218.

[6] Sutton *v.* Stone, 1 Dick. 107; Shaw *v.* Wright, *ubi sup.*

[7] Mitchell *v.* Draper, *ubi sup.*; [*Re* Rusk, W. N. (1870), 188].

[8] See form of writ in Vol. III.

[9] Colston *v.* Gardner, 2 Cha. Ca. 43, 46; 3 Swanst. 279, n. In the Marquis of Caermarthen *v.* Hawson, the Court of Exchequer appears to have doubted whether they could revive a sequestration against the heir to copyhold lands, on account of the difficulty of compelling the lord to admit the sequestrators, and also by reason of the lord's right to the fine. 3 Swanst. 294, n. ; see *ib.* 298.

[10] But the suing out of a sequestration on a case does not operate as a transfer of title. Coats *v.* Elliott, 23 Texas, 606.

The sequestrators, upon entering upon the real estate of the disobedient person, should serve the tenants in possession with a *1055 *notice in writing to attorn and pay their arrears and growing rents to them: which may be done, either by serving the tenant personally with the notice, and at the same time showing him the sequestration under seal, or by leaving the notice at his dwelling-house with some of his family, together with a copy of the sequestration, and showing the original writ to the person served.[1]

If the tenants refuse to attorn, the proper course appears to be to obtain from the sequestrators a return of the names of the tenants, and of their refusal to attorn,[2] and then to move, upon notice to the tenants, that they may be ordered to attorn and pay their rents to the sequestrators.[3] This order shall be made upon the tenants by name, and not upon the tenants generally.[4]

We have seen before, that sequestrators may take possession of lands in the disobedient person's own occupation.[5] It seems also, that where the sequestration is for the non-performance of a decree, the Court will, upon motion with notice, give them authority to set and let the property;[6] but no such authority will be given, where the sequestration is upon *mesne process*.[7]

A fraudulent alienation of property will not prevent the effect of a sequestration:[8] and where, upon a motion for a writ of assistance to enforce an injunction to put sequestrators into possession of the house and goods of the defendant, the defendant alleged that he had assigned the house and goods to A. B. for a valuable consideration, it was ordered that A. B. should be examined *pro interesse suo*, unless he showed cause to the contrary at the next seal.[9]

Sequestrators are accountable for all that they receive, and are bound from time to time to make returns to the Court of what comes to their hands under the sequestration;[10] and they may be ordered, on motion with notice, to pass their accounts and pay over their balances.[11] Where the sequestration is for non-performance of a decree for payment of money, the proceeds are applicable to the payment of the demand;[12] but the sequestrators ought not so to apply them of their own *1056 authority. They ought to bring the *money arising from the

[1] See Shaw *v.* Wright, Reg. Lib. 1795. B. 652; 3 Ves. 22, 24. For form of notice, see Vol. III.

[2] The return need not be filed. Seton, 1219.

[3] Rowley *v.* Ridley, 2 Dick. 622, 631, cited 4 Ves. 738; 3 Swanst. 306, n. (*b*); Anon., 2 Cha. Ca. 163; Goldsmith *v.* Goldsmith, 5 Hare, 123, 127, 129; 10 Jur. 561. For form of order, see Seton, 1219; and for form of notice, see Vol. III.

[4] Anon., 2 Cha. Ca. 163.

[5] *Ante*, p. 1054.

[6] Neale *v.* Bealing, 3 Swanst. 304, n. (*c*); Harvey *v.* Harvey, 3 Ch. Rep. 87; Dunkley *v.* Scribnor, 2 Mad. 443, 446.

[7] Ray *v.* ——, 3 Swanst. 306, n.

[8] Colston *v.* Gardner, 2 Cha. Ca. 43, 46; S. C. *nom.* Coulston *v.* Gardiner, 3 Swanst. 279, n.; Witham *v.* Bland, *ib.* 277, n.; Bird *v.* Littlehales, *ib.* 299, n.; Hamblyn *v.* Ley, *ib.* 301, n.; Blenkinsopp *v.* Blenkinsopp, 12 Beav. 568, 583; 14 Jur. 777; 1 De G., M. & G. 495, 499; 16 Jur. 787.

[9] Bird *v.* Littlehales, *ubi sup.*

[10] Desbrow *v.* Crommie, Bunb. 272; Howell *v.* Lord Coningsby, 1 Fowl. Ex. Pr. 161.

[11] Hinde, 138. For forms of order, see Seton, 1219; and for form of notice of motion, see Vol. III.

[12] Davis *v.* Davis, 2 Atk. 24.

rents or otherwise into Court: which they may obtain leave to do by petition or motion: and the person who is desirous of having the sequestered property applied under the decree, in satisfaction of his demand, must apply to the Court for that purpose.[1]

It appears that the Court will direct a writ of assistance to issue, for the purpose of putting sequestrators into possession.[2]

Where any person has been committed for a contempt in not delivering to any person, or depositing in Court or elsewhere, as directed by any order, books, papers, or any other articles or things, any sequestrators have the same power to seize and take such books, papers, writings, or other articles or things, being in the custody or power of the person against whom the sequestration was issued, as they would have over his own property; and thereupon such articles or things, so seized and taken, may be dealt with by the Court as is just: and after such seizure, the Court may, upon the application of the prisoner or of any other person in the cause or matter, or upon any report to be made in pursuance of the 11 Geo. IV. & 1 Will. IV. c. 36, order the discharge of the prisoner, upon such terms, as to costs or otherwise, as to the Court will seem proper.[3]

It is a contempt of the Court to disturb sequestrators, in their possession of property taken under the sequestration;[4] and where sequestrators have been forcibly dispossessed, the Court will compel restitution to them of the property of which they were so dispossessed.[5]

Where lands or the profits of lands are the subject of a suit, and the suit has been duly registered as a *lis pendens*, or express notice of the suit given,[6] the title is bound from the filing of the bill, and every purchaser *pendente lite* comes in at his peril: even though he has paid a *bonâ fide* consideration;[7] but in other cases, unless the decree or order operates as a judgment,[8] the land is * not liable till *1057 sequestration;[1] and so, where an account of profits is decreed against a trustee of land, by way of execution of a trust, there, the person only is charged for breach of trust in not applying the profits,

[1] 1 Newl. 689.

[2] See Seton, 1216; and for form of order, see *ib.* 1229, No. 2.

[3] 11 Geo. IV. & 1 Will. IV. c. 36, § 15, r. 16; but see now 23 & 24 Vic. c. 149, §§ 2, 5, *ante*, pp. 501, 502.

[4] Angel *v.* Smith, 9 Ves. 336; Lord Pelham *v.* Duchess of Newcastle, 3 Swanst. 289, n.

[5] Lord Pelham *v.* Duchess of Newcastle, *ubi sup.* In Valentine *v.* Teller, 1 Hopk. 422, it was held, that there is no sufficient reason for the injunction. The writ of assistance is to be considered as the only necessary process of the Court, for giving possession of land, which has been the subject of adjudication. See Ludlow *v.* Lansing, 1 Hopk. 231; Kershaw *v.* Thompson, 4 John. Ch. 609; Wallen *v.* Williams, 7 Cranch, 602; Garretson *v.* Cole, 1 Har. & J. 370; Devaucene *v.* Devaucene, 1 Edw. Ch. 272; Buffum's Case, 13 N. H. 14; Fackler *v.* Worth, 2 Beasley (N. J.), 395. [*Infra*, 1062, n. 3.]

[6] 2 & 3 Vic. c. 11, § 7, *ante*, p. 399.

[7] Crofts *v.* Oldfield, 3 Swanst. 278, n.; Bird *v.* Littlehales, *ib.* 299, n.; Self *v.* Madox, 1 Vern. 459: see Atlas Bank *v.* Nahant Bank, 23 Pick. 489, 490; Gregory *v.* Gardiner, 13 Cal. 591.

In Boulden *v.* Lanahan, 29 Md. 200, 210, it is said that "no principle is better settled than that a purchaser *pendente lite*, or after the litigation terminated, is bound by the judgment or decree rendered against the party under whom he derives title." Inloes *v.* Harvey, 11 Md. 519; 1 Story Eq. Jur. § 406; Story Eq. Pl. § 351.

[8] See *ante*, p. 1033.

[1] Bird *v.* Littlehales, *ubi sup.*; Hamblyn *v.* Ley, 3 Swanst. 301, n.; 1 Dick. 94; Coulston *v.* Gardiner, 3 Swanst. 279, n.

and the land is not charged but while in the hands of the trustee, nor then, neither, till sequestration issued: so that purchasers before sequestration are free.[2] It is to be observed, however, that even where lands are collaterally charged by a sequestration, a voluntary conveyance, executed before the sequestration issued for the purpose of defeating it, will not have that effect:[3] and that, in *Witham* v. *Bland*,[4] where a personal decree had been made against the father, upon which a sequestration issued, Lord Nottingham revived the sequestration against the son, who was also the heir: because he did not claim as heir, but under a voluntary conveyance, executed before the sequestration, to defeat the decree.[5] A sequestration binds from the time of awarding it: and not from the time of executing it, or of its being laid on by the commissioners.[6]

When any person claims to be entitled to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or has a title paramount to the sequestration, he should apply to the Court to direct an inquiry whether the applicant has any and what interest in the property sequestered.[7] This inquiry is called an examination *pro interesse suo;* and an order for such an examination may be obtained by a party interested, as well where the property consists of goods and chattels or personalty, as where it is real estate.[8] Thus, in *Martin* v. *Willis*,[9] a person claiming title to goods seized under a sequestration, obtained an order for an examination *pro interesse suo*, and in the mean time that the goods might be restored to him on his giving security.

An order for the inquiry will not be granted till after the sequestrators have made a return: because, till then, it cannot appear to the *1058 Court what is sequestered.[10] The application for * the order is usually made by motion, supported by affidavit showing the facts under which the claim arises.[1]

It has been doubted whether a plaintiff can compel a claimant to be examined *pro interesse suo;*[2] but in *Bird* v. *Littlehales*,[3] an order was made for a person to be examined *pro interesse suo*, on the application of the plaintiff; and similar orders were pronounced in *Hamblyn* v. *Lee*,[4]

2 Crofts *v.* Oldfield, 3 Swanst. 278, n.

3 Coulston *v.* Gardiner, 3 Swanst. 279, n.; Bird *v.* Littlehales, *ib.* 299, n.; Hamblyn *v.* Ley, *ib.* 301, n.; and see Langley *v.* Bredon, cited *ib.* 284, n.

4 3 Swanst. 276, n.

5 See Johnson *v.* Chippindall, 2 Sim. 55, 64, where a release by a grantee of an annuity to the grantor, after sequestration, was held to be good.

6 Burdett *v.* Rockley, 1 Vern. 58.

7 The mode of proceeding is the same, where the property is in the possession of a receiver. Anon., 6 Ves. 287; Angel *v.* Smith, 9 Ves. 336; Brooks *v.* Greathead, 1 J. & W. 178; Russell *v.* East Anglian Railway Company, 3 M'N. & G. 104, 113, 117, 125; *post*, Chap. XXXIX. § 3, *Receivers.*

8 Lord Pelham *v.* The Duchess of Newcastle, 3 Swanst. 290, n.

9 In Scacc. 10 May, 1745; 1 Fowl. Ex. Pr. 160, where it is stated that this order was directed by the Court to be made, similar to that in Mackenzie *v.* The Marquis of Powis, 6 July, 1739, which was settled by the Court.

10 Lord Pelham *v.* The Duchess of Newcastle, 3 Swanst. 289, n.

1 Hunt *v.* Priest, 2 Dick. 540. The order is sometimes made at Chambers, on summons. For form of order, see Seton, 1220, No. 1; and for forms of notice of motion and summons, see Vol. III.

2 Kaye *v.* Cunningham, 5 Mad. 406.

3 See Swanst. 299, 300, n.

4 Seton, 1220; 1 Dick. 94; 3 Swanst. 302, n.

and in *Johnes* v. *Claughton*.[5] In *Bird* v. *Littlehales* the order was made in consequence of the defendant's counsel having stated, in answer to an application for a writ of assistance, that the defendant had assigned the property for a valuable consideration to A. B.; whereupon the Court directed that A. B. should be examined *pro interesse suo*, unless he showed cause to the contrary.[6]

Where sequestrators or a receiver are in possession of property belonging to a party, and a person claiming that property adversely to the party brings an action at Law against the sequestrators or receiver, for the purpose of enforcing his claim, the Court will interfere by injunction to prevent the person claiming from proceeding with the action: for, although the Court will sometimes permit a person to proceed at Law against the sequestrators or receiver, where a matter is in a fit state for the right to be ascertained by a trial at Law,[7] such a proceeding cannot be adopted, unless the permission of the Court has been first obtained. This was settled in *Angel* v. *Smith*,[8] where the rule was laid down, both with respect to receivers and sequestrators, that their possession is not to be disturbed without leave.[9]

Sometimes, where a person claiming a legal right to property sequestered has made an application for an inquiry as to his interest, the Court, finding his right to be clear and undisputed, has at once made an order in his favor, without an inquiry.[10] The Court has, also, ordered the possession of the property claimed to be delivered up to the claimant, upon his entering into good and sufficient security to restore it, in case the decision upon his claim should be against him.[11] In the case of *Empringham* v. *Short*,[12] where the sequestrator took possession of property * which was claimed by a third per- *1059 son, Sir James Wigram V. C. had occasion to investigate the practice of the Court in trying the rights of parties under sequestrations, and he came to the conclusion, that it is perfectly clear that, in such cases, the Court exercises a discretion: observing, that "where the case has been considered to admit of no doubt, the Court has determined it, without further inquiry. In some cases, the Court has ordered the parties to bring an ejectment; in other cases, where the sequestrator has found a person in possession of the property, the Court has ordered a writ of assistance to issue, unless the party submitted to come in and be examined *pro interesse suo*. The Court sees what is necessary to be done, in order to try a question of right, and it then puts it in the way of trial." [1]

[5] Jac. 573.

[6] Bird *v.* Littlehales, Reg. Lib. 1742, A. 187.

[7] Attorney-General *v.* Mayor of Coventry, 1 P. Wms. 308; Anon., 6 Ves. 288; Angel *v.* Smith, 9 Ves. 335.

[8] *Ubi sup.*

[9] Johnes *v.* Claughton, Jac. 573; Brooks *v.* Greathead, 1 J. & W. 178; Russell *v.* East Anglian Railway Company, 3 M'N. & G. 104, 117; Crow *v.* Wood, 13 Beav. 271. [An injunction against a railroad company is binding upon a receiver of the company subsequently appointed by another Court. Safford *v.* People, 85 Ill. 558.]

[10] Dixon *v.* Smith, 1 Swanst. 457, 459.

[11] Wharam *v.* Broughton, 1 Ves. S. 180, 181.

[12] 3 Hare, 461.

[1] 3 Hare, 470.

An infant applies for the inquiry by his guardian;[2] and a person may apply for the inquiry *in formâ pauperis*.[3]

If it appears that the claimant has a plain title to the property, the sequestration will be discharged against him: with or without costs, as the Court may determine upon the circumstances of the case.[4]

A sequestration upon *mesne process*, like other processes of contempt, may be discharged upon the contemnor clearing his contempt and paying the costs incidental thereto.[5]

Where sequestrators are in the possession of lands or tenements in question in the cause, the appointment of a receiver of the rents and profits of those lands will have the effect of discharging the sequestration.[6]

A sequestration against a defendant upon *mesne process* abates on the death of the plaintiff, but it is revived with the suit;[7] and the Court will not, immediately upon the abatement, turn the sequestrators out of possession, but will give time for the revival of the suit.[8] Where the person against whom sequestration on *mesne process* has issued dies, the process, being personal, not only abates but falls altogether, and cannot be revived: but it is otherwise, where it is issued for non-performance of a decree:[9] for there, the sequestration is merely abated with the suit, and, being in the nature of an execution, it may be revived against the personal representative of the person.[10] If the de-
*1060 cree, in such * case, is for a mere personal demand, the sequestration can only be revived against the personal representative, and not against the heir:[1] unless the decree is for the performance of a covenant in which the heir is bound, or for the land itself. Where, however, the land descends to an heir in tail,[2] or to a purchaser, the land, of course, ceases to be bound, unless it has been entailed or conveyed away, subsequently to the decree, or with the view of avoiding the effect of the sequestration.[3]

A sequestration against the lands of a married man will not bind his wife's dower after his death, even though the marriage took place after the sequestration issued:[4] and where a sequestration was awarded to sequester a manor and other real estate belonging to a defendant, to satisfy a decree, out of which manor an annuity was secured to the defendant's wife, which, together with the manor, had been seques-

[2] Lord Pelham *v.* Duchess of Newcastle, 3 Swanst. 290, n.
[3] *Ante*, p. 39.
[4] Gilb. For. Rom. 81; Tatham *v.* Parker, 1 Sm. & G. 506; 1 Jur. N. S. 992.
[5] 1 Turn. & Ven. 126; see Heyn *v.* Heyn, Jac. 49, 53.
[6] Shaw *v.* Wright, 3 Ves. 22, 24.
[7] Hyde *v.* Forster, 1 Dick. 132.
[8] Per Lord Hardwicke, in White *v.* Hayward, 2 Ves. S. 464.
[9] Hawkins *v.* Crook, 3 Atk. 594; University College *v.* Foxcroft, 1 Vern. 166; Ramshaw *v.* Greenhill, cited 1 Ves. S. 183.
[10] Burdett *v.* Rockley, 1 Vern. 58; Wharam *v.* Broughton, 1 Ves. S. 180, 182, 183; White *v.* Hayward, 2 Ves. S. 461, 464; Hyde *v.* Greenhill, 1 Dick. 106; and see Tatham *v.* Parker, 1 Sm. & G. 506; 1 Jur. N. S. 992.
[1] Burdett *v.* Rockley, 1 Vern. 58; University College *v.* Foxcroft, *ib.* 166; Wharam *v.* Broughton, 1 Ves. S. 180; Hyde *v.* Greenhill, *ubi sup.*; Marquis of Caermarthen *v.* Hawson, 3 Swanst. 294, 298, n.
[2] Earl of Athol *v.* Earl of Derby, 1 Cha Ca. 220.
[3] *Ante*, p. 1055.
[4] Burdett *v.* Rockley, 1 Vern. 118.

tered during the husband's life: upon the application of the wife, after the defendant's death the sequestration was discharged, as far as respected the annuity.[5]

A sequestration will not go or be revived against an heir on the death of the ancestor, unless the suit be revived;[6] and it is to be noticed that, in such case, the suit must be revived against the heir; and that a revivor against the personal representative alone, will not warrant the revivor of the sequestration against the heir.[7]

The proper course, where there is an abatement of the suit by the death of the plaintiff, appears to be, for the person whose property is sequestered, to move that the representative of the plaintiff may revive the suit within a given time, or else that the sequestration may be removed.[8] It seems, however, that where sequestration is upon real estate, and the person in default dies, but the plaintiff does not revive the suit against the real representative, the person claiming the land may proceed by ejectment to recover possession of it, and that the Court will not restrain him.[9] Where, however, a sequestration is in force, or has been revived, a party claiming an interest in the property sequestered ought not to proceed by ejectment or other action to recover it, but should apply to the Court for an inquiry as to his interest.[10]

Where a sequestrator abuses his power, the Court will, upon representation of the facts, make an order that he show cause why * he *1061 should not be committed and pay the costs to the party complaining.[1]

The costs of a sequestration are not liquidated, but are costs to be taxed. The fees payable to the commissioners are regulated by the nature and value of the property.[2] Sometimes the sequestrators have been allowed a poundage, and sometimes, under circumstances of trouble and expense, a specific sum *in solido*.[3]

In cases where a decree is made *pro confesso*, the Court is now expressly enabled to direct a sequestration of the real and personal estate of the defendant to be issued, and to direct payment to be made, out of such real or personal estate, of such sum or sums of money as, at the hearing, or any subsequent stage of the cause, the plaintiff appears to be entitled to.[4]

Every person, not being a party in any cause, who obtains an order, or in whose favor an order is made, is entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience

[5] Procter *v.* Reynol, 1 Cha. Rep. 247; Langley *v.* Breydon, cited 2 Cha. Ca. 46.
[6] Derby *v.* Ancram, cited 2 Cha. Ca. 46.
[7] See Burdett *v.* Rockley, 1 Vern. ed. Raithby, 58 n.
[8] See White *v.* Hayward, 2 Ves. S. 462, 464.
[9] Burdett *v.* Rockley, *ubi sup.*; Reg. Lib. 1681, A. 671; 1682, A. 184.
[10] *Ante*, p. 1057.
[1] Lord Pelham *v.* Lord Harley, 3 Swanst. 291, n.
[2] Braithwaite's Pr. 241.
[3] 1 Turn. & Ven. 125; Wood *v.* Freeman, 2 Atk. 542; and see Hawkins *v.* Crook, 3 Atk. 594.
[4] Ord. XXII. 9; *ante*, p. 527.

to any order may be enforced, is liable to the same process for enforcing obedience to such order as if he were a party to the cause.[5]

The process of contempt, which has been before described, is not well adapted to enforce obedience to a decree or order, by which any person is directed to execute any deed or other instrument, or make a surrender or transfer. In such a case, if the person refuses or neglects to obey the decree or order, the Court is enabled under the provisions of the Trustee Acts, 1850 & 1852, either to vest his estate, or appoint a person to convey the same in his place, according to the decree or order.[6]

*1062 * Where a decree or order has directed possession of property to be given, the person prosecuting the same may pursue a more summary course than the ordinary process of contempt: for he is entitled, upon due service of the decree or order,[1] to an order for a writ of assistance,[2] directed to the sheriff of the county where the property lies, commanding him to put the plaintiff into the possession of the

[5] Ord. XXIX. 2; see Lane *v.* Oliver, 2 Hare, 97; 6 Jur. 1080. The 10th Equity Rule of the U. States Courts is the same. See *ante*, p. 1043, note.

Purchasers, under decrees in Chancery, are regarded to a certain extent as parties to the suit, so as to be under the control of the Court on the one hand, and its protection on the other. Thus, a purchaser under an order or decree in Chancery may be compelled to complete his purchase by order on him in a summary way, without a bill, to pay or bring the money into Court. Richardson *v.* Jones, 3 Gill & J. 164; Gordon *v.* Sims, 2 McCord Ch. 165; Brown *v.* Wallace, 4 Gill & J. 479; Dunham *v.* Minard, 4 Paige, 441; Morris *v.* Mowatt, 2 Paige, 586; Anderson *v.* Foulke, 2 Har. & G. 346; Wood *v.* Mann, 3 Sumner, 318. [Or by judgment and execution. Deaderick *v.* Smith, 6 Humph. 138.] And on the other hand, parties to the suit, and all parties coming in under the decree, as well as all who do not claim to hold by title paramount to the parties, will be enjoined from disturbing the purchaser. Stackpole *v.* Curtis, 2 Moll. 504; Dorsey *v.* Campbell, 1 Bland, 363; McComb *v.* Kankey, 1 Bland, 363; Chapline *v.* Chapline, 1 Bland, 364; Wright *v.* Wright, 1 Bland, 365. [But see Huddleston *v.* Williams, 1 Heisk. 579.]

[6] 13 & 14 Vic. c. 60; 15 & 16 Vic. c. 55; see Wellesley *v.* Wellesley, 4 De G., M. & G. 537, 541; and see Seton, 1197; Braithwaite's Pr. 170, 361; and *post*, Chap. XLV., *Statutory Jurisdiction*. By the 11 Geo. IV. & 1 Will. IV. c 36, § 15, r. 15, the Court was empowered in such a case, where the person had been in prison two months for such refusal, to direct the deed to be executed by a Master in Ordinary, or a Master Extraordinary; and it is presumed that this may now be done by the Judge (15 & 16 Vic. c. 80, § 36); or by a commissioner to administer oaths in Chancery in England (16 & 17 Vic. c. 78, § 1); but the object is more conveniently effected under the Acts above referred to; and see Seton, 1230. A decree for a deed, in Ohio, operates as a conveyance, subject as between the parties, to a revesting of the title by a reversal of the decree; but such a reversal does not affect the title of a purchaser acquired *bonâ fide*, while the decree was in force. Taylor *v.* Boyd, 3 Ohio, 337. Such decree need not be recorded in the Registry of Deeds. Bennett *v.* Williams, 5 Ohio, 461. A decree for the execution of a deed may still be enforced by attachment, notwithstanding the statute making such decree operate as a conveyance. Randall *v.* Pryor, 4 Ohio, 424. A decree for a deed, in the Circuit Court of the United States, does not operate as a conveyance in Ohio. The actual execution of a deed has to be enforced in that Court by attachment and sequestration, as in England. Shepherd *v.* Ross County, 7 Ohio, 271.

In Mississippi, the title cannot be passed by a decree; conveyances must be made under it by the party, or by a commissioner. Wallace *v.* Wilson, 34 Miss. 357.

In Connecticut, Courts of Equity are authorized by statute to "pass the title to real estate by a decree, without any act on the part of the defendant, when in their judgment it shall be the proper mode to carry the decree into effect;" and such decree, having been duly recorded, "shall, while in force, be as effectual to transfer the same as the deed of the defendant." Rev. Stat. tit. 12, § 22; King *v.* Bill, 28 Conn. 598. The title passes by the decree only as of the date of the decree, and does not as a legal title relate back to the commencement of the suit. King *v.* Bill, *supra*. [See *ante*, 1033, n. 5.]

[1] See *ante*, p. 1044.

[2] Ord. XXIX. 5.

premises in question, pursuant to the decree or order.[3] A demand of possession is not now necessary.[4]

The application for this writ is made by *ex parte* motion, supported by affidavit showing the due service of the decree or order in the usual manner, and that it has not been obeyed.[5] The affidavit need only show that the order was not complied with * within the time *1063 limited: it need not show an existing non-compliance at the time the application for the writ is made.[1] The copy of the decree or order served need not be indorsed with the notice required previously to the issue of an attachment;[2] but the writ will be ordered to issue, notwithstanding the copy of the decree or order was so indorsed.[3]

The writ is prepared and indorsed, in like manner as a commission of sequestration;[4] and will be sealed by the Record and Writ Clerk, on the order authorizing the writ to issue being produced, and on a *præcipe* being filed with him.[5] In preparing the writ, the language of the decree or order should be followed.[6]

The writ is lodged with the under-sheriff or deputy-sheriff of the county,[7] and is executed in the name of the sheriff. The Court will enjoin an action brought against a sheriff's officer, in respect of his acts

[3] See 9th Equity Rule of the United States Courts, *post*, Appx. A writ of assistance is, in ordinary cases, the first and only process for giving possession of land, under the adjudication of the Courts. Valentine *v.* Teller, 1 Hopk. 422; Fackler *v.* Worth, 2 Beasley (N. J.), 395. [Irvine *v.* McRee, 5 Humph. 554; Beatty *v.* De Forrest, 12 C. E. Green, 482. *Ante*, 1056, n. 5.] This writ is granted in order to give the plaintiff the full benefit of the decree. But in putting the purchaser into possession of premises sold and conveyed in pursuance of its decree, the Court will not interfere with, nor attempt in cases of doubt, to settle the rights of any party claiming possession by title paramount to that of the mortgagee or other party in whose favor the decree was made. Thomas *v.* De Baum, 1 McCarter, 37. [The writ is discretionary, and will only be granted in a clear case. Vanmeter *v.* Borden, 10 C. E. Green, 414. It will not be granted where the purchaser has left it doubtful whether he has not given the person in possession a right to remain. Barton *v.* Beatty, 1 Stew. Eq. 412. And see Blauvelt *v.* Smith, 7 C. E. Green, 31. It will go *ex debito justitiæ*, to put the purchaser under a foreclosure sale in possession. Beatty *v.* De Forrest, 10 C. E. Green, 343; S. C., on appeal, 12 C. E. Green, 482. *Infra*, 1275, n. 5. A proceeding by a purchaser to obtain a writ of possession is only a step, in the foreclosure suit, whereby he and any person who meddles with the property after bill filed become parties to the decree of foreclosure. Kessinger *v.* Whittaker, 82 Ill. 22.]

Where a decree has set aside a deed conveying real estate, and directed the defendants to reconvey to the plaintiff and to deliver up possession, which they had made default in doing, the Court ordered a writ of assistance, upon production of notice of motion, and affidavit of personal service of a copy thereof, and of the other papers, a certified copy of the decree, a certificate of its enrolment, a deed of reconveyance approved of by a Master, and an affidavit showing a demand of possession and execution of the deed of reconveyance, and a refusal to do either. Devaucene *v.* Devaucene, 1 Edw. Ch. 272. An injunction is not necessary, before a writ of assistance. Valentine *v.* Teller, 1 Hopk. 422; see Van Hook *v.* Throckmorton, 8 Paige, 33. This writ issues and is of force only against those bound immediately or mediately by the judgment; against those only should the sheriff execute it; they alone, therefore, have a right to be heard in the cause with reference to the issuing or execution of the writ. Gelpeke *v.* Milwaukee, &c. R. R. Co., 11 Wis. 454.

[4] Ord. XXIX. 1, *ante*, p. 1045.

[5] Braithwaite's Pr. 158. For form of order, see Seton, 1228; and for forms of affidavit and motion paper, see Vol. III. In Thomas *v.* De Baum, 1 McCarter, 37, the application, for a writ of assistance was made by petition.

[1] Webster *v.* Taylor, 18 Jur. 869, V. C. W.

[2] Under Ord. XXIII. 10, *ante*, p. 1043.

[3] Bower *v.* Cooper, 2 Hare, 412; Braithwaite's Pr. 158; Seton, 1229.

[4] *Ante*, p. 1051. A fee of 1*l.* is payable, by a Chancery fee fund stamp affixed to the writ. Regul. to Ord. Sched. 4.

[5] For forms of writ, indorsement, and *præcipe*, see Vol. III.

[6] Braithwaite's Pr. 158.

[7] See *ante*, p. 466.

under the writ; although damages are claimed against him for taking chattels not included in the order.[8]

Process of contempt for non-performance of a decree or order, has the same effect in preventing the party from being heard, as the like process for not appearing or answering;[9] and the contempt may be cleared, waived, or discharged, in nearly the same manner.[10]

In addition to the process of contempt before mentioned, every person to whom, in any cause or matter, any sum of money or any costs have been directed to be paid, is, after the lapse of one month[11] from the time when the decree or order for payment was duly passed and entered, entitled to sue out one or more writs of *fieri facias*, or of *elegit*, for the amount due to him.[12]

The writ of *fieri facias* or *elegit* is prepared by the creditor or his solicitor, and engrossed on parchment;[13] and will be issued by the Record and Writ Clerk, when the month from the entry of the decree or order has expired, unless a time is limited by the decree or order *1064 for payment of the money: in which case, it will * not be issued until such time has also expired.[1] At the time the writ is presented for sealing, the decree or order, or an office copy thereof, upon which one of the entering clerks has marked the day of the month and year on which the same was left for entry, must be produced; and a *præcipe* must be filed.[2] If the writ is issued for costs, and such costs have been taxed, an office copy of the Taxing Master's certificate of taxation must also be produced.

On the writ must be indorsed the words "By the Court," and also, thereunder, the calling and place of residence of the person against whom the writ is issued, and the amount of the sum to be levied, according to the form used upon like writs issuing out of the Superior Courts of Common Law;[3] and also the name and place of business of the solicitor by whom the writ is issued, and of his agent, if any, or the name and place of residence of a party suing out the writ in person, and, in either case, the address for service, if any.[4] Where the writ is issued for the recovery of a balance of a sum of money or of costs remaining due, the full sum mentioned in the order, or the full amount of costs, as taxed, may be inserted in the body of the writ, but in the in-

[8] Walker *v.* Micklethwaite, 1 Dr. & S. 49; and see *ante*, p. 511.

[9] *Ante*, p. 504 *et seq.*

[10] *Ante*, p. 507 *et seq.*

[11] That is, twenty-eight days. Ord. XXXVII. 10.

[12] Ord. XXIX. 6; 1 & 2 Vic. c. 110, § 18; Taylor *v.* Jardine, 1 Hare, 316; Streeten *v.* Whitmore, 5 Beav. 228; 6 Jur. 92. These writs cannot be issued to enforce payment of money into Court: Braithwaite's Pr. 195; nor to enforce payment by a receiver appointed by the Court. Whitehead *v.* Lynes, 11 Jur. N. S. 74; 13 W. R. 306, M. R.; 34 Beav. 161; 12 L. T. N. S. 332, L. C.; affirmed, on this point, by L. C.

[13] The writ must have affixed to it a Chancery fee fund stamp of 1*l.* Regul. to Ord. Sched. 4. For forms of writs, see Ord. Scheds. F. & G., and Vol. III.; and for forms of *præcipe*, see Vol. III

[1] Braithwaite's Pr. 195; Adkins *v.* Bliss, 2 De G. & J. 286; 4 Jur. N. S. 1162. Where the bill has been taken *pro confesso* against the disobedient person, see Ord. XXII. 13; *ante*, p. 527.

[2] Ord. XXIX. 7; Braithwaite's Pr. 196.

[3] Ord. XXIX. 10. For the forms in use at Law, see Chitty's Forms, 303 *et seq.*; 337 *et seq.* For forms of indorsement, see Vol. III.

[4] Ord. III. 2, 5; *ante*, pp. 453, 454.

dorsement of the sum to be levied, only so much as remains due should be mentioned.[5]

The writs, when sealed, are delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the Superior Courts of Common Law belongs; and must be executed, as nearly as may be, in the same manner in which such like writs are executed.[6] And the writs, when returned by the sheriff or other officer, must be delivered to the parties or solicitors by whom respectively they were sued out, and must thereupon be filed as of record in the office of the Clerks of Records and Writs. And for the execution of such writs, the sheriff or other officer is not to take or be allowed any fees, other than such as are allowed for the execution of the like writs issuing out of the Superior Courts of Common Law.[7]

A tenant by *elegit*, on applying for a sale of the extended property * and payment of his debt, is bound to account, like a *1065 mortgagee in possession.[1]

Where it appears, upon the return of any such writ of *fieri facias*, that the sheriff or other officer has, by virtue thereof, seized, but not sold, any goods of the person directed to pay the sum of money or costs, the person to whom the same is payable is at liberty, immediately after the writ with the return has been filed as of record, to sue out a writ of *venditioni exponas*.[2] Such writ will be issued by the Record and Writ Clerk, on a *præcipe* being filed with him.[3]

If a sufficient sum to answer the demand of the person issuing a common writ of *fieri facias* is not levied under it, he is entitled to have a second writ issued into the same or another county: his rights being the same as those of a plaintiff at Law.[4]

Where part only of a debt directed to be paid by an order had been levied under a *fieri facias*, the Court refused to make an order for the payment of the balance; but directed an inquiry as to the amount due, and ordered payment thereof within ten days after the date of the Chief Clerk's certificate.[5]

The person prosecuting the decree or order does not, as at Common Law, lose his right to issue the writs of *fieri facias* or *elegit*, by arresting the person proceeded against upon an attachment:[6] for the arrest is a

[5] Braithwaite's Pr. 195; see Bryan *v.* Metropolitan Saloon Omnibus Company, 4 Drew. 546; and see *post*, Chap. XXXI., *Costs*.

[6] For the practice at Law as to the like writs, see Chitty's Arch. 634 *et seq.*; 670 *et seq.*

[7] Ord. XXIX. 8. The sheriff, levying under a writ of *fieri facias* issued by the Court of Chancery, is not entitled to an injunction to restrain proceedings against him by strangers to the suit. Rock *v.* Cook, 2 De G. & S. 493; 12 Jur. 957; 2 Phil. 601. [But see Tufton *v.* Harding, 6 Jur. N. S. 116.] For mode of enforcing return, and liabilities of sheriff, see Evans *v.* Davies, 7 Beav. 81; and *ante*, p. 470.

[1] Bull *v.* Faulkner, 1 De G. & S. 685; 12 Jur. 33.

[2] Ord. XXIX. 9. For the practice at Law as to a like writ, see Chitty's Arch. 666.

[3] For form of writ, see Ord. Sched. H., and Vol. III.; and for form of *præcipe*, see Vol. III.

[4] Braithwaite's Pr. 196; Spencer *v.* Allen, 2 Phil. 215; 11 Jur. 93. For the practice at Law, see Chitty's Arch. 668; and Chitty's Forms, 312 *et seq.*

[5] Hipkins *v.* Hipkins, 26 L. J. Ch. 512, V C. S.

[6] 1 & 2 Vic. c. 110, § 16.

consequence of the contempt committed by not obeying the order of the Court; and does not, therefore, deprive the person prosecuting the decree or order of the benefit of the statute.[7]

If, upon the return of any writ of *fieri facias* or *elegit*, it appears that the person against whom the writ was issued is a beneficed clerk, and has no goods or chattels nor any lay fee in the bailiwick of the sheriff to whom the writ was directed, the person to whom the sum of money or costs mentioned in the writ is payable, is, immediately after the writ with the return has been filed as of record, at liberty to sue out one or more writ or writs of *fieri facias de bonis ecclesiasticis*, or one or more writs of *sequestrari facias*;[8] and every such writ is prepared, issued, and indorsed, a *præcipe* thereof is filed, and a like fee on issuing is payable as in the case of a common writ of *fieri facias*.[9]

*1066 * The writs when sealed are delivered to the bishop;[1] and must be executed by him as nearly as may be in the same manner as that in which like writs issuing out of the Courts of Common Law are executed;[2] and when returned by the bishop must be delivered to the parties or solicitors by whom respectively they were sued out; and be thereupon filed as of record in the office of the Clerks of Records and Writs; and for the execution of such writs, the bishop or his officers are not to take or be allowed any fees other than such as are allowed for the execution of the like writs issuing out of the Superior Courts of Common Law.[3]

Where the party to perform a decree or order is a peer of Parliament, or otherwise entitled to the privilege of peerage, or a member of the House of Commons, and after due service of the decree or order, refuses or neglects to obey the same according to the exigency thereof,[4] he cannot, any more than in a case of *mesne process*,[5] be proceeded against by attachment, or any other process which requires an arrest. In order to compel his obedience to the decree or order, writs of *fieri facias* or *elegit* may be issued against his property, as against unprivileged persons;[6] or the same process may be resorted to as in the case of his contempt in not appearing or answering: namely, sequestration of his property and effects.[7]

To obtain a sequestration in such case, an order *nisi* for the issue

[7] Roberts *v.* Ball, 3 Sm. & G. 168; 1 Jur. N. S. 585; *ante*, p. 1042; and see O'Brien *v.* Lewis, 4 Giff. 396; 9 Jur. N. S. 620; *ib.* 764; 11 W. R. 973, L. JJ.

[8] Ord. XXIX. 11.

[9] See Ord. XXIX. 12; and *ante*, pp. 1063, 1064. For forms of the writs, see Ord. Sched. J. and Vol. III.; and for forms of *præcipe* and indorsement, see Vol. III.

[1] In practice, the writs are taken to the Registrar of the diocese, who will thereupon issue the sequestration. Chitty's Arch. 1272, 1273. If the See is vacant, the writs are delivered to the Archbishop. *Ibid.*; Braithwaite's Pr. 221.

[2] For the practice at Law as to like writs, see Chitty's Arch. 1272 *et seq.*; and as to the powers of a sequestrator, see 12 & 13 Vic. c. 67; Chitty's Arch. 1274.

[3] Ord. XXIX. 13.

[4] Ord. XXIX. 3; *ante*, p. 1046.

[5] See *ante*, pp. 472, 496.

[6] *Ante*, p. 1063.

[7] *Ante*, pp. 472, 496. As to the process against a privileged person, to enforce payment of costs, see *post*, Chap. XXXI., *Costs*. For tables of process against a privileged person, see Seton, 1240, 1241.

thereof against the privileged person must, in the first place, be obtained on *ex parte* motion, supported by an affidavit of the due service of an indorsed copy of the decree or order upon the privileged person, and of his non-compliance therewith.[8]

The order *nisi* being drawn up, passed, and entered, is served personally, in the same manner as a similar order on *mesne process*;[9] but if the personal service cannot be effected, an order for substituted service may be obtained on an *ex parte* motion, supported by affidavit, in the manner before explained.[10] It seems that, where there has been due service of the original order upon a person entitled to the privilege of peerage in England, and he afterwards goes into another country, personal service of the order *nisi* upon him there will be good.[11]

* The order *nisi* will be made absolute upon an *ex parte* motion, *1067 supported by an affidavit of service of the order *nisi*, and a certificate of the Registrar, indorsed thereon, of no cause shown;[1] and the sequestration may thereupon be issued and enforced as in the case of unprivileged persons.[2]

The practice of obtaining a vesting order, or an order appointing a person to convey, under the Trustee Acts, may be resorted to in the case of peers and members of Parliament, as well as in other cases.[3]

If the decree or order is sought to be enforced against a corporation aggregate, writs of *fieri facias* and *elegit* may, in like manner, be issued against the property of the corporation;[4] or the same process may be adopted as in the case of default in appearing or answering: namely, that by *distringas* and sequestration.[5] The writ of *distringas* is issued by the Record and Writ Clerk, on proof by affidavit of the due service of an indorsed copy of the decree or order, and non-compliance.[6] The subsequent proceedings, down to the issuing of the sequestration, are the same as in the case of a *distringas* and sequestra-

[8] Seton, 1226; Crawley *v.* Clarke, 3 Bro. C. C. 373. For form of order *nisi*, see Seton, 1225, No. 1; and for forms of affidavit and motion paper, see Vol. III.

[9] *Ante*, p. 473.

[10] *Ante*, pp. 473 *et seq.*; Shuttleworth *v.* Earl of Lonsdale, 2 Cox, 47.

[11] Davidson *v.* The Marchioness of Hastings, 2 Keen, 509, 515.

[1] For form of order absolute, see Seton, 1226; and for forms of motion paper and affidavit, see Vol. III.

[2] *Ante*, p. 1049 *et seq.*

[3] *Ante*, p. 1061; and see *post*, Chap. XLV. *Statutory Jurisdiction* (*Trustee Acts*).

[4] *Ante*, p. 477.

[5] See *ante*, pp. 477, 497, 498; Ang. & Ames, Corp. §§ 667 *et seq.* and notes. With reference to corporations established for private emolument, Chancellor Bland, of Maryland, in giving judgment in McKim *v.* Odom, 3 Bland, 422, said that "evils and embarrassments must arise from a rigid adherence to the notion that such a corporation can only be forced to respond to a suit against it by *distringas* and sequestration of its property. Take the case of a turnpike road company that had refused to answer a bill in Chancery. The road itself could not be taken and closed by virtue of a *distringas* or sequestration, because that, as one of the highways of the republic, it could not, and ought not to be, obstructed by any process whatever against those, whose only interest in it is the toll they are allowed to exact in consideration of keeping it in repair. Consequently, in this instance, the only method by which the Court could effectually levy upon its property, as a means of enforcing an answer, would be to appoint a sequestrator or receiver, to take the place of the company's toll-gatherer, at each gate along the whole line of the road."

[6] *Ante*, p. 477. As to the indorsement in this case, see *ante*, p. 1044. For tables of process against a corporation aggregate, see Seton, 1241; and for forms of affidavit of service of order and of *distringas*, see Vol. III.

tion against a corporation for want of appearance;[7] and the sequestration is executed and returned in like manner as in the case of an unprivileged person.[8]

Decrees or orders made by the Court of Chancery in England, in any suit between party and party, or in any matter or proceeding by petition in cases of minors, bankrupts, idiots, or lunatics, for the payment of or accounting for money, may, when enrolled in the Court of Chancery in Ireland, be enforced, by process of attachment and committal, against the person of the party against whom the decree or order has been made, as fully and effectually as if the decree or
*1068 order had been originally made by the Court of *Chancery in Ireland.[1] For this purpose, a copy of the decree or order must be exemplified and certified to the Court of Chancery in Ireland, under the Great Seal of England.[2] To procure the exemplification, a petition must be presented to the Lord Chancellor of England, stating the purpose for which the exemplification is desired.[3] The petition must then be left with the Secretary of the Lord Chancellor, and, when answered, taken to the order of course seat at the Registrar's office: when an order will be drawn up, in accordance with the prayer of the petition.[4] The exemplification and docket must then be prepared by the solicitor, and the exemplification engrossed on parchment.[5] Two of the Clerks of Records and Writs will then examine the exemplification with the entry of the original order, and sign their names to the exemplification, and to the certificate appended in the docket.[6] The exemplification and docket are then transmitted by them to the purse bearer of the Lord Chancellor. The Great Seal will thereupon be affixed, and the signature of the Lord Chancellor procured. The exemplification, thus completed, may afterwards be obtained from the purse bearer by the party who has applied for it, upon payment of the proper fee,[7] and is forwarded by such party to Ireland; and the Lord Chancellor there will, on presentation of the exemplification to him, cause it to be enrolled in the Court of Chancery in Ireland.[8]

Similar decrees and orders made by the Court of Chancery in Ireland when duly exemplified and certified to the Court of Chancery of England, under the Great Seal of Ireland, and orders of the Landed Estates Court in Ireland, when duly certified under the seal of that Court,

[7] *Ante*, pp. 477, 478. For form of order for a sequestration, see Seton, 1227; and for forms of motion papers, affidavits, *præcipe*, sequestration, and indorsements, see Vol. III.

[8] See *ante*, p. 1051 *et seq.*

[1] 41 Geo. III. c. 90, § 5.

[2] *Ibid.*; and see Seton, 1148.

[3] Braithwaite's Pr. 551. For form of petition, see Vol. III.

[4] Braithwaite's Pr. 551. For orders in such case, see Bell *v.* Rees, and De Sorbien *v.* Bland, cited Seton, 1148.

[5] The exemplification must bear a 3*l.* Inland Revenue stamp, and the docket, and a certificate for the Record and Writ Clerk's signature, should be written on paper, continuously on one sheet, and bear a 2*s.* like stamp. Braithwaite's Pr. 548, n. (*b*), 549, n. (*a*); 55 Geo. III. c. 184, Sched. Part 2; 15 & 16 Vic. c. 87, § 11. For forms of exemplification, docket, and indorsements, see Vol. III.

[6] See Mackintosh *v.* Stewart, Dec., 1864. For form of certificate, see Vol. III.

[7] The fee is 1*l.* 1*s.*, and is payable in money. It appears that the present practice is regulated, to some extent, by a letter from Lord Chancellor Chelmsford to the Clerks of Records and Writs.

[8] 41 Geo. III. c. 90, § 5.

may be ordered to be enrolled in the Court of Chancery in England; and, when so enrolled, may be enforced by process of attachment and committal against the person of the disobedient party, in the same manner as if such decree or order had been originally made in the Court of Chancery of England.[9]

An order to enroll a decree or order of the Irish Court will be made by the Lord Chancellor on motion or petition of course, supported by the production of a copy of the decree or order, exemplified
*and certified under the Great Seal of Ireland.[1] A docket of *1069 the enrolment must then be prepared and completed.[2]

Service upon the disobedient person of the decree or order, when enrolled in England, is not required; and if the decree or order directs an attachment to issue, it may be issued as soon as the enrolment is completed. If it does not direct an attachment to issue, an *ex parte* application must be made to the Lord Chancellor or Lords Justices, or one of the Vice-Chancellors, for leave to issue it.[3] The Master of the Rolls does not appear to have any jurisdiction under these Acts.[4]

Officers and attendants upon the Court, suitors and witnesses, are to have privilege *eundo, redeundo, et morando*, for their necessary attendance; but not otherwise; and where any of them are arrested at such times of necessary attendance, it is a contempt of Court.[5] A solicitor who is proceeding to the Court, to attend to his professional business there pending, is privileged from arrest; and the question in such cases is, whether, at the time of his arrest, he was *bonâ fide* proceeding in a direct line to or from the Court.[6] The solicitor is also privileged if he is on his way to attend an appointment at the offices of the Court.[7] If the first arrest is bad, all the detainers lodged under it are so.[8] The application to discharge must be made to that Court of which the proceeding is a contempt.[9]

[9] 41 Geo. III. c. 90, § 6; 21 & 22 Vic. c. 72, § 36; and see Pennefather *v.* Short, 1 W. N. 102, L. JJ.; *ib.* 126, V. C. W.

[1] Braithwaite's Pr. 478. For forms of order, see *ibid.*; Seton, 1148, No. 1; and for forms of motion paper and petition, see Vol. III.; and see Pennefather *v.* Short, 1 W. N. 102, L. JJ.; *ib.* 126, V. C. W.

[2] Braithwaite's Pr. 479; *ante*, p. 1022. For forms of docket, see Vol. III.

[3] Braithwaite's Pr. 139, 140, 176, 479; Seton, 1145, 1148; *Re* Keogh, 5 De G., M. & G. 73.

[4] *Re* Scott, 12 Beav. 361.

[5] Ord. XLII. 1; see, as to barristers, Anon., 1 Y. & C. Ex. 331; as to solicitors, *Ex parte* Ledwich, 8 Ves. 598; Gascoygne's Case, 14 Ves. 183; Castle's Case, 16 Ves. 412; Attorney-General *v.* Leathersellers' Company, 7 Beav. 157; Jones *v.* Rose, 11 Jur. 379, L. C.; Eyre *v.* Barrow, 4 Jur. N. S. 652; 6 W. R. 767, V. C. S.; *Re* Jewitt, 10 Jur. N. S. 814; 12 W. R. 945, M. R.; 33 Beav. 559, from which it appears that the solicitor was on his way to attend the Chambers of the Common Law Judges. See Dodd *v.* Holbrook, 11 Jur. N. S. 969; 12 *ib.* 19; 14 W. R. 125, V. C. S. as to suitors and witnesses: Moore *v.* Booth, 3 Ves. 350; *Ex parte* Byne, 1 V. & B. 316; List's Case, 2 V. & B. 374; Orchard's Case, 5 Russ. 159; Gibbs *v.* Phillipson, 1 R. & M. 19, 21; Attorney-General *v.* Skinners' Company, 8 Sim. 377; C. P. Coop. 1; Plomer *v.* Macdonough, 1 De G. & S. 232; 1 S. C. *nom.* Plumer *v.* Macdonald, 11 Jur. 899; Newton *v.* Askew, 6 Hare, 319; 13 Jur. 186; Andrewes *v.* Walton, 1 M'N. & G. 380, 389; 14 Jur. 260; and see Seton, 1238. As to the privilege and practice at Law, see Chitty's Arch. 768.

[6] Per Lord Langdale, in Attorney-General *v.* Leathersellers' Company, *ubi sup.*; and see Jones *v.* Rose, and Eyre *v.* Barrow, *ubi sup.*

[7] Eyre *v.* Barrow, and *Re* Jewett, *ubi sup.*; and see Moore *v.* Booth, *ubi sup.*

[8] *Ex parte* Ledwich, *ubi sup.*; and see Hooper *v.* Lane, 6 H. L. Ca. 443; 3 Jur. N. S. 1026.

[9] List's Case, and Newton *v.* Askew, *ubi sup.*; and see Eyre *v.* Barrow, *ubi sup.*; but see Dodd *v.* Holbrook, *ubi supra*.

Any one who uses violence or abusive language to a person serving the process or orders of the Court, or uses scandalous or contemptuous words against the Court or the process thereof, is liable to be committed upon motion, on notice to the person so offending.[10] It *1070 seems, that where the contempt is established by * one witness only, an *ex parte* motion for an order *nisi* should be made in the first instance: in other cases, notice of motion should be given.[1]

[10] Ord. XLII. 2; see Anon., 2 Atk. 471; Anon., 2 Ves. S. 520; Van *v.* Price, 1 Dick. 91; Williams *v.* Johns, 3 Dick. 477; 1 Mer. 303 n. (*d*); Elliot *v.* Halmarack, 1 Mer. 302; Wellesley's Case, 2 R. & M. 639; Lechmere Charlton's Case, 2 M. & C. 316; *Ex parte* Van Sandau, 1 Phil. 445, 605; *Re* Keane, cited Seton, 865; and see Smith *v.* Lakeman, 2 Jur. N. S. 1202, V. C. S.; Coleman *v.* West Hartlepool Railway Company, 8 W. R. 734, V. C. W.; Felkin *v.* Lord Herbert, 10 Jur. N. S. 62; 12 W. R. 241, V. C. K. Privilege of Parliament is no protection. Wellesley's Case, and Lechmere Charlton's Case, *ubi sup.*

[1] See Anon., 3 Atk. 219; Elliot *v.* Halmarack, 1 Mer. 302; Seton, 1239. For forms of order discharging a special contempt, see Seton, 1237; and for forms of motion paper and notice of motion, see Vol. III.

*CHAPTER XXVII. *1071

TRIALS OF QUESTIONS OF FACT, AND ASSESSMENTS OF DAMAGES.

SECTION I. — *In what cases directed.*

IT was formerly the practice of the Court, in certain cases where legal rights were involved, or where there was great difficulty in deciding upon facts, to give the parties leave to bring an action, or to direct an issue to be tried by a jury, in a Court of Common Law. But now, whenever any relief or remedy within the jurisdiction of the Court of Chancery is sought in any cause or matter, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or fact, cognizable in a Court of Common Law, on the determination of which the title to such relief or remedy depends, is to be determined by or before the Court of Chancery, with or without a special or common jury: except that, whenever it appears to the Court that any question of fact may, under the circumstances of the particular case, be more conveniently tried by a jury at the Assizes, or at any Sitting in London or Middlesex for the trial of issues in the Superior Courts of Common Law, the Court may direct an issue, whereby any such question may be so tried.[1]

If, however, the object of the suit in Equity is to recover or defend the possession of land under a legal title, or under a title

[1] 25 & 26 Vic. c. 42, §§ 1, 2; 21 & 22 Vic. c. 27, §§ 3, 6; Baylis *v.* Watkins, 8 Jur. N. S. 1165, L. JJ.; Egmont *v.* Darell, 1 H. & M. 563; Eaden *v.* Firth, *ib.* 573; Young *v.* Fernie, 1 De G., J. & S. 353; 10 Jur. N. S. 58; *Re* Catholic Publishing and Bookselling Company, 10 Jur. N. S. 192; 12 W. R. 455, M. R.; 2 De G., J. & S. 116; 10 Jur. N. S. 301, L. JJ.; Williams *v.* Williams, 33 Beav. 306; Cowgill *v.* Rhodes, *ib.* 310; Freeman *v.* Tottenham and Hampstead Railway Company, 11 Jur. N. S. 254, V. C. S.; *ib.* 254, L. JJ., 13 W. R. 1004; and see Curlewis *v.* Carter, 9 Jur. N. S. 1148; 12 W. R. 97, V. C. S.; Copeland *v.* Webb, 1 N. R. 119, V. C. K.; Davenport *v.* Jepson, *ib.* 173; L. JJ.; Johnson *v.* Wyatt, 2 De G., J. & S. 18; 9 Jur. N. S. 1353; Davenport *v.* Goldberg, 2 H. & M. 282; Fernie *v.* Young, L. R. 1 H. L. 63; 12 Jur. N. S. 437; Jenner *v.* Jenner, L. R. 1 Eq. 361, 368. The 21 & 22 Vic. c. 27, §§ 3, 5, first enabled the Court to try questions of fact with or without a jury. This enactment, however, appears to be superseded by the 25 & 26 Vic. c. 42. The defendant to a bill for an injunction to protect a legal right cannot *ex debito justitiæ* require to have such right tried by a jury; for the Court, before the statutes 21 & 22 Vic. c. 27, and 25 & 26 Vic. c. 42, sent such cases to be tried at Law, not in order that they might be tried by a jury, but because the Court, having no jurisdiction to try a legal right, required to have the judgment of a Court of Common Law upon it. Boxill *v.* Hitchcock, L. R. 3 Ch. Ap. 417. Application for a jury in a patent case refused. *Ibid.*

*1072 * which would have been legal but for some outstanding term, lease, or mortgage (and whether *mesne* profits or damages are or are not sought in such suit), such relief only is to be given in Equity as would have been proper according to the former rules and practice of the Court; and it is not incumbent on the Court to grant relief in any suit concerning any matter as to which a Court of Common Law has concurrent jurisdiction, if it appears to the Court that such matter has been improperly brought into Equity, and that the same ought to have been left to the sole determination of a Court of Common Law.[1]

It seems that the Court will now direct a question of fact to be tried before itself, or a Court of Common Law, only in those cases in which it would formerly have given the parties leave to bring an action at Law, or would have directed an issue.[2] It is necessary, therefore, to consider the rules which regulated the practice of the Court in this respect.

Whenever the equitable title of the plaintiff depended upon his legal title, and the latter was disputed, it was formerly the practice to require him to establish his legal title by an action, before granting any equitable relief. Cases of this kind occur most frequently where the Court is asked to restrain the commission of acts which are injurious to the legal title; and will, therefore, be more appropriately discussed in the Chapter on Injunctions.[3]

Where there was contradictory evidence[4] between persons of equal credit, who had equal opportunities of information, and the evidence was so equally balanced on both sides, that it became doubtful which scale preponderated, an issue was in general directed, in order that the Court might be satisfied, by the verdict of a jury, of the *1073 truth or falsehood of the facts controverted;[5] but * if the

[1] 25 & 26 Vic. c. 42, § 4; Swaine *v.* Great Northern Railway Company, 10 Jur. N. S. 191; 12 W. R. 391, L. JJ.; 9 Jur. N. S. 1196, V. C. W.; and see Clarkson *v.* Edge, 10 Jur. N. S. 871; 12 W. R. 518, M. R.; Durell *v.* Pritchard, L. R. 1 Ch. Ap. 244, L. JJ.; S. C. *nom.* Darrell *v.* Pritchard, 12 Jur. N. S. 16; Robson *v.* Whittingham, L. R. 1 Ch. Ap. 442; 12 Jur. N. S. 40, L. JJ. In such case, the bill will be dismissed without prejudice to the right to an action at Law. Robson *v.* Whittingham, *ubi supra*; see Jenner *v.* Jenner, L. R. 1 Eq. 361, 368; [Ward *v.* Higgs, 4 N. R. 459; Metropolitan Board *v.* Sant, L. R. 7 Eq. 197.]

[2] See George *v.* Whitmore, 26 Beav. 557; Bradley *v.* Beavington, 4 Drew. 511; 5 Jur. N. S. 562; Morrison *v.* Barrow, 1 De G., F. & J. 633, 639; Peters *v.* Rule, 5 Jur. N. S. 61; 7 W. R. 171, V. C. W.; Egmont *v.* Darell, 1 H. & M. 563; Eaden *v.* Firth, *ib.* 573; and see Davenport *v.* Goldberg, 2 H. & M. 282; 25 & 26 Vic. c. 42, § 3. An issue is sent from a Court of Equity to be tried before a Court of Law, to aid the Court of Equity in the ascertainment of facts. An action is ordered to be tried in a Court of Law when the equity is based on a strictly legal right. Fisher *v.* Carroll, 1 Jones (Law), 27; see Decker *v.* Caskey, Saxton, 427.

[3] See *post*, Chap. XXXVI., *Injunctions*.

[4] See O'Brien *v.* Bowes, 4 Bosw. 657.

[5] Stokes *v.* Edmeades, 1 M'Cl. & Y. 436; and see *ante*, pp. 947, 948; Tappan *v.* Evans, 11 N. H. 331. In the case last cited, Parker C. J. said: "In a controversy about matter of fact, the Court of Chancery, if it have jurisdiction, may direct an issue, to try the fact by a jury; although a verdict is not, perhaps, indispensable, and the Court might itself find the fact. The Court directs an issue for the better information of its conscience. If fully satisfied as to the evidence, they will not send it to a trial at Law. Issues are frequently directed when matters of law are mixed with matters of fact. Where the uncertainty as to the validity of a title arises from questions of fact, it is most proper that they should be tried by a jury." 11 N. H. 334; Seymour *v.* De Lancey, 1 Hopk. 449; Lapresse *v.* Falls, 7 Ind. 692; McDowell *v.* Bank of W. & B. 1 Harring. 369; Munson *v.* Reed, 1 Clarke, 580; Marshall *v.* Thompson, 2 Munf. 412; Galt *v.* Carter, 6 Munf.

Court was able to come to a conclusion satisfactory to its own mind, an issue was not directed, however conflicting the evidence might be.[1]

There were cases, also, where the Court directed issues, although there was no contradictory evidence, or any matter to embarrass the Court, or to prevent its coming to an immediate decision upon *the evidence before it. Such cases, however, were principally *1074 confined to those in which the Common Law invested a party filling a particular situation with certain rights, of which it was the object of the suit to divest him. Thus, an heir-at-law was so far

245; Boyd *v.* Hamilton, 6 Munf. 459; Dale *v.* Roosevelt, 6 John. Ch. 355; Miller *v.* Wack, 1 Saxton, 205; Decker *v.* Coskey, 1 Saxton, 427; Apthorp *v.* Comstock, 2 Paige, 484; Lee *v.* Beatty, 8 Dana, 207; Nice *v.* Purcell, 1 Hen. & M. 372. Issues should be directed only in those cases where there is a want of evidence, or where the evidence is contradictory, or so nearly balanced as to render an open and rigid cross-examination of the witnesses before a jury necessary. Townsend *v.* Graves, 3 Paige, 453. An issue has been ordered to try a question of fraud. Hood *v.* Marquess, 4 Call, 416; see Stewart *v.* Inglehart, 7 Gill & J. 132. So, to try whether a will, said to have been lost, was ever, in fact, executed, and if so, what were its provisions. Brent *v.* Dold, Gilmer, 211. So, to try whether a deed was duly and fairly executed. Anon., 1 Desaus. 124; Pomeroy *v.* Winship, 12 Mass. 514; Dodge *v.* Griswold, 12 N. H. 573. So, to try the title to land before the purchaser was compelled to accept the title. Bowman *v.* Middleton, 1 Desaus. 159; Fox *v.* Ford, 5 Rich. Eq. 349. So, to try the question of the marriage of parents and the legitimacy of a child. Vaigneur *v.* Kirk, 2 Desaus. 640. So, to try the genuineness of a deed, forming a link in the chain of title, on a bill for the specific performance of a purchase of land. Delancey *v.* Seymour, 5 Cowen, 714; S. C. 1 Hopk. 436. So, to try whether an absolute bill of sale was intended only as a security. Knibb *v.* Dixon, 1 Rand. 249. So, to try whether the sale of a horse or other property was really intended as a shift to evade the statute against usury. Douglass *v.* M'Chesney, 2 Rand. 109; see Ward *v.* Hill, 4 Gray, 593. So, to try whether the testator was sane, or seriously intended the proposed will, as such, or had subsequently nullified it by a republication of a former will, or by a revocation. Banks *v.* Booth, 6 Munf. 385. So, to try the fact of a secret partnership. Cocke *v.* Upshaw, 5 Munf. 464. So, to try a claim in a creditor's suit. Ringold *v.* Jones, 1 Bland, 89. So, to try the question of title, in partition. Larkin *v.* Mann, 2 Paige, 27. So, to try the validity of a will of real estate, where the question arose collaterally, and the heir insisted on the invalidity of the will, in his answer. Colton *v.* Ross, 2 Paige, 396. [See State *v.* Allen, 2 Tenn. Ch. 43.] So, to try a question of usury, arising out of disputed facts, upon the determination of which, the right of the plaintiff to a decree against the defendant depended. New Orleans G. L. & B. Co. *v.* Dudley, 8 Paige, 452. So, to ascertain the damage sustained by the purchaser, by the loss of twenty-eight acres of land, recovered from him by a better title. Smith *v.* Martin, 4 Desaus. 149. So, to try whether the execution of a certain deed was an act of fraudulent preference in contemplation of bankruptcy. Grugeon *v.* Gerrard, 4 Y. & C. 119. The question as to whether an assignment of a mortgage was intended as an absolute one, or as a mere authority to enable the defendant to collect, being doubtful on the evidence, the Court directed an issue in Fisler *v.* Porch, 2 Stockt. Ch. 243. The fact that there has been a verdict of a jury, in an ejectment suit between the same parties, and upon the same question, may be a sufficient reason for refusing to award a feigned issue, in a case where a feigned issue would otherwise have been proper. Van Wyck *v.* Seward, 6 Paige, 62. Where the amount in controversy is small, and the facts can be satisfactorily ascertained by discovery, an issue at Law will not be awarded. Garwood *v.* Eldridge, 1 Green Ch. 200.

[1] Robinson *v.* Anderson, 7 De G., M. & G. 239; see, however, Collins *v.* Saurey, 4 Bro. P. C. ed. Toml. 692; Mason *v.* Mason, 1 Mer. 308, 313; Carlisle *v.* Cooper, 3 C. E. Green, 241; [S. C. 6 C. E. Green, 576, 590.] Where the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses or strong corroborating circumstances in support of the bill, no issue should be ordered. Smith *v.* Betty, 11 Grattan (Va.), 752. So it is not the practice to direct an issue where a cause is set down for a hearing upon bill, answer, replication, and proofs, and the evidence fails as to a matter essential to the equity of the plaintiff, or to the defence relied on. Kearney *v.* Harrell, 5 Jones Eq. (N. C.), 199. [No issue should be ordered until the plaintiff has thrown the burden of proof on defendant. Beverley *v.* Walden, 20 Gratt. 147, 154; Wise *v.* Lamb, 9 Gratt. 294; Grigsby *v.* Weaver, 5 Leigh, 197. And see, as to the practice in Virginia and West Virginia, Hord *v.* Colfert, 28 Gratt. 49; Anderson *v.* Cranmer, 11 W. Va. 562; Tompkins *v.* Stephens, 10 W. Va. 156. And as to practice in Nevada, Duffey *v.* Moran, 12 Nev. 94.]

regarded by the Courts, that it was considered that all freehold estates of which his ancestor died seised, or to which he was entitled at the time of his death, were vested in him, unless it was shown that the ordinary course of descent had been interrupted by the ancestor having executed a will; and so strongly did Courts of Equity consider the claim, that they would not, if the heir objected to it, even where the evidence before them was such as to leave no ground for doubt upon the subject, take upon themselves to establish a will affecting real estate, without previously having the opinion of a jury upon an issue *devisavit vel non*.[1]

In the case also of a rector, his common-law right to all the tithes of his parish was considered so strong that the Court would not take upon itself the responsibility of deciding against it, even upon the most indubitable testimony, if the rector thought proper to insist upon having it tried by a jury.[2] Thus, in all cases, the right of a rector to an issue to try the validity of a *modus* or composition in lieu of tithes was considered indisputable; and the same rule was extended to a vicar, who had established his general right to the tithes in question under his endowment.[3] But the rule only applied where the title to the tithes was undisputed: for if the occupiers set up and proved a different title, such as a distinct grant of tithes to the persons under whom they claimed, supported by evidence of constant non-payment to the rector, to rebut which there was no evidence on the part of the rector, he was not considered entitled to an issue.[4]

Even an heir-at-law might, by his conduct, deprive himself of his right to an issue to try the validity of a will: as where, if the *1075 * administration under the will would affect the real estate, which was subjected to the payment of debts, he at first opposed the probate, and then withdrew his opposition, and stood by and allowed the executors and devisees to pay away large sums of money under the will;[1] or where, upon a bill to perpetuate the testimony of the witnesses to the will, he did not cross-examine the witnesses, but took his costs

[1] Lord Fingal *v.* Blake, 1 Moll. 113; Tucker *v.* Sanger, 1 M'Cl. & Y. 425; Cooke *v.* Cholmondely, 2 M'N. & G. 18, 26; 11 Jur. 702, V. C. E.; S. C. *nom.* Cooke *v.* Turner, 15 Sim. 611, 623; Boyse *v.* Rossborough, Kay, 71; 18 Jur. 205; 3 De G., M. & G. 817; 3 Jur. N. S. 373; 1 K. & J. 124, 502; Taylor *v.* Brown, 10 W. R. 361, M. R.; Egmont *v.* Darell, 1 H. & M. 563; *ante*, pp. 876, 877: see Banks *v.* Booth, 6 Munf. 385; Van Alst *v.* Hunter, 5 John. Ch. 148; Rogers *v.* Rogers, 3 Wend. 515; Middleton *v.* Sherburne, 4 Y. & C. 358; Sneed *v.* Ewing, 5 J. J. Marsh. 460; see 2 Rev. Stat. New York, 67.

In New Jersey, it is held that there is no reason for the Court submitting the question of fact, whether a will has been cancelled, or surreptitiously destroyed, to a jury, where the evidence is such as to create no embarrassing doubt in the mind of the Court, although insisted on by one of the parties to the suit: Hildreth *v.* Schillinger, 2 Stockt. Ch. (N. J.) 196.

Courts of Chancery have no original jurisdiction to try the validity of wills of personal estate. See Rogers *v.* Rogers, 3 Wend. 503; Colton *v.* Ross, 2 Paige, 369. And in many of the States the decision of the Courts of Probate is conclusive on the validity of wills, both of real and personal estate, and may not be re-examined in any other Court. See *ante*, p. 874, note.

[2] Williams *v.* Price, 4 Pri. 156.

[3] Adams *v.* Evans, *Ib.* 14.

[4] See Wilmot *v.* Kellaby, Daniell, 116; S. C. *nom.* Wilmot *v.* Hellaby, 5 Pri. 355, and cases there cited; see also Barker *v.* Baker, Wightw. 397.

[1] Pike *v.* Hoare, Amb. 428; 2 Eden, 182.

as a disinherited heir;[2] or where he acquiesced in the will, in such a manner as would bar his possessory rights at Law (namely, for twenty years), and put the party claiming under it in a worse situation than he would have been in had he disputed the will originally;[3] or where the will in question in the suit had been traced into his possession, but he did not produce it;[4] or where he admitted the will in issue in the suit, but alleged that it had been revoked by a subsequent will in his favor, and did not produce any evidence of the revocation.[5]

Where, however, the heir-at-law had been a party (but not in that character) to proceedings in the Ecclesiastical Court, and before the Judicial Committee of the Privy Council, by which the validity of the will, as to personalty, was established, he was held not to have thereby waived his right to an issue *devisavit vel non*.[6]

In a creditor's suit, the Court would not grant an issue *devisavit vel non:* because the right of the creditors was paramount to the rights of those claiming under the will, or of the heir.[7]

The right of an heir-at-law to an issue was one which he might waive; and, even in the case of an infant, if his counsel thought it clear that there was no ground to dispute the will, he was justified in declining an issue.[8]

If an adult heir-at-law refused an issue, on the hearing of the cause, the Court would establish the will against him; though he did not admit the will by his answer.[9]

Except in the cases of an heir-at-law, or of a rector or vicar, who were entitled to issues as a matter of right, the granting of an issue by a Court of Equity was entirely a matter of discretion in the Court: which it would not, however, exercise without due deliberation,[10] and a mistake in the exercise of which was a just * ground of *1076

2 Pike *v.* Hoare, Amb. 428; 2 Eden, 182.

3 Tucker *v.* Sanger, M'Cl. 424; 1 M'Cl. & Y. 425; 13 Pri. 119; Man *v.* Ricketts, 7 Beav. 93, 101; 8 Jur. 159; Affd. 1 H. L. Ca. 472, *nom.* Ricketts *v.* Turquand.

4 Hampden *v.* Hampden, 3 Bro. P. C. ed. Toml. 550; Dalston *v.* Coatsworth, 1 P. Wms. 730; Hayne *v* Hayne, 1 Dick. 18; Woodroffe *v.* Wood, 1 Dick. 32; Williams *v.* Williams, 33 Beav. 306; and see Cowgill *v.* Rhodes, 33 Beav. 310.

5 Whitaker *v.* Newman, 2 Hare, 299, 303; 7 Jur. 231.

6 Stacey *v.* Spratley, 2 De G. & J. 94; 5 Jur. N. S. 28.

7 Spikernell *v.* Hotham, 9 Hare, 73.

8 Levy *v.* Levy, 3 Mad. 245; *ante*, p. 163.

9 Jackson *v.* Barry, 2 Cox, 225.

10 Short *v.* Lee, 2 J. & W. 464, 497; O'Connor *v.* Cook, 6 Ves. 665, 671; Boyse *v.* Rossborough, 1 K. & J. 124, 139; Hopwood *v.* Earl of Derby, 1 K. & J. 255, 262; Davenport *v.* Goldberg, 2 H. & M. 282; Black *v.* Lamb, 1 Beasley, 113; Trenton Banking Co. *v.* Woodruff, 1 Green Ch. 117; Tappan *v.* Evans, 11 N. H. 334; Dale *v.* Roosevelt, 6 John. Ch. 257; Crittenden *v.* Field, 8 Gray, 626; Hill *v.* Ward, 4 Gray, 593; Waterman *v.* Dutton, 5 Wis. 413; Carlisle *v.* Foster, 10 Ohio (N. S.), 198; [Milk *v.* Moore, 39 Ill. 588; Pankey *v.* Raum, 51 Ill. 88.] It was held in New Hampshire, in the case of Marston *v.* Brackett, 9 N. H. 336, that *a defendant*, in a bill in Chancery, has a constitutional right to have matters of fact, alleged in the bill and denied by the answer, tried by a jury, if they are material to the decision of the cause, and the application is seasonably made. The question whether *either party* is not entitled, of right, to the trial of any issue in fact, by the jury, under the provision of the Constitution of New Hampshire, was left without decision in Dodge *v.* Griswold, 12 N. H. 575. But in Hoitt *v.* Burleigh, 18 N. H. 389, Parker C. J. said: "We have settled that a party to a bill in Equity has a constitutional right to require a trial by jury, of a contested matter of fact, if he asserts that right at the proper stage of the cause." In this latter case, however, the motion for issues was made by the defendant. See Clark *v.* Society, 45 N. H. 331, 338; Dodge *v.* Griswold, 12 N. H. 575.

In Texas, either party has a right to trial

appeal;[1] and, therefore, if the Court refused an issue, and the *1077 Court of Appeal thought that the contrary decision would * have been a sounder exercise of discretion, it would rectify the order of the Court below accordingly;[1] and so, where the House of Lords thought that the Court below had directed issues improperly, it reversed the order directing the issues, and remitted the cause, with directions to the Judge to decide upon the matter himself.[2]

of issues of fact in Equity suits. Faulk *v.* Faulk, 23 Texas, 653; see Appx. 5 R. I. 596. In Ward *v.* Hill, 4 Gray, 593, the Supreme Court of Massachusetts held that the ordering of an issue to a jury in an Equity suit, upon the application of the plaintiff, is within the discretion of the presiding Judge, and not open to exception. So in Crittenden *v.* Field, 8 Gray, 626. In Franklin *v.* Green, 2 Allen, 522, recently decided in Massachusetts, an issue had been framed by the Court for a jury to determine, whether a certain note involved in the general controversy had been obtained from the plaintiff by the fraud and misrepresentation of the defendant. Upon trial of the issue, the jury found that the note had been so obtained. The defendant contended that the plaintiff was entitled to no relief, because the whole evidence produced at the hearing in the suit afterwards had showed, notwithstanding the verdict, that no fraud had been practised by which he had suffered any injury or damage. "But in this Commonwealth," Chapman J. said, "the right of trial by jury is secured by the Constitution. In suits in Equity the issues do not grow out of the pleadings, as in suits at Law, but are framed by the Court; yet in framing the issues the Court will have regard to the constitutional provision, and will allow the parties to submit to the jury all such material facts as are proper to be decided by them; and when a verdict is rendered, and not set aside for good cause shown, it will be regarded as settling the facts in issue conclusively." [See Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45; Shaw *v.* Norfolk R. Co., 16 Gray, 409.]

In North Carolina, it has been held, that issues of fact must be decided by a jury in Equity as well as at Law, and it must appear on the face of the decree that they were so decided. Taylor *v.* Person, 1 Hawks, 298. In Georgia, Equity cases are decided by a jury. Brown *v.* Burke, 22 Geo. 574; Mounce *v.* Byars, 11 Geo. 180; McDougald *v.* Dougherty, 11 Geo. 570.

Whether the fact proposed to be tried by the jury is material or not is a question for the Court. Charles River Bridge *v.* Warren Bridge, 7 Pick. 369. The issue is to be made up under the direction of the Court. Charles River Bridge *v.* Warren Bridge, 7 Pick. 379; Marston *v.* Brackett, 9 N. H. 349; *post*, 1110, 1111, notes. In some other States, it is held, that the Chancellor may decide all questions of fact for himself. Lee *v.* Beatty, 8 Dana, 207; Iler *v.* Roath, 3 How (Miss.) 216; Munson *v.* Reed, 1 Clarke, 580; Nice *v.* Purcell, 1 Hen. & M. 273; Fornshill *v.* Murray, 1 Bland, 485; Smith *v.* Croom, 7 Florida, 180; Miller *v.* Wack, Saxton, 204; Beekman *v.* Saratoga & Sche. R. R. Co., 3 Paige, 45; Scudder *v.* Trenton, Delaware Falls Co., 1 Saxton, 694; U. States *v.* Samperyac, 1 Hemph. 118. But when any question of fact arises, which the Chancellor considers doubtful, he should refer it to a jury. Still the verdict is to satisfy the conscience of the Chancellor, and if he is not satisfied he may disregard it. [Dunphy *v.* Kleinsmith, 11 Wall. 610; Orgain *v.* Ramsey, 3 Humph. 580; James *v.* Brooks, 6 Heisk. 154; Burt *v.* Rynex, 48 Mo. 309; Milk *v.* Moore, 39 Ill. 588;] Lee *v.* Beatty, Iler *v.* Roath, *vbi supra*; see also Munson *v.* Reed, *supra*; Garwood *v.* Eldridge, 1 Green Ch. 290; Apthorp *v.* Comstock, 2 Paige, 488; Marshall *v.* Thompson, 2 Munf. 412; Bullock *v.* Gordon, 4 Munf. 450; Galt *v.* Carter, 6 Munf. 245; Mulock *v.* Mulock, 1 Edw. Ch. 14; O'Conner *v.* Cooke, 8 Sumner's Ves. 536, Perkins's notes and cases cited; U. States *v* Samperyac, 1 Hemph. 118; Fisler *v.* Porch, 2 Stockt. 243; Hall *v.* Layton, 10 Texas, 55. The Chancellor is not bound under the Statutes of Delaware, to direct an issue to be tried at Law, unless the points in controversy involve the merits of the cause. Waters *v.* Comly, 3 Harring. 117. For cases in which issues have been directed, see Seton, 983 *et seq.*

[1] So held in Townsend *v.* Graves, 3 Paige, 457; Belknap *v.* Trimble, 3 Paige, 601; Gardner *v.* Gardner, 22 Wend. 526; Drayton *v.* Logan, Harp. Eq. 57. [So, in New Jersey. Newark, &c. R. Co. *v.* Newark, 8 C. E. Green, 515.] It is otherwise in Pennsylvania. Scheetz's Ap. 35 Penn. (State) 88. In Massachusetts, it has been decided that the ordering of an issue to a jury, upon the application of the plaintiff, is within the discretion of the presiding Judge, and not open to exception. Ward *v.* Hill, 4 Gray, 593; Crittenden *v.* Field, 8 Gray, 626. [But it is open to appeal and revision by a full Court. Brooks *v.* Tarbell, 103 Mass. 496.] In Ray *v.* Doughty, 4 Blackf. 116, it was held, that a Court of Chancery may take the opinion of a jury as to any of the facts in controversy between the parties, whenever it thinks proper to do so. See Lapreese *v.* Falls, 7 Ind. 692; Black *v.* Shreve, 2 Beasley (N. J.), 455; McGowan *v.* Jones, R. M. Charlt. 184.

[1] See Hampson *v.* Hampson, 3 V. & B. 41.

[2] Nicol *v.* Vaughan, 2 Dow & C. 420; 5 Bligh N. S. 505; see also S. C. *nom.* Earl of Winchilsea *v.* Garetty, 1 M. & K. 253; *post*, 1078. [The Court of Appeal will not only reverse the order directing an issue,

The Court refused an issue, where, though the facts were controverted, it saw clearly that, even if found to be as the party asking for the issue alleged them to be, the party would not in Law be entitled to relief.[3] Where, also, it was obvious that the finding of a jury could be in no other way but one, an issue was refused.[4] Upon the same principle, although there was evidence of a continued adulterous intercourse between a married woman and her paramour, the Court refused to grant an issue to try the legitimacy of her child: because there was also evidence of such access between the husband and his wife as was consistent with the presumption of the child's legitimacy.[5]

Although the Court has jurisdiction, without directing any trial of issues at Law, to declare an instrument forged, and to order it to be delivered up,[6] yet where both the defendant and a witness had sworn to the due execution of the instrument alleged to be forged, the Court directed an issue to try whether the deed in question was the deed of the party by whom it purported to be executed.[7]

It was generally in those cases only where there was contradictory evidence that the Court granted an issue to try a controverted fact; a mere suggestion upon the record, unsupported by evidence, in opposition to evidence on the other side, was not sufficient. Thus, where issues had been directed to try the validity of a bond, merely upon the surmise and suggestion of a party: the bond being unobjectionable on the face of it, and all the evidence, as to the circumstances under which it was obtained, was before the Court upon the report of a Master, the House of Lords reversed the order directing the issues, and remitted the cause to the Master of the Rolls, with directions to him to decide upon the matter himself.[8]

* It must not, however, be understood that, unless there was *1078 contradictory evidence, the Court was precluded from sending a matter to be investigated before a jury; for where the evidence was all on one side, but not sufficient to satisfy the conscience of the Court

but will, in a proper case, render a final decree on the merits. Newark, &c. R. Co. *v.* Mayor of Newark, 8 C. E. Green, 515; Gass *v.* Mason, 4 Sneed, 508; Jarrett *v.* Jarrett, 11 W. Va. 584. And see Williams *v.* Guest, L. R. 10 Ch. App. 467, where, although it was held that the appeal would lie, the Court refused to interfere.] The order directing an issue may be set aside at a term of the Court subsequent to that in which it was made, such order being merely interlocutory. Dabbs *v.* Dabbs, 27 Ala. 646. So the Court may proceed to a final decree without setting aside the order for trying the issue. Field *v.* Holland, 6 Cranch, 8. So where an issue framed and tried does not embrace the objects contemplated, the Court will direct a new and proper issue. Braxton *v.* Willing, 4 Call, 288.

[3] Blackburn *v.* Jepson, 3 Swanst. 132; Berney *v.* Harvey, 17 Ves. 119, 127.

[4] Ross *v.* Aglionby, 4 Russ. 489, 494, 498; Hildreth *v.* Skillenger, 2 Stockt. (N. J.) 196; Goodenough *v.* Powell, 2 Russ. 219, 229.

[5] Bury *v.* Phillpot, 2 M. & K. 349, 352; and see *ante*, p. 851.

[6] Peake *v.* Highfield, 1 Russ. 559, 563; and see Masters *v.* Brahan, 1 Russ. 560, n.; Seccombe *v.* Fitzgerald, *ib.* 561, n.; White *v.* Hussy, Prec. in Ch. 14; but see Bridge *v.* Eddows, cited 2 Ves. S. 446, 448.

[7] Peake *v.* Highfield, 1 Russ. 559. An issue was directed to try a question of forging a deed, on a bill issued for the purpose of settling the title to a large tract of land, and to prevent a multiplicity of suits. Apthorp *v.* Comstock, 2 Paige, 482.

[8] Nichol *v.* Vaughan, 2 Dow & C. 420; 5 Bligh N. S. 505; see also S. C. *nom.* Earl of Winchilsea *v.* Garetty, 1 M. & K. 253; Harrod *v.* Harrod, 1 K. & J. 4; 18 Jur. 853; Hoitt *v.* Burleigh, 18 N. H. 390.

that the fact was as it was represented to be, the Court was in the habit of directing an issue to try the fact, although the evidence in support of it was not opposed by any adverse claim on the other side. Thus, where the defendants had not disputed the plaintiff's title, but had put him to the proof of it by their answer, and the plaintiff had gone into long evidence in support of his title, which the Master of the Rolls did not deem satisfactory, issues were directed to try it.[1] It sometimes happened, that where, upon the hearing of a cause, a matter not in issue, which appeared to the Court material to the question, started up, the Court directed an issue to try it;[2] but the Court would not permit a party to take an issue, upon a point in question, in a different form from that which he had stated in his pleadings.[3] Thus, the Court refused to permit defendants to have an issue to prove matters which were not stated in their answers, but which appeared by the answer of the plaintiffs to their cross-bill.[4] So, where the plaintiff, in a bill for specific performance, failed in proving the terms of the agreement he relied upon, the Court would not assist him by directing an issue to ascertain the terms;[5] and a party was held not entitled to an issue, or an inquiry, to establish a case relied upon by his pleading, but omitted in proof.[6]

An issue may be directed to ascertain the facts upon any question in the suit; thus, it seems an issue may be directed upon a motion to commit a party for the breach of an injunction, where the fact of the breach is strongly controverted;[7] and an issue has been directed upon an application for an injunction;[8] and upon a motion for a receiver;[9] and during proceedings at Chambers.[10]

An order for the trial of a question of fact before the Court itself, or a Court of Common Law, will not, in general, except by consent, be made before the question as to which an issue is sought comes before *1079 the Court for adjudication.[11] Where, however, it was *clear that

[1] Moons *v.* De Bernales, 1 Russ. 301; see also Burkett *v.* Randall, 3 Mer. 466.

[2] Balch *v.* Tucker, 2 Ch. Ca. 40.

[3] Nor will a defendant be allowed to add a totally new issue of fact, not in any way suggested by his answer, to the issues which have been already directed for trial. Morgan *v.* Fuller, L. R. 2 Eq. 296.

[4] Warden and Minor Canons of St. Paul's *v.* Kettle, 2 V. & B. 1, 16; and see Bennett *v.* Neale, Wightw. 324; Price *v.* Berrington, 3 M'N. & G. 486, 498; 15 Jur. 999, 1002; Savage *v.* Carroll, 1 B. & B. 548; 2 B. & B. 451. But a supplemental bill opens the case to a further answer and to further evidence. And in such a case a motion for issues, to be tried by a jury, is in order after the coming in of the answer to the supplemental bill. Hoitt *v.* Burleigh, 18 N. H. 389; see Morgan *v.* Fuller, L. R. 2 Eq. 296.

[5] Savage *v.* Carroll, 2 B. & B. 451.

[6] *Ibid.* 1 B. & B. 548; Price *v.* Berrington, 3 M'N. & G. 486, 498; 15 Jur. 999, 1002.

[7] See Agar *v.* Regent's Canal Company, G. Coop. 77, 79.

[8] De Tastet *v.* Bordenave, Jac. 516; and see *post*, p. 1081.

[9] Gardiner *v.* Rowe, 4 Mad. 236.

[10] Irvine *v.* Sullivan (1865, I., No. 87), 31 May, 1869, Leg. Lib. A. 1331, V. C. J.

[11] Bradley *v.* Bevington, 4 Drew. 511; 5 Jur. N. S. 562; George *v.* Whitmore, 26 Beav. 557; Morrison *v.* Barrow, 1 De G., F. & J. 633, 639; Davenport *v.* Goldberg, 2 H. & M. 282; Hamp *v.* Hamp, 35 Beav. 189; Jenkins *v.* Bushby, 16 W. R. 189, V. C. M.; Henderson *v.* Runcorn Soap and Alkali Company, W. N. (1868), 250, V. C. G.; Roskell *v.* Whitworth, L. R. 5 Ch. Ap. 459, L. J. G.; see also Fullagar *v.* Clark, 18 Ves. 481; Ridgway *v.* Roberts, 4 Hare, 106, 119. [An order for issues will not be made until all the proof is taken and publication passed. Goodyear *v.* Providence Rubber Co., 2 Cliff. 351. And the right may be waived by going before the Master. Hauser *v.* Roth, 37 Ind. 89.] For cases where, under former practice, an issue

there were questions which could not properly be tried by the Court, issues to be tried in a Court of Common Law were directed, upon an interlocutory application;[1] and it seems, that an order for the trial of a question *devisavit vel non* will be made on an interlocutory application by an heir-at-law;[2] and that where the equitable title depends on the legal title, and the latter is disputed, the Court may on a motion for an injunction direct a trial *of the question of the *1080 legal title;[1] and that, although it is competent for the Court, at any stage of the cause, to direct a trial, yet that as a general rule an application for a trial ought to be made, in the course of the discussion

was directed on an interlocutory application, see Bacon *v.* Jones, 4 M. & C. 433; 3 Jur. 994; Ansdell *v.* Ansdell, 4 M. & C. 449; Townley *v.* Deare, 3 Beav. 213; Middleton *v.* Sherburne, 4 Y. & C. Ex. 358, 377, 393; Lewis *v.* Thomas, 3 Hare, 26, 29; Bonser *v.* Bradshaw, 4 Jur. N. S. 1011; 6 W. R. 427, V. C. S.; and see Kent *v.* Burgess, 11 Sim. 361, 377; 5 Jur. 166; Lancashire *v.* Lancashire, 9 Beav. 259; see New Orleans G. L. & B. Co. *v.* Dudley, 8 Paige, 452; Eames *v.* Eames, 16 Pick. 141, cited *post*, 1110, note; Waterman *v.* Dutton, 5 Wis. 413; Marston *v.* Brackett, 9 N. H. 349. A motion for an issue is premature, if made before the pleadings are closed. The Court should see what facts are controverted, and the plaintiff should have the benefit of the discovery the defendant may make in his answer. Tibbetts *v.* Perkins, 20 N. H. 275. The right to issues is not to be asserted by plea, as that might interfere with the plaintiff's right to require an answer, which is also a legal right. Hoitt *v.* Burleigh, 18 N. H. 390; see Johnson *v.* Hainesworth, 6 Ala. 443; Eames *v.* Eames, 16 Pick. 141, cited *post*, 1110, note; Waterman *v.* Dutton, 5 Wis. 413. In Tennessee, issues of fact may be framed by agreement of parties, or by the Court on the application of either party, before the cause is opened, or heard at all. Lancaster *v.* Ward, 1 Overton, 430.

In Charles River Bridge *v.* Warren Bridge, 7 Pick. 369, 370, Parker C. J. said: "But it is objected that according to the course of proceedings this motion is premature, because an issue can be directed only on a hearing, for it cannot be determined of what facts the issues shall consist, until after a hearing shall have taken place, and the evidence is looked at, which is adduced in support of the facts. If it were true that issues to the country should be ordered only when the Court on inspecting the evidence, found a difficulty in deciding the fact, this position would be maintained; but certainly a full hearing is not necessary in order to come to the result, for if by inspecting the bill and answer it should be perceived that there are important facts asserted and denied, we do not see why issues may not be directed as soon as the Court shall determine, in their discretion, that those facts shall be so ascertained; and certainly much time may be saved by this course of proceeding." See *post*, 1110.

Under the New York Code, by the rules of Court, if either party desires a trial by jury in a suit which would formerly have been a suit in Chancery, he must give notice of a motion therefor, within ten days after issue joined. Where a cause is called, if it appears that the trial will require the examination of a long account, the Court may order a reference; or if there are questions which ought to be determined before the account is taken, the Court may try and determine those questions and direct a reference to take and state the account; and so, also, where the cause is called for trial, if difficult questions of fact are involved, depending probably upon conflicting testimony, the Court has power to order those questions to be tried by a jury. O'Brien *v.* Bowes, 4 Bosw. (N. Y.) 657. But where the cause is actually tried by the Judge, without a jury, each party giving all the testimony he desires, and the cause is finally submitted for determination, it is too late to order a trial by jury. *Ibid.*

[Under a statute which gives to either party a right to trial by jury in a Chancery case, the party making the application must submit a proper issue, or the Chancellor may disregard the verdict. Gass *v.* Mason, 4 Sneed, 508. And an order for trial by jury may be refused, if the Court deem the issue offered irrelevant and immaterial. Williamson *v.* Montgomery, 40 Mo. 373. Referring questions of fact to a jury is discretionary. Blakey *v.* Johnson, 13 Bush, 197.]

[1] Tatton *v.* London & Lancashire Fire Insurance Company, W. N. (1868), 50, V. C. W.

[2] Middleton *v.* Sherburne, 5 Y. & C. Ex. 358, 377, 393; Hopwood *v.* Earl of Derby, 1 K. & J. 255; Bonser *v.* Bradshaw, 4 Jur. N. S. 1011; 6 W. R. 427, V. C. S., and the cases there cited. In Massachusetts, the order directing an issue for the trial of a question of fact by a jury, is regarded as interlocutory. Eames *v.* Eames, 16 Pick. 141; Ward *v.* Hill, 4 Gray, 595. So in Alabama. Dabbs *v.* Dabbs, 27 Ala. 646.

[1] Eaden *v.* Firth, 1 H. & M. 573; Bovill *v.* Hitchcock, L. R. 3 Ch. Ap. 417, L. J. Lord Cairns; and see Davenport *v.* Phillips, 5 N. R. 485, V. C. W.

upon the application for the injunction, or in the course of the discussion upon an application to dissolve the injunction.[2]

Where the question is directed to be tried before the Court of Chancery, it is, except in the case of a disinherited heir, who has, on the trial of the question *devisavit vel non*, a right to a jury,[3] discretionary in the Court whether a jury shall be summoned or not;[4] if the Court thinks it best that a question should be tried before a jury, a jury can be had; but if, in the opinion of the Court, a trial without a jury is preferable, neither party can claim a jury as a matter of right.[5] Where the bill seeks an injunction in aid of a legal right the application for a jury shall be made in the course of the discussion upon an application for the injunction, or in the course of the discussion upon an application to dissolve the injunction, or sometimes at the hearing; and if the defendant applies at any other time, especially after the disclosure of the evidence, the Court will require very strong proof that the case is one which the Court itself cannot try.[6] When the Lord Chancellor has directed a trial by jury, before a Vice-Chancellor, it is *ultra vires* for the Vice-Chancellor to substitute, even by consent, a trial before himself without a jury.[7]

Formerly the Court of Chancery had, in no case, power to award damages; but now, whenever it has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the Court may, if it think fit, award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance; and such damages may be assessed in such manner as the Court shall direct.[8]

*1081 * These provisions do not, however, extend the jurisdiction of

[2] Roskell *v.* Whitworth, L. R. 5 Ch. Ap. 459, 464, L. J. G.

[3] Shedden *v.* Patrick, L. R. 1 H. L. Sc. & D. 470.

[4] Bovill *v.* Hitchcock, L. R. 3 Ch. Ap. 417, L. J. Lord Cairns.

[5] Per Lord Cairns L. J., Bovill *v.* Hitchcock, L. R. 3 Ch. Ap. 419; Peters *v.* Rule, 5 Jur. N. S. 61; 7 W. R. 171, V. C. W; Eaden *v.* Firth, 1 H. & M. 573; and see Freeman *v.* Tottenham and Hampstead Railway Company, 11 Jur. N. S. 254, L. JJ.; 13 W. R. 1004; Davenport *v.* Goldberg, 2 H. & M. 282. For the practice as to trials of questions of fact, see *post*, §§ 2, 3. For circumstances under which a cause, ordered to be tried without a jury, was subsequently ordered to be tried with a jury; see Tangye *v.* Stott, 14 W. R. 128, V. C. W.

[6] Roskell *v.* Whitworth, L. R. 5 Ch. Ap. 459, L. J. G.

[7] Fernie *v.* Young. L. R. 1 H. L. 63; 12 Jur. N. S. 437, 440.

[8] 21 & 22 Vic. c. 27, § 2; see Soames *v.* Edge, Johns. 669; Hindley *v.* Emery, L. R. 1 Eq. 52; 11 Jur. N. S. 874, V. C. W.; Schotsmans *v.* Lancashire and Yorkshire Railway Co., L. R. 1 Eq. 349; 12 Jur. N. S. 42, M. R.; Thomlinson *v.* Dixon, 14 W. R. 528, M. R.; McRae *v.* London, Brighton, & South Coast Railway Company, W. N. (1868), 25, V. C. S.; Betts *v.* Neilson, L. R. 3 Ch. Ap. 429, L. C.; Corporation of London *v.* Southgate, W. N. (1868), 297; 17 W. R. 197, V. C. M.; Acraman *v.* Price, 18 W. R. 540, V. C. J. For cases where damages were awarded, instead of specific performance, see Kay *v.* Johnson, 2 H. & M. 118, 124; Barlow *v.* Scott, 24 N. Y. 40; Pingree *v.* Coffin, 12 Gray, 305; Peabody *v.* Tarbell, 2 Cush. 226; Andrews *v.* Brown, 3 Cush. 130, 136; Betts *v.* Neilson, L. R. 3 Ch. Ap. 431, 440; and see Carne *v.* Brancher, 17 W. R. 342, M. R.; *ib.* 837, L. JJ.; and instead of mandatory injunction; Pentney *v.* Lynn Paving Comm'rs, 13 W. R. 983, V. C. K.; Senior *v.* Pawson, 1 W. R. 364, V. C. W.; L. R. 3 Eq. 330; Isenberg *v.* The East India House Estate Company, 3 De G., J. & S. 263; 10 Jur. N. S. 221; McRae *v.* London, Brighton, & South Coast Railway Co., W. N. (1868), 25, V. C. S.; Viscountess Gort *v.* Plark, W. N. (1868),

the Court; and damages will not, therefore, be given in cases where, previously to the Act, the Court would not have ordered an injunction, or decreed specific performance.[1] Where the Court is of opinion that the plaintiff should have proceeded at Law, no assessment

93; 16 W. R. 569, L. JJ.; Lockwood *v.* London & North Western Railway Co., W. N. (1868), 234, V. C. G.; Eastwood *v.* Lever, 33 L. J. Ch. 355, L. JJ.; Bowes *v.* Law, L. R. 9 Eq. 636, V. C. J. For form of order for inquiry as to damages in case of ancient lights, see Senior *v.* Pawson, L. R. 3 Eq. 330, V. C. W. As to assessment of damages in Patent cases, see Penn *v.* Bibby, L. R. 3 Eq. 308, V. C. W.; Penn *v.* Jack, L. R. 5 Eq. 81, V. C. W.; Betts *v.* Neilson, L. R. 3 Ch. Ap. 429, L. C.

[The burden of proof is on the party claiming to have sustained damage to show both the fact of damage and its amount. Dwight *v.* Northern, &c. R. Co., 54 Barb. 271; Hyman *v.* Devereux, 65 N. C. 588; Ranning *v.* Reeves, 2 Tenn. Ch. 264. The award of damages is limited to the amount specified in the undertaking. Roberts *v.* White, 73 N. Y. 375; Hovey *v.* Rubber-Tip Pencil Co., 50 N. Y. 335. Though, it seems, interest may be allowed on the penalty of the bond, when the judgment enjoined and interest exceed the penalty. Marshall *v.* Minter, 43 Miss. 666. In Illinois, all proper expenses incurred should be allowed, including attorney's fees. Darst *v.* Gale, 83 Ill. 136; Collins *v.* Sinclair, 51 Ill. 328; Silsbee *v.* Lucas, 53 Ill. 479; Wilson *v.* Haecker, 85 Ill 349; and see Alexander *v.* Colcord, 85 Ill. 323. Counsel fees are not allowed as damages. Oelrichs *v.* Spain, 15 Wall. 211; Baggett *v.* Beard, 43 Miss. 120. So in Tennessee in an unreported case. Nor for resisting an application for an order of injunction. Kittle *v.* De Lamater, 7 Neb. 70. Nor the expenses of trustees in attending the hearing of a motion to dissolve an injunction. Tamarra *v.* Southern Illinois University, 54 Ill. 334. But attorney's fees incurred in dissolving the injunction are recoverable in other States. Beeson *v.* Beeson, 59 Ind. 97; Wallace *v.* York, 45 Iowa, 81; Hefner *v.* Hesse, 29 La. Ann. 149; Buford *v.* Keokuk, &c. Packet Co., 3 Mo. App. 159. And see, when suggestions in writing are required in assessment of damages; Forth *v.* Xenia, 54 Ill. 210. In New York, counsel fees are not allowed as damages on the dissolution of an injunction, except such as are incurred in procuring the dissolution. Hovey *v.* Rubber-Tip Pencil Co., 50 N. Y. 335. And these will be allowed if the motion has been made, though continued by the Court until the hearing on the merits. Andrews *v.* Glenville Woollen Co., 50 N. Y. 282. Where the erection of a business house was delayed by injunction, it was held that damages were allowable for: 1. Loss in rent of the building; 2. Increased cost of the labor and materials; 3. Counsel fees on motion to dissolve the injunction, and on the appeal from the order of dissolution. Roberts *v.* White, 73 N. Y. 375

In New Jersey, damages seem to be allowable only in cases where the complainant obtained the injunction by a wrongful statement of the facts. Dodd *v.* Flavel, 2 C. E. Green, 255; Hewitt *v.* Kuhl, 11 C. E. Green, 97; Green *v.* Philadelphia Freestone and Granite Co., 11 C. E. Green, 443. But see Brown *v.* Easton, Court of Appeals, March Term, 1879, cited in Dickinson's Ch. Pr. 33 note. So in Indiana. Boden *v.* Dill, 58 Ind. 273. In N. C. there must be legal malice or want of probable cause. Burnett *v.* Nicholson, 79 N. C. 548.

See, as to the damages, where the plaintiff has been put into possession of property as receiver. Davenport *v.* Harbert, 1 Tenn. Leg. Rep. 172. Where a house, the removal of which has been restrained, is blown down. Patterson *v.* Kingland, 8 Blatchf. 278. Where, under a modification of an injunction, the machinery of a corporation was allowed to be removed from the State. Moulton *v.* Richardson, 49 N. H. 75. Where personal property has depreciated. Meysinberg *v.* Schleiper, 48 Mo. 426.

Only those who sign the obligation are liable, and, consequently, the plaintiff, if he do not sign, can only be held bound by action. Patterson *v.* Bloomer, 9 Abb. Pr. 27. And see, as to the action where there are several obligees and obligors, Peerce *v.* Athey, 4 W. Va. 22. A surety is bound by the allegations of the bill or petition. Green *v.* Huey, 23 La. Ann. 704. And cannot go behind the decree in the case in which the bond was given to inquire into the illegality of the agreement on which the decree was founded. Oelrichs *v.* Spain, 15 Wall. 229

See also, as to damages, Holmes *v.* Weaver, 52 Ala. 516; Cummings *v.* Burleson, 78 Ill. 281; Ovington *v.* Smith, 78 Ill. 250; Taylor *v.* Brownfield, 41 Iowa, 264; McKinzie *v.* Mathews, 59 Mo. 99; Raupman *v.* Evansville, 49 Ind. 392; Gault *v.* Goldthwaite, 34 Texas, 104; Brown *v.* Jones, 5 Nev. 374; Johnson *v.* Walker, 25 Ark. 196. And see *infra*, 1678.]

[1] Rogers *v.* Challis, 27 Beav. 175; 6 Jur. N. S. 334; Chinnock *v.* Sainsbury, 6 Jur. N. S. 1318; 9 W. R. 7, M. R.; Norris *v.* Jackson, 1 J. & H. 319; Wicks *v.* Hunt, Johns. 372; Howe *v.* Hunt, 31 Beav. 420; 8 Jur. N. S. 834; Johnson *v.* Wyatt, 2 De G., J. & S. 18; 9 Jur. N. S. 1333; Middleton *v.* Magnay, 2 H. & M. 233, 236; Laurence *v.* Astin, 11 Jur. N. S. 576; 13 W. R. 981, M. R.; Durell *v.* Pritchard, L. R. 1 Ch. Ap. 244; S. C. *nom.* Darrell *v.* Pritchard, 12 Jur. N. S. 16, L. JJ.; Franklinski *v.* Ball, 33 Beav. 560; Lewers *v.* Earl of Shaftesbury, L. R. 2 Eq. 270; 12 Jur. N. S. 389, V. C. W.; 16 L. T. N. S. 135, L. C.; Ferguson *v.* Wilson, L. R. 2 Ch. Ap. 77, L. JJ.; Calcraft *v.* Thompson, 35 Beav. 559; W. N. (1867), 8 15 W. R 387, L. C.; Lehmann *v.* McArthur, L. R. 3 Ch. Ap. 496, L. JJ.; L. R. 3 Eq. 746, V. C. S.; Scott *v.* Rayment, L. R. 7 Eq. 112, V. C. G.

of damages will be directed in Equity; but the bill will be dismissed, without prejudice to the plaintiff's right to proceed at Law.[2] The plaintiff may, by his conduct, forfeit his right to damages,[3] and the damages may be awarded, although not specifically prayed by the bill,[4] in addition to an account.[5] Where there will be extreme difficulty in the Court seeing its way to assess the damages, leave will, it seems, be given to the plaintiff to proceed at Law for the purpose of recovering damages.[6]

*1082 * Unless special damage can be shown to have been caused by the delay, the Court will not, in addition to decreeing the specific performance of a contract, award damages on account of its non-performance.[1]

The amount of the damages may be assessed before the Court itself, either with or without a jury, or before a Court of Common Law at *Nisi Prius*, or at the Assizes, or before the sheriff of any county or city, in like manner as is done in cases of writs of inquiry at common law, which are to be executed before a Judge or before the sheriff;[2] or by an inquiry in Chambers.[3]

A plaintiff will not be put to his election[4] because, pending a suit in Equity, he has commenced an action at Law for damages, which he might under this Act obtain in the suit.[5]

[2] Clarkson *v.* Edge, 10 Jur. N. S. 871; 12 W. R. 518, M. R.; Laurence *v.* Austin, 11 Jur. N. S. 576; 13 W. R. 981, M. R.; Franklinski *v.* Ball, 33 Beav. 560; Durell *v.* Pritchard, L. R. 1 Ch. Ap. 244; S. C. *nom.* Darrell *v.* Pritchard, 12 Jur. N. S. 16, L. JJ.; Bauman *v.* Matthews, 4 L. T. N. S. 783, L. C.; Wycombe Railway Co. *v.* Donnington Hospital, L. R. 1 Ch. Ap. 268, 275; 12 Jur. N. S. 347, 349, L. JJ.; Cooke *v.* Forbes, L. R. 5 Eq. 166, V. C. W.; Avery *v.* Griffin, L. R. 6 Eq. 606. 609, V. C. G.; Brook *v.* Archer, W. N. (1868), 5 V. C. W.; Female Orphan Asylum *v.* Waterlow, W. N. (1868), 231, M. R.; Scott *v.* Rayment, L. R. 7 Eq. 112, 116, V. C. G. In such cases, the decree will state that the bill is dismissed without prejudice to an action. Robson *v.* Whittingham, L. R. 1 Ch. Ap. 442; 12 Jur. N. S. 40, L. JJ., see also Jackson *v.* Duke of Newcastle, 3 De G., J. & S. 275; 10 Jur. N. S. 688, 810. [See Starnes *v.* Newsom, 1 Tenn. Ch. 239.]

[3] Collins *v.* Stuteley, 7 W. R. 710, M. R.; Lancaster *v.* De Trafford, 8 Jur. N. S. 873; 10 W. R. 474, M. R.

[4] Wedmore *v.* Mayor of Bristol, 11 W. R. 136, V. C. S.; Catton *v.* Wyld, 32 Beav. 266; Curriers' Company *v.* Corbett, 2 Dr. & S. 355; dismissed at the hearing by the L. JJ., 11 Jur. N. S. 719; 13 W. R. 1056; Betts *v.* Neilson, L. R. Ch. Ap. 429, L. C. Damages assessed in a patent suit, although the patent had expired before the hearing. Davenport *v.* Rylands, L. R. 1 Eq. 302; 12 Jur. N. S. 71, V. C. W.; but see Betts *v.* Gallais, W. N. (1870), 176; 18 W. R. 945, V. C. J.; L. R. 10 Eq. 392. But in Yost *v.* Devault, 9 Iowa, 60, it was held that the Court will not proceed to assess the plaintiff's damages in case specific performance cannot be decreed, unless the petition and prayer be adapted for this, and evidence with a view to this issue be given. The general prayer is not sufficient for the purpose.

[5] Betts *v.* Neilson, L. R. 3 Ch. Ap. 429, L. C.

[6] Betts *v.* De Vitre, 11 Jur. N. S. 9, V. C. W.; and see Hills *v.* Evans, 8 Jur. N. S. 525, 531, L. C. Where damages were not given at the hearing, a supplemental order, directing an inquiry for that purpose, will not be made. Mayor of Hythe *v.* East, 1 W. N. (1866), 18; 14 W. R. 273, V. C. K.

[1] Chinnock *v.* Marchioness of Ely, 2 H. & M. 220; 10 Jur. N. S. 32. The decree was subsequently reversed on the merits. S. C. 11 Jur. N. S. 329; 13 W. R. 597; L. C.; see also Middleton *v.* Magnay, 2 H. & M. 233.

[2] 21 & 22 Vic. c. 27, §§ 3–6.

[3] Mold *v.* Wheatcroft, 27 Beav. 510; Leather Cloth Co. *v.* Hirschfield, L. R. 1 Eq. 299, V. C. W.; Middleton *v.* Greenwood, 2 De G., J. & S. 142; 10 Jur. N. S. 350, V. C. W. and L. JJ.; Curriers' Company *v.* Corbett, 2 Dr. & Sm. 355; 11 Jur. N. S. 719; 13 W. R. 1056, L. JJ. As to the form of the inquiry, see *ibid.*; Seton, 928, No. 3; and as to the evidence on the inquiry, see Mold *v.* Wheatcroft, 30 L. J. Ch. 598, M. R.; Leather Cloth Co. *v.* Hirschfield, L. R. 1 Eq. 299, V. C. W. For the practice as to the assessment of damages, see *post*, §§ 2, 5.

[4] As to election, see *ante*, pp. 815–818.

[5] Anglo-Danubian Navigation Co. *v.* Rogerson, L. R. 4 Eq. 3, M. R.

Where the Court awards damages, and directs a trial as to the amount of such damages before the Court itself, either with or without a jury, or directs a writ of inquiry of damages, or an inquiry as to the amount of damages in any manner, the defendant or other person against whom damages have been awarded may take out a summons before a Judge at Chambers for liberty to pay into Court a sum of money in respect of such damages;[6] and in case such liberty is given, and a sum of money is paid into Court accordingly, then, in the event of a larger sum for damages not being awarded than the amount so paid into Court, the plaintiff or person seeking such damages, will be ordered to pay the costs of such trial or writ of inquiry, or other inquiry, unless the Court otherwise directs.[7]

In general, the Court will not authorize an advance to the parties out of a fund in Court, in order to enable them to proceed to the trial of the issue.[8] It has, however, been permitted under special circumstances.[9]

An order directing the trial of a question of fact or the assessment of damages may be appealed from, in the usual manner;[10] and neither party is, by going to trial, precluded from appealing against the order by which the trial was directed.[11]

* Section II. — *Trials and Assessments before the Court itself, by or without a Jury.* *1083

Where any question of fact, or any question as to the amount of damages, is, in any suit or proceeding, directed by any order to be tried by a jury before the Court itself, or before the Court itself without a jury,[1] the question must be reduced into writing,[2] and copied on paper of the same description and size as that on which bills are printed,[3] by the plaintiff, or such person as the Court shall direct, or by the solicitor for such plaintiff or person. It is then called the "Record for Trial;" and must be filed with the Clerk of Record and Writs in whose division the suit or proceeding may be, within three days after such order has been passed and entered; and must be entered for trial within three

[6] For form of summons, see Vol III.

[7] Ord. XLI. 40. As to the mode of making the payment, see *post*, Chap. XL., *Payment into Court.*

[8] Johnson *v.* Todd, 3 Beav. 218, 221; Nye *v.* Maule, 4 M. & C. 342, 345.

[9] Coombs *v.* Brooks, 3 De G. & S. 452; 13 Jur. 784; and see Gregg *v.* Taylor, 4 Russ. 279, 281.

[10] Hampson *v.* Hampson, 3 V. & B. 41; Nicol *v.* Vaughan, 2 Dow & C. 420; 5 Bligh N. S. 505; see also S. C. *nom.* Earl of Winchilsea *v.* Garetty, 1 M. & K. 253, 257, and see *post*, Chap. XXXII., *Rehearings and Appeals*; but see *post*, 1463, n. (1).

[11] Butlin *v.* Masters, 2 Phil. 290; Parker *v.* Morrell, *ib.* 453; White *v.* Lisle, 3 Swanst. 351, n.; 1 C. P. Coop. t. Cott. 361; but see De Tastet *v.* Bordenave, Jac. 516, 521; 1 C. P. Coop. t. Cott. 361; *ante*, 1075, 1076, in note.

[1] For forms of orders, see Seton, 970, Nos. 1, 2, and 3. After issues have been directed, a new issue not raised on the pleadings will not be added. Morgan *v.* Fuller (No. 1), L. R. 2 Eq. 296, V. C. W.

[2] 21 & 22 Vic. c. 27, §§ 4, 5; 25 & 26 Vic. c. 42, § 3; Ord. XLI. 26.

[3] Ord. XLI. 26, as varied by Ord. 6 March, 1860, r. 16; as to such paper, see Ord. IX. 3, *ante*, p. 396.

days after it has been filed.[4] Upon production to the Registrar of a certificate of the Clerk of Records and Writs that the "Record for Trial" has been filed, the same will be set down for trial in the cause-book of the Judge to whose Court the suit or proceeding is attached, and be marked "Trial by Jury," or "Trial before the Court without a Jury," as the case may be; and either party may then apply to the Court to fix a day for the trial.[5] This application should be made by motion or summons, with the consent of, or on notice to, the opposite party.[6]

The Court may make all such rules and orders upon the sheriff, or any other person, for procuring the attendance of a special or common jury for the assessment of damages, or the trial of a question of fact, as may be made by any of the Superior Courts of Common Law at Westminster; and may also make any other orders which to the Court may seem requisite; and every such jury is to consist of persons possessing the qualifications, and be struck, summoned, balloted for, and called in like manner, as if such jury were a jury for the trial of any cause in any of the Superior Courts; and every juryman so summoned is entitled to the same rights, and subject to the same duties and liabilities, as if he had been duly summoned for the trial of any such cause in any of such Superior Courts; and every party to any such proceeding is entitled to the same rights as to challenge and otherwise as if he were a party to any such cause; and, generally, for all purposes of, or auxiliary to, the assessment of damages of the trial, of
*1084 * questions of fact, by a jury before the Court itself, the Court has the same jurisdiction, powers, and authority in all respects as belong to any Superior Court of Common Law, or to any Judge thereof, for the like purposes.[1]

Where the Court orders a question of fact, or a question as to the amount of damages, to be tried by a special jury, a direction to that effect must be contained in the order directing the trial;[2] and in such case the plaintiff, or such person as the Court directs, must, ten days at the least before the day fixed for the trial, obtain, on motion or petition as of course, and serve on the sheriff, or, if he is interested in the matter in question, then upon the coroner, and on the opposite party, an order for a special jury.[3] The expense of the special jury is, in the first instance, to be borne and paid by the plaintiff, or such other person; but is afterwards to be paid and borne as the Court directs.[4]

[4] Ord. XLI. 26. See Morgan *v.* Fuller (No. 1), L. R. 2 Eq. 296, V. C. W. *supra* (5). For forms of Records for Trial, see Ord. Sched. N., Nos. 1 and 2; and *post*, Vol. III.

[5] Ord. XLI. 28. As to advancing trial, see Hoffman *v.* Postel, W. N. (1868), 250, V. C. G. The Court sometimes fixes the day, by the order directing the trial; see Seton, 970. No. 1.

[6] The costs of a brief to counsel to fix a day will in general be allowed. Clark *v.* Malpas, 31 Beav. 554, 558. For form of summons, see Vol. III.

[1] 21 & 22 Vic. c. 27, § 3. The practice at Law throughout this chapter is extracted, by permission, from the 11th edition of Chitty's Archbold; the text being preserved, except where it was clearly inapplicable to proceedings in Chancery.

[2] Ord. XLI. 27; see Seton, 970, No. 1. There is no appeal from such an order; Shrubsole *v.* Schneider. 12 W. R. 359, L. C.

[3] For form of order, see Ord. Sched. N., No. 4; and Vol. III.; and for forms of motion paper and petitions, see *ibid*

[4] Ord. XLI. 30.

Where the Court has not specially directed the question to be tried by a special jury, either party may, fourteen days at the least before the day fixed for the trial, obtain, on motion or petition of course,[5] an order for a special jury: which order must be served on the opposite party twelve days at the least, and on the sheriff or coroner ten days at the least, before the day fixed for the trial; and the expense of the special jury is in the first instance to be borne by the party obtaining the same; but if the Court, upon the trial, is of opinion that it was proper that the trial should be had by a special jury, the Court may give such directions as to the costs thereof as it thinks fit.[6]

Where the trial is to take place by a common jury, the plaintiff, or such person, must, ten days at the least before the day fixed for the trial, obtain, on motion or petition as of course, and serve on the sheriff or coroner, an order for the sheriff or coroner to summon a common jury for the trial.[7]

Where an order has been made for a special jury, the sheriff or coroner must, in addition to the special jury, summon twelve common jurymen for the trial, in order that, in the event of a sufficient number of special jurors not being in attendance to make a jury, a *tales* may be directed by the Court, or prayed for by either party.[8]

The mode and practice of proceeding to nominate and reduce a special jury are the same, in all respects, as are for the time being in force in the Superior Courts of Common Law, when a special *jury is ordered to be struck, or as near thereto as the practice *1085 of the Court of Chancery will admit.[1] By the Juries' Act, 1870, special juries for London and Middlesex are to be provided in the same manner as in other counties;[2] and the former practice of nominating and reducing special juries in London and Middlesex is to cease, except that any of the Superior Courts, or any Judge thereof, may order that a special jury be struck according to the former practice.[3] It is therefore expedient to state the former practice, where a cause was to be tried before a special jury of the county of Middlesex; which was as follows:[4] On serving the sheriff with the order for a special jury,[5] an appointment was obtained to nominate the jury before the under-sheriff;[6] a copy of such appointment had to be served on the opposite party. At the time so appointed, the parties attended before the under-sheriff, when the jurors' book was produced and the special jurors' list, and numbers written on pieces of parchment or card, corresponding with the names in such list. The under-sheriff then put the numbers

[5] For forms of motion paper and petition, see Vol. III.

[6] Ord. XLI. 31.

[7] Ord. XLI. 29. For form of order, see Ord. Sched. N., No. 3; and Vol. III.; and for forms of motion paper and petition, see *ibid.*

[8] Ord. XLI. 32.

[1] 21 & 22 Vic. c. 27, § 3; Ord. XLI. 38

[2] 33 & 34 Vic. c. 77, § 16. See, for the mode of summoning a special jury in the counties, Chitty's Arch. 366, 367.

[3] The Juries' Act, 1870 (33 & 34 Vic. c. 77), § 17.

[4] See Chitty's Arch. 369 *et seq.*

[5] *Ante*, p. 1084.

[6] 15 & 16 Vic. c. 76, § 110. In London, the special jury is nominated and struck before the secondary. *Ibid.*

into a box, and, having shaken them together, drew out forty-eight of them one after another, and, as each number was drawn, referred to the corresponding number in the special jurors' list, and read aloud the name designated by such number. At the time of reading each name, either party or his solicitor might object to such person named as being incapacitated from serving on the jury; and if he proved the same to the satisfaction of the under-sheriff, such name was set aside and another number drawn instead: which might in like manner be challenged; and so on, until forty-eight names were chosen. If the whole of the forty-eight names could not be obtained in this way, the under-sheriff might nominate the remainder.[7] The clerk of the under-sheriff furnished each party with a list of the names of the forty-eight jurors, their additions, and places of abode. He also gave out another appointment for the purpose of striking them: which had to be served on the opposite solicitor. At the time so appointed the parties again attended the under-sheriff; who then struck out twelve names for each party, at their desire, beginning with the plaintiff; or, if either of the solicitors did not attend, the under-sheriff proceeded *ex parte*, and struck out twelve names for the party absent.[8] The clerk to the under-sheriff then made out lists of the twenty-four names remaining, and gave them to the solicitors. At Law, a Judge might make an order to oblige a party to proceed to the striking of a special jury;[9] and *1086 it was no objection that there had * been a change of sheriffs after the forty-eight were nominated, and before the parties attended to strike the jury.[1]

The order for a common or special jury must be returned by the sheriff or coroner to the solicitor or person who has lodged the same, together with his return, and the jury panel; and the order and jury panel must, two days at the least before the day of trial, be left with the Clerk of Record and Writs, to be annexed to the Record for Trial.[2]

Either party may apply, by summons to a Judge at Chambers, for a view by the jury summoned for any trial; and on the hearing of such summons, each party is to name a shower for such view.[3] The summons for a view, and the order to be made thereon, must state the place at which the view is to be made, and the distance thereof from the office of the under-sheriff. The sum to be deposited in the hands of the under-sheriff is 10*l.* in case of a common jury, and 16*l.* in case of a special jury, if such distance does not exceed five miles, and 15*l.* in case of a common jury, and 21*l.* in case of a special jury, if it is above five miles. If such sum is more than sufficient to pay the ex-

7 See 6 Geo. IV. c. 50. § 32.
8 See White *v.* Eastern Union Railway Company, 11 C. B. 875; 21 L. J. C. P. 112.
9 Joseph *v.* Perry, 3 Dowl. 699.
1 Rex *v.* Hart, Cowp. 412.
2 Ord. XLI. 33.
3 Ord. XLI. 36. As to a view see Taylor on Evid. §§ 502-505 A.; Best, 197. For form of order for a view, see Ord. Sched. N., No. 5, and Vol. III.; and for form of summons, see *ibid.*

penses of the view, the surplus will be forthwith returned to the solicitor or party who obtained the view. If such sum is not sufficient to pay such expenses, the deficiency is to be forthwith paid by such solicitor or party.[4]

The proceedings after an order for a view has been made are the same in all respects as are in force in the Superior Courts of Common Law where a view is to be had, or as near thereto as the practice of the Court of Chancery will admit.[5] It seems, therefore, that the order, when passed and entered, should be left at the sheriff's office, together with a list of the jury, where it is special, and the jurymen have been struck. The under-sheriff will then summon the special jurymen, or, in the case of a common jury, he will summon such of the common jurymen as he thinks fit. The expenses of the view must be deposited with the under-sheriff.

On the day appointed for the trial, and previously to the commencement thereof, the record for trial, with the return and jury panel (if any) annexed thereto, is transmitted by the Clerk of Records and Writs to the Registrar of the Court in attendance; and a copy thereof must be left for the Judge before whom the trial is appointed to be had, by the person at whose instance the same has been entered for trial.[6]

Either party may sue out, at the Record and Writ Clerks' Office, *subpœnas ad testificandum*, and *subpœnas duces tecum*, to compel the attendance of witnesses on any trial, according to the forms in * use in the Court of Chancery, or as near thereto as the circum- *1087 stances of each case will admit.[1]

Upon every trial by a jury before the Court itself, the Court has the same powers, jurisdiction, and authority as belong to any Judge of any of the Superior Courts of Common Law sitting at *Nisi Prius*;[2] and where the question is tried before the Court itself without a jury, the evidence may be taken by the oral examination of witnesses and other proofs in open Court; and the verdict of the Judge has the same effect as the verdict of a jury; and the proceedings upon and after such trial, as to the power of the Court, the evidence, and otherwise, are the same as in the case of a trial by a jury.[3]

All persons between twenty-one and sixty, possessing the property necessary by law to qualify them to serve on juries, may be jurors, with the following exceptions: namely, aliens, unless, being otherwise

[4] Ord. XLI. 37; which order also specifies the mode in which the under-sheriff is to pay and account for the money so deposited. [See Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80.]

[5] Ord. XLI. 38. For the practice at Law, see Chitty's Arch. 371, 372.

[6] Ord. XLI. 41.

[1] Ord. XLI. 51. As to documentary evidence, see *ante*, p. 862 *et seq.*; 21 & 22 Vic. c. 27, § 7; and as to compelling the attendance of witnesses, see *ante*, p. 912. For forms of *subpœnas* and notice to admit documents, see Vol. III.

[2] 21 & 22 Vic. c. 27, § 4. As to the functions of the Judge, as distinguished from those of the jury, see Taylor on Evid. §§ 21–41; Best, § 82; Powell, 7–17.

[3] 21 & 22 Vic. c. 27, § 5; and see Fernie *v.* Young, L. R. 1 H. L. 63; 12 Jur. N. S. 437. For directions as to the briefs of counsel, see Vol. III.

qualified, they have been domiciled in England or Wales for ten years, or upwards;[4] persons attainted of treason or felony, or of any crime that is infamous, unless they have obtained a free pardon; and men under outlawry.[5]

The following persons are exempted from serving on juries: namely, peers; members of parliament; judges; clergymen; Roman Catholic priests; ministers of any congregation of Protestant dissenters and of Jews, whose place of meeting is duly registered, provided they follow no secular occupation, except that of a schoolmaster; serjeants, barristers-at-law, certified conveyancers and special pleaders, if actually practising; members of the society of doctors of law and advocates of the civil law, if actually practising; attorneys, solicitors, and proctors, if actually practising, and having taken out their annual certificates, and their managing clerks, and notaries public in actual practice; officers of the Courts of Law and Equity, and of the Admiralty and Ecclesiastical Courts, including therein the Courts of Probate and Divorce; and the clerks of the peace, or their deputies, if actually exercising the duties of their respective offices; coroners; jailers and keepers of houses of correction, and all subordinate officers of the same; keepers in public lunatic asylums; members and licentiates of the Royal College of Physicians in London, if actually practising as physicians; members of the Royal Colleges of Surgeons in London, Edinburgh, and Dublin, if actually practising as surgeons; apothecaries certified by the Court of Examiners of the Apothecaries' Company, and all registered *1088 medical practitioners and registered * pharmaceutical chemists, if actually practising as apothecaries, medical practitioners, or pharmaceutical chemists respectively; officers of the navy, army, militia, and yeomanry, while on full pay; the members of the Mersey Docks and Harbor Board; the masters, wardens, and brethren of the corporation of Trinity House of Deptford Strand; pilots licensed by the Trinity House of Deptford Strand, Kingston-upon-Hull or Newcastle-upon-Tyne, and all masters of vessels in the buoy and light service, employed by either of those corporations, and all pilots licensed under any Act of Parliament or charter for the regulation of pilots; the household servants of her Majesty, her heirs and successors; officers of the post office; commissioners of customs and officers, clerks or other persons acting in the management or collection of the customs; commissioners of inland revenue, and officers or persons appointed by the commissioners of inland revenue, or employed by them or under their authority or direction in any way relating to the duties of inland revenue; sheriff's officers; officers of the rural and metropolitan police; magistrates of the Metropolitan Police Courts, their clerks, ushers, doorkeepers and messengers; members of the council of the municipal corporation of any borough, and every justice of the peace assigned to keep the peace

[4] The Juries' Act, 1870 (33 & 34 Vic. c. 77), § 8.

[5] The Juries' Act, 1870 (33 & 34 Vic. c. 77), § 10.

therein, and the town clerk and treasurer for the time being of every such borough, so far as relates to any jury summoned to serve in the county where such borough is situate; burgesses of every borough in and for which a separate Court of Quarter Sessions shall be holden, so far as relates to any jury summons for the trial of issues joined in any Court of General or Quarter Sessions of the Peace in the county wherein such borough is situate; justices of the peace, so far as relates to any jury summoned to serve at any sessions of the peace for the jurisdiction of which he is a justice; and officers of the Houses of Lords and Commons;[1] but no person whose name is in the jury book as a juror is entitled to be excused from attendance on the ground of any disqualification or exemption, other than illness, not claimed by him at or before the revision of the lists.[2] No person is to be summoned to serve on any jury or inquest (except a grand jury) more than once in any one year, unless all the jurors have been already summoned to serve during such year; but no person is to be exempted from serving as a common juror by reason of his being on any special jury list, or being qualified to serve as a grand juror; and no person is to be summoned or liable to serve as a juror in more than one Court on the same day.[3] In Middlesex, no person is to be returned to serve on a jury at *Nisi Prius* who has served as a juror in either of the two preceding terms or vacations: having the sheriff's certificate of having so *served;[1] which certificate the sheriff is bound to give to every *1089 common juror serving or attending as such, but not to grand or special jurors;[2] and if any sheriff returns a person as juror within the times above mentioned, the Court, on examination and proof of such offence in a summary way, may set such fine upon the offender as the Court thinks meet.[3]

In all these cases of exemption, the party, if summoned, should either attend and claim his privilege,[4] or should get some person to attend for him, who will be able to satisfy the Court as to his title to such exemption.

Every man is qualified and liable to serve on juries, who is between the ages of twenty-one years and sixty, — and has, within the county in which he resides, in his own name, or in trust for him, 10*l.*, by the year above reprizes, in lands or tenements of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of such lands or tenements, or in lands, tenements, and rents taken together, in fee-simple, fee-tail, or for the life of himself or some other person, — or has, within the same county, 20*l.* by the year above reprizes, in lands or tenements held by lease for twenty-one years or longer, or for a term

[1] The Juries' Act, 1870 (33 & 34 Vic. c. 77), § 9, and Schedule.
[2] The Juries' Act, 1870 (33 & 34 Vic. c. 77), § 12.
[3] The Juries' Act, 1870 (33 & 34 Vic. c. 77), § 19.

[1] 6 Geo. IV. c. 50; and 2 & 3 Vic. c. 71, § 42.
[2] 2 & 3 Vic. c. 71, § 40; *Ex parte* Atkinson, 10 Bing. 339; 2 Dowl. 773; 4 M. & Sc. 160.
[3] 6 Geo. IV. c. 50, § 42.
[4] Trial per Pais, 87.

of years determinable on any life or lives, — or, being a householder, is rated or assessed to the poor-rate, or to the inhabited house duty, in Middlesex, on a value of not less than 30*l.*, or in any other county on a value of not less than 20*l.*, or occupies a house containing not less than fifteen windows.[5]

In London, a juror must be a householder, or the occupier of a shop, warehouse, counting-house, chambers, or office, for the purpose of trade or commerce, within the city, and have lands, tenements, or personal estate of the value of 100*l.*[6]

All those described in the jurors' book as esquires or persons of higher degree, or as bankers or merchants, are qualified and liable to serve on special juries.[7]

If any man summoned to attend on a jury does not attend in pursuance of such summons, or being thrice called over, does not answer to his name; or, if any such man, or any talesman, after being called, is present, but does not appear, or after appearance wilfully withdraws himself from the presence of the Court: the Court is to set such fine upon him as it thinks meet, and in the case of a viewer not less than 10*l.*, unless some reasonable excuse be proved by oath or affidavit.[8] The Court will not hear counsel for a juryman who has been fined for a contempt.[9]

The under-sheriff causes the name, addition, and place of abode *1090 * of each person, summoned and impanelled to serve on the jury, to be written on distinct pieces of parchment or card: which are put into a box provided for that purpose; and when the cause is called on, the Registrar draws out twelve[1] of these pieces of parchment or card, one after another, and calls the jurors' names written thereon;[2] and if any of the jurors, whose names are so drawn, do not appear, or, if challenged, the challenge be allowed, then other names are drawn, until twelve jurors appear, and, after all causes of challenge allowed, remain as fair and indifferent; and these twelve persons being sworn, on their names being marked in the panel, are the jury to try the issue; and their names must be kept apart until they return their verdict, and must then be returned to the box; but where a jury are once drawn, they may afterwards (if not objected to) be sworn in other causes, without being redrawn; and if any be challenged or withdrawn by consent, the Court may order them to be set aside, and other names drawn in their stead.[3] Where a view, however, has been had, the jurors who

[5] 6 Geo. IV. c. 50, § 1.
[6] 6 Geo. IV. c. 50, § 50.
[7] 6 Geo. IV. c. 50, § 31. The Juries' Act, 1870 (33 & 34 Vic. c. 77), § 6.
[8] 6 Geo. IV. c. 50, §§ 38-51; see now 25 & 26 Vic. c. 107, § 12. As to the mode of summoning the jury, see *ib.* § 11.
[9] Carne *v.* Nicholl, 1 Scott, 68; 3 Dowl. 155; but the Court will attend to affidavits, stating circumstances in extenuation of his conduct.

[1] See Muirhead *v.* Evans, 15 Jur. 385, Ex., where thirteen, by mistake were sworn on the jury, and the Judge discharged the jury, and had them called again.
[2] Ord. XLI. 42. If the trial continues beyond one day it is usual at the sitting of the Court, on any subsequent day, to call over the names of the jury again.
[3] 6 Geo. IV. c. 50, § 22.

had it are to be called first, and then other jurors must be called to make a complete jury.[4]

A special jury is balloted for and called in the order in which they are drawn from the box, in the same manner as common jurors.[5]

When the jury come to the book to be sworn, either party may challenge them.

Where the trial has been specially directed by the Court to be by a special jury, then, in the event of there not being a sufficient number of special jurymen in attendance, it is in the discretion of the Court whether or not to have the jury made up from the common jurymen in attendance;[6] and where a special jury has been summoned at the instance of either party, without the special direction of the Court, then, in the event of a sufficient number of special jurymen not being in attendance, the jury will, unless the Court otherwise directs, be made up from the common jurymen in attendance, on the application of either party.[7] The number of common jurymen wanted is made up by drawing the names of common jurors out of the box; and it is presumed that, in such case, or where the trial is to take place by a common jury, and a sufficient number of jurors do not appear, or after challenge do not remain, to make a jury, the Court may, as at Law, upon the request of either party, direct the sheriff to name and appoint so many other able men of the same county, then present, as will
* make up a full jury; and that the sheriff must thereupon *1091
return such men duly qualified as shall be present or can be found to serve on such jury, and add and annex their names to the former panel.[1]

When a full jury appear,[2] either party may challenge them for cause:[3] as well the talesmen,[4] as the jurors originally returned.[5] Challenges are of two kinds: I. To the array; and, II. To the polls; and each of these is again subdivided into: Principal challenges; and, Challenges to the favor. In this order they will now be considered.

I. A challenge to the array is an objection to all the jurors returned by the sheriff, collectively:[6] not for any defect in them, but for some partiality or default in the sheriff, or his under-officer, who arrayed the panel.[7] This is either, 1. A principal challenge; or, 2. A challenge to the favor.

1. The causes of principal challenge to the array are such as the following; namely, that the sheriff or other returning officer is of kindred

4 6 Geo. IV. c. 50, § 24; see 15 & 16 Vic. c. 76, § 114; and *ante*, p. 1086.

5 15 & 16 Vic. c. 76, §§ 108, 110. The Juries' Act, 1870 (33 & 34 Vic. c. 77), § 16. In Chancery it is not customary to ballot for a special jury, but to call their names indiscriminately from the panel.

6 Ord. XLI. 32, 34.

7 Ord. XLI. 35.

1 6 Geo. IV. c. 50, § 37; Chitty's Arch. 383; and see 21 & 22 Vic. c. 27, § 3, *ante*, p. 1084.

2 R. *v.* Edmonds, 4 B. & Ald. 471.

3 There is no right of peremptory challenge of special jurors summoned at the assizes under the C. L. P. Act, 1852, § 108; Creed *v.* Fisher, 18 Jur. 228, Ex.

4 6 Geo. IV. c. 50, § 37.

5 See Barrett *v.* Long, 3 H. L. Ca. 395.

6 Co. Litt. 156, 158; see O'Connell *v.* The Queen, 11 Cl. & Fin. 155; 9 Jur. 25.

7 3 Bla. Com. 359. For form of challenge to the array, see Chitty's Forms, 229; and Vol. III.

or affinity to the plaintiff or defendant, if the affinity continue; that one or more of the jury are returned at the nomination of the plaintiff or defendant; that an action of battery is pending at the suit of the plaintiff or defendant against the sheriff, or at the suit of the sheriff against the plaintiff or defendant; that an action of debt is pending at the suit of the plaintiff or defendant against the sheriff, but not if by the sheriff against the plaintiff or defendant; that the sheriff or returning officer holds lands depending upon the same title with that in litigation between the parties; that the sheriff is under the distress of the plaintiff or defendant; that the sheriff is counsel, attorney,[8] officer, servant, or gossip of either party; or is an arbitrator in the same matter, and has treated thereof.[9]

2. The causes of challenge to the array for favor are such as imply, at least, a probability of bias or partiality in the sheriff, but do not amount to a principal challenge: thus, that the plaintiff or defendant is tenant to the sheriff; or that the son of the sheriff has married the daughter of the plaintiff or defendant; or the like.[10]

What has been said here as to the challenges to the array must, perhaps, be understood as having reference only to common, and not to special juries: for it seems very doubtful if the array in *1092 * special jury causes can be challenged.[1] Nor indeed are challenges to the array very usual in common jury causes: for, if there be an objection to the sheriff, the jury may be summoned by the coroner;[2] besides, this objection would be a good ground for a new trial.[3]

II. A challenge to the polls is an exception to one or more of the jurors who have appeared individually; and this is either: 1. A principal challenge; or, 2. A challenge to the favor.

1. The causes of principal challenge to the polls may be classed under the following heads: (1.) Challenge *propter honoris respectum:* as if a Lord of Parliament be put upon a jury, he may challenge himself, or he may have a writ of privilege for his discharge; but it is doubtful if either party can challenge him: for he is merely exempted from serving.[5]

(2.) Challenge *propter defectum:* that the juror is not qualified to serve upon a jury.[6] Thus, that he has not sufficient property, or is not otherwise qualified: in which case, he shall be discharged, if the Court be satisfied of the fact,[7] but this does not extend to special jurors; that he is an alien:[8] unless the juror be a special one;[9] that he is within the age of twenty-one;[10] or that he is an idiot or lunatic.[11] But a matter which merely exempts a man from serving on a jury, and does not

[8] Baylis *v.* Lucas, Cowp. 116.
[9] Co. Litt. 156.
[10] *Ibid.*
[1] 6 Geo. IV. c. 50, § 27; R. *v.* Johnson, 2 Str. 1000; R. *v.* Burridge, 1 Str. 593; 2 Ld. Raym. 1364.
[2] See Ord. XLI. 29, 30, 31.
[3] Baylis *v.* Lucas, Cowp. 112.
[4] Co. Litt. 156; 2 Hawk. c. 43, § 11; 3 Bla. Com. 361.
[5] By 6 Geo. IV. c. 50, § 2.
[6] *Ante*, p. 1089.
[7] 6 Geo. IV. c. 50, § 27; Co. Litt. 156.
[8] Co. Litt. 156.
[9] Semble, R. *v.* Despard, 2 M. & R. 406; 8 B & C. 417.
[10] Co. Litt. 157; and see Geo. IV. c. 50, § 1; *ante*, p. 1089.
[11] Gilb. C. B. 95.

incapacitate him, can never be a cause of challenge; and it is said,[12] that if a person thus exempted be summoned, and appear, he cannot excuse himself from serving on a jury, if there be not a sufficient number of jurors without him. Where a juror is erroneously named in the panel, &c., and sworn by such wrong name: if the error be in the Christian name, it amounts only to a matter of challenge, and cannot be objected to after verdict;[13] if in the surname, the Court, it seems, may set aside the verdict,[14] and grant a new trial; but will not do so unless the mistake has been productive of some injustice.[15]

(3.) Challenge *propter affectum:* by reason of some supposed bias or partiality. Thus, that the juror is of kin to either party within the ninth degree,[16] or, according to Lord Coke, however remote the kindred;[17] that there is affinity or alliance by marriage * between *1093 the juror and one of the parties, if such affinity continue, or if there be issue of the marriage alive: for, otherwise, it would be but a challenge to the favor;[1] that the juror is godfather to the party's child, or the party godfather to the juror's child; that the juror has land which depends upon the same title as the land in question; in a cause where the parson of a parish is party, and the right to the church comes in debate, that the juror is a parishioner; and so, in all other cases where the juror has an interest in the action, direct or collateral;[2] that the juror has before given a verdict in the same cause, or upon the same title or matter, though between other parties; that he was chosen arbitrator in the same cause by one of the parties, and had entered upon an examination of it: but otherwise, if he were chosen indifferently by both parties; that he is counsellor, servant, or of fee, of either party;[3] that he is tenant of either party;[4] that he is of the same society or corporation with either party:[5] but that he is his fellow-servant is but a challenge to the favor;[6] that he has taken information of the case before he is sworn;[7] that he has declared his opinion of the case beforehand;[8] that since he has been returned, he has eaten or drunk at the expense of one of the parties:[9] but that one of the parties has lately been entertained at the juror's house, is only matter of challenge to the favor;[10] that one of the parties has labored the juror, and given him money or other things for giving his verdict; but if the party only labor the juror to appear and act conscientiously, it is no matter of challenge whatever; or that an action, implying malice or displeasure, is pending between the juror and one of the parties: but if not implying malice, &c., it is but matter of chal-

12 2 Hawk. c. 43, § 26.

13 Wray *v.* Thornes, Willes, 488; Hill *v.* Yates, 12 East, 230 a.

14 Norman *v.* Beaumont, Willes, 484; Barnes, 453; Dovey *v.* Hobson, 6 Taunt. 460; 2 Marsh. 154; and see Russell *v.* Ball, Barnes, 455.

15 See Chitty's Arch. 1509.

16 Finch, L. 401; 3 Bla. Com. 363; see Barrett *v.* Long, 3 H. L. Ca. 395.

17 Co. Litt. 157.

1 Co. Litt. 157.

2 See Bailey *v.* Macaulay, 13 Q. B. 815; Williams *v.* Great Western Railway Company, 28 L. J. Ex. 2.

3 Co. Litt. 157.

4 Gilb. C. B. 95.

5 3 Bla. Com. 363.

6 Co. Litt. 157.

7 2 Hale, 306.

8 2 Hawk. c. 43, § 28.

9 Co. Litt. 157.

10 Anon., 3 Salk. 81.

lenge to the favor.[11] In an action against an insurance office on a life policy, it is no objection to a special juror being sworn that he is a director of another insurance office: unless that office has granted a policy on the life in question, and the amount of that policy is unpaid.[12]

(4.) Challenge *propter delictum:* when, for some act of the juror, he has ceased to be, in consideration of Law, *probus et legalis homo.* Thus, that he has been attainted of treason or felony, or convicted of any crime that is infamous of which he has not obtained a free pardon;[13] or that he is under outlawry or excommunication.[14]

*1094 * 2. The challenge to the polls for favor is of the same nature with the principal challenge *propter affectum*, but of an inferior degree. The general rule of law is, that the juror shall be indifferent; and if it appear probable that he is not so, this may be made the subject of challenge, either principal or to the favor according to the degree of probability of his being biassed. The cause of a principal challenge to the polls, we have seen, is such matter as carries with it, *primâ facie*, evident marks of suspicion either of malice or favor. But when, from circumstances, it appears probable that a juror may be biassed in favor of or against either party, and yet such circumstances do not amount to matter for a principal challenge, it may then be made a challenge to the favor. The effect of these two species of challenge is the same; the only difference between them is in the mode of trying them.

No challenge, either to the array or to the polls, can be made before a full jury have appeared.[1] It is immaterial which party challenges first; but the party who first begins to challenge must finish all his challenges before the other begins: otherwise, he is precluded from making any further challenge; and the challenges of the party who challenged first must be first tried.[2]

The challenge to the polls is made *ore tenus;* and it is not in general required that the party challenging shall immediately declare his cause of challenge: unless there be not a sufficient number of jurors remaining on the panel, or the other side challenges *touts par avail.*[3] But if the juror were formerly sworn in the same cause, and is now challenged (in which case the cause of challenge must have arisen since the jury was before sworn), or if, after a challenge to the array is tried and overruled, the party challenges the polls, the party must declare his cause of challenge presently.[4] If a juror is challenged, and the challenge tried and overruled, he may still be challenged by the opposite party.[5] The challenge to the array must be in writing.[6]

[11] Co. Litt. 157.
[12] Craig *v.* Fenn, Car. & M. 43.
[13] 6 Geo. IV. c. 50, § 3.
[14] 2 Hawk. c. 43, § 1; and see Brunskill *v.* Giles, 2 M. & Sc. 41; 9 Bing. 13.
[1] 2 Hawk. c. 43, § 1; and see Brunskill *v.* Giles, 2 M. & Sc. 41; 9 Bing. 13.
[2] Trial per Pais, 144.
[3] Trial per Pais, 143.
[4] Co. Litt. 158.
[5] *Ibid.*
[6] For forms of challenges see the following cases: that the jury were returned at the instance of the party, 2 Burn J. 868; that the sheriff is of kin to one of the parties, *ibid.*; that the sheriff is an alderman and interested in the event of the trial, Cr. Cir. Comp. 105; that the sheriff is a citizen and a freeman, and has paid a sum of money towards defraying the expenses of the suit, *ibid.*; and for a

A challenge to the array or to the polls ought to be propounded in such a way at the trial that it may be then put upon the record, so that the other party may either demur, or counterplead, or deny the matter of challenge; and unless the challenges are so put upon the record, the party is not in a condition, as a matter of * right, to *1095 insist upon them.[1] Although the Court would probably, in some cases, where a valid challenge has been made and overruled, but omitted to be put upon the record, grant a new trial, they will not do so where the party must have been aware of the ground of challenge before the trial, and might, by moving to change the venue, have obviated the objection.

As to challenges to the array, it lies entirely in the discretion of the Court how they shall be tried: sometimes they are tried by two of the coroners, sometimes by two of the jury.[2] If the challenge, however, is a principal challenge, it may be tried by the Court itself, without the aid or intervention of triers. If the array be quashed as to the sheriff, the jury will be summoned by the coroner: if quashed as to the coroner, then the jury will be summoned by persons appointed by the Court for that particular purpose, called elisors: to whose array no challenge is allowed.[3] If the array be not quashed, the party may then make his challenges to the polls.

Challenges to the polls, if to the favor are thus tried: If two jurors have been already sworn, they try the challenge; if not, the Court appoints two indifferent persons to try it, who are thence named triers. If the triers try one juror, and he be found indifferent, he is sworn, and then he and the two triers try the next. When another is found indifferent, the two triers are superseded, and the first two so sworn on the jury try the next.[4] An oath is previously administered to those who try the challenge.[5] But where the challenge to the polls is the principal challenge, it is tried by the Court without the aid or intervention of triers, and indeed, in both cases of principal challenge and challenge to the favor, in trials at *Nisi Prius*, the associate or Master, upon an objection to any particular person in the panel being intimated to him, will in general refrain from calling him.

The juror himself may be examined as to the matter of challenge, provided it do not tend to his dishonor or discredit.[6]

After the challenge is decided, if the juror is found indifferent, he is immediately sworn on the jury; if otherwise, he is desired to quit the jury box, and the officer proceeds to swear the next juror, if not chal-

counter plea to this last challenge, and a demurrer to the counter plea, *ibid.*; see also, Trial per Pais, 159–187; 10 Went. 472; 2 Rich. Prac. C. B. 180; Lil. Ent. 472; R. *v.* Hughes, 1 Car. & K. 235; and see Chitty's Arch. 437; Chitty's Forms, 229; and Vol. III.

[1] Mayor, &c. of Carmarthen *v.* Evans, 10 M. & W. 274; 2 Dowl. N. S. 290; and see R. *v.* Edmonds, 4 B. & Ald. 471.

[2] 2 Hale, 275.

[3] Co. Litt. 158.

[4] *Ibid.*

[5] Anon., 1 Salk. 152. For form of oath, see Chitty's Arch. 438; and Vol. III.

[6] Co. Litt. 158; Anon., 1 Salk. 153; and see R. *v.* Edmonds, 4 B. & Ald. 471. As to when the sheriff may be examined, see 1 Car. & K. 235.

lenged. If a juror is challenged and rejected, he cannot afterwards be sworn as a talesman.[7]

After a full jury appears, the jurors, if not challenged, are sworn *1096 * by the Registrar to try the question ordered to be tried by the jury, and a true verdict to give thereon according to the evidence.[1] The trial then proceeds.

If the affirmative of the issue is on the plaintiff, he, as a general rule, has a right to begin.[2] Therefore, on an issue, to try whether A. B. was at a certain time of sound mind, the plaintiff was held entitled to begin, as he affirmed the soundness.[3] In considering, however, which party ought to begin, it is not so much the form of the issue which is to be considered as the substance and effect of it; and the Judge will consider what is the substantial fact to be made out, and on whom it lies to make it out.[4] And it seems that, as a general rule, the party entitled to begin is he who would have a verdict against him if no evidence were given on either side.[5]

The senior counsel for the party who has the right to begin states, to the jury, or to the Court, as the case may be, the facts, and circumstances of the case, the substance of the evidence he has to adduce, and its effect in proving the case stated; and he remarks upon any point of law on which, together with the matters of fact, the jury will have to found their verdict.[6] Counsel should not state facts which he cannot go into evidence to prove;[7] but he is not generally very strictly confined to the case opened by him:[8] though, of course, any misstatement made by him may prejudice his case with the jury, or the Court.

The plaintiff's counsel also sometimes, in opening his case, states the matter of defence, and the evidence by which he can disprove it.[9] He is at liberty, whether the defence be known or not, either at once to enter into the whole of his case, or to make out a *primâ facie* case only, and to reserve his answer to the defendant's case; but, as a general rule, he cannot answer part of the defendant's case in his opening, and

7 Parker *v.* Thornton, 2 Ld. Raym. 1410; 1 Str. 640.

1 21 & 22 Vic. c. 27, § 4; Ord. XLI. 42. For form of oath, see Ord. Sched. N., No. 7; and Vol. III.

2 As to the right to begin, see Taylor on Evid. §§ 349–360; Best, §§ 639–641; Powell, 186.

3 Per Erskine J. in Frank *v.* Frank, 2 M. & Rob. 314.

4 Ashby *v.* Bates, 15 M. & W. 589, an action on a life-policy. Soward *v.* Leggatt, 7 C. & P. 613; Ridgway *v.* Ewbank, 2 M. & Rob. 217.

5 Belcher *v.* M'Intosh, 8 C. & P. 720; Doe Worcester Trustees *v.* Rowland, 9 C. & P. 734; and see Osborn *v.* Thompson, *ib.* 337; 2 M. & Rob. 254; Cooper *v.* Egginton, 8 C. & P. 748; Hudson *v.* Brown, *ib.* 774; Amos *v.* Hughes, 1 M. & R. 464; Birt *v.* Leigh, 1 C. & K. 611; Ridgway *v.* Ewbank, 2 M. & Rob. 217; Geach *v.* Ingall, 14 M. & W. 95, per Alderson B.; Leete *v.* Gresham Life Insurance Society, 15 Jur. 1161, Ex.; Booth *v.* Milns, 15 M. & W. 669.

6 See Plunkett *v.* Cobbett, 5 Esp. 136; 2 Selw. N. P. 142. The rules of the Courts of Common Law will be followed, as far as the questions of fact are concerned. Daw *v* Eley, 11 Jur. N. S. 923; 14 W. R. 48, V. C. W.

7 Per Lord Denman, in Howard *v.* Gossett, Car. & M. 380. As to counsel, in his address to the jury, referring to matter of history, &c., see Darby *v.* Ouseley, 1 H. & N. 1; 2 Jur. N. S. 497.

8 Kirkman *v.* Jervis, 7 Dowl. 678; Murray *v.* Butler, 1 Esp. 105; Penson *v.* Lee, 2 B. & P. 333; see Paterson *v.* Zachariah, 1 Stark. 72; Duncomb *v.* Daniel, 8 C. & P. 22.

9 See Delauney *v.* Mitchell, 1 Stark. 439.

afterwards call evidence in reply to the * defendant's case.[1] But *1097
the Judge, in his discretion, may allow this to be done.[2]

After the senior counsel has thus stated the case, the witnesses to prove it are next called and examined, in their order.[3] As a general rule, the first witness is examined by the counsel next in rank to the senior, the second by the junior, if there be three counsel engaged on that side, the third by the senior: each barrister examining a witness in the order of his precedence. Whilst a witness, however, is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but, after one counsel has brought his examination to a close, no other counsel on the same side can, without leave, put a question to the witness.[4]

Where there are several defendants who appear by separate solicitors, and have separate counsel, if their defences are different or distinct from each other, the counsel of each has a right to address the jury, or the Court, as the case may be, and examine witnesses; but if they rely on the same ground of defence, only one counsel can be heard to address the jury, and one counsel only can examine each witness upon the part of all the defendants, in the same manner as if they had appeared and defended jointly;[5] and where two defendants appear and plead by the same solicitor, but, at the trial, counsel appears for one defendant only, and the other defendant appears in person, the counsel only will be allowed to address the jury, or the Court, as the case may be; but the defendant who has no counsel may cross-examine the witnesses.[6] In general, where several defendants defend separately at the trial, each defendant will be allowed to cross-examine the plaintiff's witnesses.

The witnesses are called by the Usher of the Court, and sworn by the Registrar.[7]

Almost all persons are now competent witnesses:[8] but as questions may still, in some few instances, arise as to the competency of a witness, it should be here mentioned, that an objection * to the *1098
competency of a witness at a trial may be taken at any period of his examination: even though it is founded on facts elicited on cross-

[1] Williams *v.* Davies, 1 C. & M. 464; 3 Tyr. 383; 1 Dowl. 647; Browne *v.* Murray, Ry. & Moo. 254; Sylvester *v.* Hall, *ib.* 255, n.; Rees *v.* Smith, 2 Stark. 31; Ry. & Moo. 255, n.; Rowlandson *v.* Fenton, 17 Jur. 606, Ex.; Smith *v.* Marable, Car. & M. 479; Shaw *v.* Beck, 8 Exch. 392, where it appeared from the cross-examination what the defence was.

[2] See Wright *v.* Wilcox, 19 L. J. C. P. 333; and see further, as to calling witnesses in reply, Chitty's Arch. 397.

[3] As to the examination of witnesses, see Taylor on Evid. §§ 1258–1332; Best on Evid. §§ 125–131, 651–665; Powell on Evid. 436–452.

[4] Doe *v.* Roe, 2 Camp. 280.

[5] See Clippendale *v.* Masson, 4 Camp. 174; Sparkes *v.* Barrett, 8 C. & P. 442; Massey *v.* Goyder, 4 C. & P. 162; Doe *d.* Fox *v.* Bromley, 6 C. & P. 292; Ridgway *v.* Phillips, 3 Dowl. 154; 1 C. M. & R. 415; King *v.* Williamson, 3 Stark. 162; 1 D. & R. 35.

[6] Perring *v.* Tucker, 4 C. & P. 70; 1 M. & M. 391; and see Massey *v.* Goyder, 4 C. & P. 162, n. (*a*).

[7] Ord. XLI. 42. For forms of oath or declaration of witness, See Ord. Sched. N., Nos. 8, 9; and Vol. III.

[8] See *ante*, p. 885, and note; and 6 & 7 Vic. c. 85; 14 & 15 Vic. c. 99; 16 & 17 Vic. c. 83.

examination, and which were known from the beginning to the party taking the objection.[1] It seems also, that a witness may be sworn on the *voir dire*, in order to ascertain his competency, after he has been sworn in chief, and his examination commenced;[2] but that it is not the practice so to swear him, unless it is specially required by the party against whom he appears.[3] The Judge is judge of fact as well as law, on a question as to the competency of a witness: but his opinion on the facts is subject to review in the Court above.[4] When a witness is discovered to be incompetent during his examination, the Judge strikes the evidence which he has given out of his notes.[5] After the witness has left the box, there is an end of all questions as to his competency:[6] therefore, it is too late to object to the competency of a witness when he, after having been examined upon matters on which the objection to the competency might have been taken, has left the box, and is recalled for another purpose, in respect of which the objection also arises.[7]

If a lunatic is tendered as a witness, it is for the Judge to examine whether the lunatic be of competent understanding to give rational evidence, and is aware of the nature and obligation of an oath. If the Judge is satisfied on these points, he should admit the lunatic as a witness.[8] Before being sworn the lunatic may be examined, and witnesses may be called as to his competency. If he is admitted, it is for the jury to judge whether his evidence be tainted by his insanity, and to decide upon the degree of credit to be attached to it.[9]

In the examination in chief of a witness, he must not, in general, be asked leading questions.[10] If, however, the witness appear evidently to be hostile to the party who has called him, the counsel may *1099 put leading questions to him in the same manner as in * cross-examination: having first obtained permission of the Judge to do so.[1]

[1] Jacobs *v.* Laybourn, 11 M. & W. 685; 1 D. & L. 352; and see Yardley *v.* Arnold, 10 M. & W. 141; 2 Dowl. N. S. 311; 1 C. & M. 434; Dewdney *v.* Palmer, 4 M. & W. 644; Wollaston *v.* Hakewell, 3 Sc. N. R. 593; Hartshorne *v.* Watson, 7 Scott, 494; 5 Bing. N. C. 47; Stone *v.* Blackburn, 1 Esp. 37; Peake Ev. 195; Turner *v.* Pearte, 1 T. R. 717.

[2] Jacobs *v.* Laybourn, *ubi sup.* The witness, when sworn on the *voir dire*, is sworn to make true answer to all such questions as the Court shall demand of him.

[3] Per L. C. B. Abinger, in Jacobs *v.* Laybourn, *ubi sup.*

[4] Doe *d.* Norton *v.* Webster, 12 A. & E. 442; and see Bartlett *v.* Smith, 11 M. & W. 483; Jacobs *v.* Laybourn, *ubi sup.* There appears to be some doubt whether the Judge can take notice of what has been proved by one witness, in order to judge of the competency of another. Doe *d.* Wildgoose *v.* Pearce, 5 M. & W. 506.

[5] Per L. C. Abinger, in Jacobs *v.* Laybourn, *ubi sup.*

[6] Beaching *v.* Gower, Holt, C. N. P. 314; see Fellingham *v.* Sparrow, 9 Dowl. 141.

[7] Wollaston *v.* Hakewell, 3 M. & G. 297.

[8] Reg. *v.* Hill, 2 Den. C. C. R. 254; 15 Jur. 470. [Before the affidavit of a person suffering from insane delusions, and confined in a lunatic asylum, can be received, his mental condition must first be ascertained by preliminary inquiry before the Court, or some one specially delegated for that purpose, and an affidavit by such person was ordered to be taken off the file. Spittle *v.* Walton, L. R. 11 Eq. 420.]

[9] *Ibid.*

[10] Peake Evid. 188; Rosc. on Evid. 146; Taylor, §§ 1262 A, 1263; Best, §§ 643-645; Powell, 437-439; and see Nicholls *v.* Dowding, 1 Stark. 81; Courteen *v.* Tonse, 1 Camp. 43.

[1] Peake, 188; Rosc. 147; per Abbott C. J. in Bastin *v.* Carew, Ry. & Moo. 127; Clarke *v.* Saffrey, *ib.* 126; Bowman *v.* Bowman, 2 M. & Rob. 501.

A witness can be allowed only to speak to facts within his own knowledge and recollection.[2] He cannot, therefore, be permitted to read his evidence;[3] but he will be allowed to refresh his memory from an entry in a book or on paper[4] made contemporaneously with, or shortly after, the occurrence of the fact referred to,[5] if he can afterwards swear to the fact from his recollection; and this, though he himself did not make the entry.[6] If he know the fact, however, only from seeing it in the book or paper, the original book or paper must be given in evidence, and proved by other means.[7] But where a witness, on seeing his initials affixed to an entry of payment, said, "I have no recollection that I received the money; I know nothing but by the book; but, seeing my initials, I have no doubt that I received the money:" this was held sufficient evidence.[8] Where a witness had been examined before commissioners of bankrupts shortly after the act of bankruptcy, he was allowed to refer to the deposition he then made for the purpose of refreshing his memory as to the date.[9] And where a surveyor made a survey or report, which he furnished to his employers, and, being afterwards called as a witness, produced a printed copy of this report, on the margin of which he had, two days before, to assist him in giving his explanations as a witness, made a few jottings, it was held that he might look at this copy to refresh his memory: the report having been made up from his original notes, of which it was in substance, though not in words, a transcript.[10] But a witness will not be allowed to refresh his memory with the copy of an instrument, although the original might have been so used, unless the copy was made by himself, or in his presence, and he knows it to be correct;[11] nor will he be allowed to refresh his memory from a copy of a paper made by himself six months after he wrote the original; though the original is proved to be so covered with figures as to be unintelligible.[12] Where a paper is put into the hands of a witness to refresh his memory, the opposite counsel has a * right to inspect it, without being forced to read *1100 it in evidence.[1] When a book is put into the hands of a witness to refresh his recollection, and questions are asked upon it in cross-examination, the book is not thereby made evidence for the party producing it: though it may be so for the opposite party.[2]

In questions of science a witness may be examined as to his opinion,

[2] Friedlander *v.* London Assurance Company, 4 B. & Ad. 193; 1 N. & M. 30; see Taylor, §§ 1264–1273.

[3] 5 St. Tr. 455.

[4] Doe *v.* Perkins, 3 T. R. 749; see Rosc. on Evid. 154; Taylor, §§ 1263–1270.

[5] Steinkeller *v.* Newton, 9 C. & P. 313.

[6] Henry *v.* Lee, 2 Chit. 124; Burrough *v.* Martin, 2 Camp. 112.

[7] Doe *v.* Perkins, T. R. 749; see Cator *v.* Croydon Canal Company, 4 Y. & C. Ex. 405, 413; [Rogers *v.* Burton, Peck, 108; Beets *v.* States, Meigs, 106.]

[8] Maughan *v.* Hubbard, 8 B. & C. 14; 2 M. & R. 5; see Trentham *v.* Deveril, 3 Bing. N. C. 397; 4 Scott, 128; [Bank *v.* Cowan, 7 Humph. 70.]

[9] Smith *v.* Morgan, 2 M. & Rob. 257; Wood *v.* Cooper, 1 C. & K. 645; Whitfield *v.* Aland, 2 C. & K. 1015; see Vaughan *v.* Martin, 1 Esp. 440.

[10] Horne *v.* McKenzie, 6 Cl. & Fin. 628; see Topham *v.* M'Gregor, 1 C. & K. 320.

[11] Burton *v.* Plummer, 4 N. & M. 315; 2 A. & E. 341.

[12] Jones *v.* Stroud, 2 C. & P. 196.

[1] Sinclair *v.* Stevenson, 10 Moore, 46; 1 C. & P. 532; 2 Bing. 514; R. *v.* Ramsden, 2 C. & P. 603.

[2] Payne *v.* Ibbotson, 27 L. J. Ex. 341.

upon facts previously stated; thus, although a physician may have never seen the patient, he may swear to his opinion of the disease, &c., upon facts stated by others.[3]

A witness may compare a disputed writing with any writing proved to the satisfaction of the Judge to be genuine; and such writings, and the evidence of the witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute.[4]

A party producing a witness may not impeach his credit by general evidence of bad character; but he may, in case the witness in the opinion of the Judge proves adverse,[5] contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.[6] Formerly, neither the plaintiff nor the defendant was allowed to give evidence for the sole purpose of discrediting his own witness;[7] nor could he put questions to him, the answers to which might tend to discredit him.[8] A witness who gave evidence adverse to the party calling him, might, however, be asked whether he had not given a different account of the same matter before the trial; but it seems, that, in the event of a denial by the witness, another witness could not be called to contradict him in that respect.[9] A *1101 * party might give evidence to prove facts denied by one of his witnesses, and thus incidentally contradict him.[1]

If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the

[3] Rosc. Evid. 153; Taylor, § 1274; Best, §§ 515, 519; and see M'Naughton's Case, 10 Cl. & F. 200; Fenwick *v.* Bell, 1 C. & K. 312; Rickards *v.* Murdock, 10 B. & C. 527; but see Campbell *v.* Richards, 2 N. & M. 542; 5 B. & Ad. 840. As to the form of the question to be put to the witness, see Sills *v.* Brown, 9 C. & P. 601.

[4] 17 & 18 Vic. c. 125, § 27; Taylor, §§ 1667–1671; Best, § 243; Powell, 358.

[5] A witness is not "adverse" within the meaning of the section, merely because his testimony is unfavorable to the party calling him. To be "adverse," so as to entitle the party calling the witness to prove that he has made at another time a statement inconsistent with his present testimony, he must, in the opinion of the Judge, be "hostile." Greenough *v.* Eccles, 5 C. B. N. S. 786; 5 Jur. N. S. 766; see Martin *v.* Travellers' Insurance Company, 1 F. & F. 505.

[6] 17 & 18 Vic. c. 125, § 22; Taylor, §§ 1282, 1283; Best, § 647; Howell, 440. Similar provisions have been adopted in a late statute of Massachusetts, under which, however, the leave of the Judge is not necessary to the admission of the contradictory evidence. St. Mass. 1869, c. 425.

[7] 5 St. Tr. 2, 764, 792; Ewer *v.* Ambrose, 3 B. & C. 749; 5 D. & R. 629; Elton *v.* Larkins, 5 C. & P. 385; Holdsworth *v.* Dartmouth (Mayor), 2 M. & Rob. 153, per Parke B.; and see Rosc. on Evid. 130.

[8] See Winter *v.* Butt, 2 M. & Rob. 357; Allay *v.* Hutchins, *ib.* 358, n.

[9] Melhuish *v.* Collier, 15 Q. B. 878; 14 Jur. 621; Taylor on Evid. 950; 1 Greenl. Ev. §§ 443, 444.

[1] See Alexander *v.* Gibson, 2 Camp. 556; Richardson *v.* Allan, 2 Stark. 334; 2 Chit. 657; R. *v.* Ball, 8 C. & P. 745.

witness, and he must be asked whether or not he has made such statement.[2] A party may also give evidence, for the purpose of detracting from the credit of one of his opponent's witnesses; as, for instance, he may show that the witness has, at some previous time, given a different account of the fact he has sworn to, either upon oath,[3] by letter,[4] or the like. A collateral irrelevant inquiry cannot be gone into to discredit a witness on the other side.[5] Before, however, giving evidence of a statement made by a witness, for the above purpose, he should be first asked whether he ever made such statement:[6] unless he expressly denied having made it, the evidence could not formerly be given.[7] Where a witness, on cross-examination, denies having used particular expressions in the presence of the parties, the opposite counsel, examining a person to contradict the witness, is not at liberty to lead him by reading from his brief the words denied: the conversation spoken to by the first witness being evidence in itself.[8]

It may sometimes be advisable to examine witnesses out of the hearing of each other. In such a case, it is usual to order the witnesses out of Court.[9] Either party, at any period of the cause, has a right to require that the unexamined witnesses should be out of Court.[10] But where a witness remains in Court, after an order for the witnesses to withdraw, it seems that the Judge cannot refuse to allow him to be examined, although the witness may be fined for his contempt.[11]

If the attorney in the cause is a * witness, he will be suffered to *1102 remain: his assistance being absolutely necessary to the proper conduct of the cause.[1] And, as a general rule, a party to the cause who is to be examined as a witness will be allowed to remain.[2]

When the direct examination is finished, the witness may be cross-examined by the counsel for the opposite party.[3] If the party calling a witness does not think proper to examine him after he is called and sworn, he may nevertheless be cross-examined by the counsel for the

[2] 17 & 18 Vic. c. 125, § 23; Taylor, §§ 1300, 1306; Best, § 646.

[3] 2 Hawk. c. 46, § 11; Lowe *v.* Jolliffe, 1 W. Bl. 365; Richardson *v.* Allan, *ubi sup.*; and see Melhuish *v.* Collier, *ubi sup.*

[4] De Sailly *v.* Morgan, 2 Esp. 691.

[5] Tenant *v.* Hamilton, 1 Rob. 821; 7 Cl. & F. 122; Attorney-General *v.* Hitchcock, 1 Ex. 91; Palmer *v.* Trower, 22 L. J. Ex. 32; Tolman *v.* Johnstone, 2 F. & F. 66; Hathaway *v.* Crocker, 7 Met. 265.

[6] Carpenter *v.* Wall, 11 A. & E. 803; 3 P. & D. 457; see R. *v.* St. George, 9 C. & P. 483. But in Massachusetts, a witness may be impeached by evidence of his previous contradictory statements, without first calling his attention to those statements. Tucker *v.* Welsh, 17 Mass. 160; Gould *v.* Norfolk Lead Co., 9 Cush. 338; Commonwealth *v.* Hawkins, 3 Gray, 463.

[7] Long *v.* Hitchcock, 9 C. & P. 619; but see Crawley *v.* Page, 7 C. & P. 791.

[8] Hallett *v.* Cousins, 2 M. & Rob. 238.

[9] Phil. on Evid. 458; Taylor, §§ 1259-1261; Rosc. 146; R. *v.* Colley, 1 M. & M. 329.

[10] Southey *v.* Nash, 7 C. & P. 632; [Dougherty *v.* Shown, 1 Heisk. 302. It is error to refuse, upon affidavit of the necessity. Rainwater *v.* Elmore, 1 Heisk. 363.]

[11] See Cobbett *v.* Hudson, 1 El. & Bl. 11, 14; 17 Jur. 488; Parker *v.* M'William, 4 M. & P. 480; 6 Bing. 683; R. *v.* Colley, 1 M. & M. 329; R. *v.* Wilde, 6 C. & P. 380; Chandler *v.* Horne, 2 M. & Rob. 423; Beamon *v.* Ellice, 4 C. & P. 585; and see Attorney-General *v.* Bulpit, 9 Pri. 4, a revenue case.

[1] Pomeroy *v.* Badderley, Ry. & Moo. 430; but see R. *v.* Webb, 3 Stark. Ev. 1733.

[2] See Constance *v.* Brain, 2 Jur. N. S. 1145, Ex.; Charnock *v.* Dewing, 3 C. & K. 373; R. *v.* Newman, 3 C. & K. 252, where, on the trial of an information for libel, the prosecutor was ordered out of Court.

[3] See Taylor, §§ 1283-1307; Best, §§ 655, 664; Powell, 442, 445.

opposite party:[4] unless he was merely called to produce a document,[5] or by mistake of counsel, and no question was put to him.[6] In cross-examining a witness, the counsel may ask him leading questions.[7] He may even be cross-examined as to a fact irrelevant to the issue, for the purpose of discrediting his testimony by what he himself may state in evidence;[8] but otherwise where it is done with the intention of calling other witnesses to disprove what he says.[9]

A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him;[10] but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; the Judge, however, may, at any time during the trial, require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.[11] Formerly it was held, that, the mere fact of counsel, whilst cross-examining a witness, putting a document into the witness's hand, and asking him whether it was in his handwriting, did not entitle the opposite party to see such document; but the opposite counsel had a right to see the document before the cross-examining counsel proceeded to *1103 found any question on the document itself.[12] Parties are not *entitled to put in, as part of their case, documents handed to a witness, on cross-examination by the opposite party, in order that he may depose to their nature.[1]

A witness is not bound to answer questions, the answer to which may expose him to punishment, or to a criminal charge, or tend so to do;[2] such questions, however, it seems may be put;[3] and a witness is not bound to answer questions, put for the purpose of degrading his character.[4] If a witness claims the protection of the Court, on the ground that his answer would tend to criminate him, and there appear to be reasonable grounds to believe that it would do so, he is not compellable to answer.[5] A party to a suit may be put into the box by his opponent

[4] Phillips *v.* Eamer, 1 Esp. 357; R. *v.* Brooke, 2 Stark. 472.

[5] Rush *v.* Smith, 1 C. M. & R. 94; Summers *v.* Moseley, *ib.* 96, n., and cases there cited.

[6] Wood *v.* Mackinson, 2 M. & Rob. 273.

[7] Rosc. Ev. 147; Taylor, § 1288; and see Dickinson *v.* Shee, 4 Esp. 68.

[8] Harris *v.* Tippet, 2 Camp. 637.

[9] Spenceley *v.* De Willott, 7 East, 103; see, as to the cross-examination of a witness generally, Rosc. on Ev. 147; Taylor, §§ 1288–1305.

[10] See Darby *v.* Ouseley, 1 H. & N. 1; 2 Jur. N. S. 497, where it was held that the plaintiff could not be asked, on cross-examination, whether his name was inscribed in a certain book; and see Taylor, §§ 1301–1303; Best, § 646.

[11] 17 & 18 Vic. c. 125, § 24. As to the practice before this enactment, see per Abbott C. J., Queen's Case, 2 B. & B. 293; Bastard *v.* Smith, 10 A. & E. 213; Davis *v.* Davis, 9 C. & P. 252; M'Donnell *v.* Evans, 16 Jur. 103, C. P.

[12] Cope *v.* The Thames Haven Dock Company, 2 C. & K. 757; but see Collier *v.* Nokes, *ib.* 1012; Reg. *v.* Duncombe, 8 C. & P. 369.

[1] Collier *v.* Nokes, *ubi sup.*

[2] See Taylor, §§ 1308–1329; Best, §§ 125–131; Powell, 68.

[3] See Rosc. on Ev. 143; Queen's Case, 2 B. & B. 311.

[4] Rosc. on Ev. 144.

[5] *Ex parte* Fernandez, 10 C. B. N. S. 3 39, 40; 7 Jur. N. S. 571; Reg. *v.* Boyes, 1 B. & S. 311; 7 Jur. N. S. 1158; *ante*, pp. 562, 942; Taylor on Evid. § 1311.

and sworn, although the counsel for such party objects that the questions intended to be put to him will criminate him, and that he will object to answer them: it is for the party himself to make such objections.[6]

All other questions, for the purpose of impeaching a witness's character must be answered.[7] Or, if general evidence is given of the bad character of the witness, the opposite party may cross-examine the witnesses as to the grounds of their opinions, if he thinks it prudent to do so; or he may call witnesses to speak to the general good conduct of the witness, or contradict any particular facts the other witnesses may have disclosed in their cross-examination.[8] The refusal of a witness to answer a question ought not, legally, to have any effect with the jury.[9]

A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and if, upon being so questioned, he either denies the fact, or refuses to answer it, the opposite party may prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the Clerk of the Court, or other officer having the custody of the records of the Court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more may be demanded or taken), is, upon proof of the identity of the person, sufficient evidence of the conviction, without proof of the signature or official character of the person appearing to have signed the same.[10]

* If any new fact arises out of the cross-examination, the wit- *1104
ness may be re-examined as to it by the counsel for the party on whose behalf he has been examined. In the same manner he may be re-examined, when necessary, in order to explain any part of his cross-examination.[1] A witness, who has been cross-examined as to what the plaintiff said in a particular conversation, cannot, on that ground, be re-examined as to other assertions made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related: although the assertions as to which it is proposed to re-examine are connected with the subject-matter of the present suit.[2] Where a witness of the plaintiff stated, on cross-examination, facts which were not strictly evidence, but might prejudice the plaintiff, it was held, that, unless the defendant applied to strike them out of the Judge's notes, the plaintiff was entitled to re-examine upon them.[3]

6 Boyle *v.* Wiseman, 10 Ex. 647; 1 Jur. N. S. 115; Osborne *v.* The London Dock Company, 10 Ex. 698; 1 Jur. N. S. 93.

7 See Cundell *v.* Pratt, 1 M. & M. 108.

8 See Taylor, §§ 1324–1327.

9 R. *v.* Watson, 2 Stark. 157; Rose *v.* Blakemore, Ry. & Moo. 382; Lloyd *v.* Passingham, 16 Ves. 59.

10 17 & 18 Vic. c. 125, § 25; Taylor, § 1233; Best, § 265. Before this enactment, if a witness was examined as to an offence imputed to him, and denied it, such denial was conclusive, and witnesses could not afterwards be called, or other evidence given, to contradict him. R. *v.* Watson, 2 Stark. 149 *et seq.*; Harris *v.* Tippet, 2 Camp. 637.

1 See, as to the re-examination of a witness, Rose. on Ev. 150; Taylor, §§ 1328, 1329; Powell, 450; The Queen's Case, 2 B. & B. 297, per Abbott C. J.

2 Prince *v.* Samo, 7 A. & E. 627.

3 Blewitt *v.* Tregoning, 3 A. & E. 554.

It is in the discretion of the Judge whether he will permit a witness to be recalled, and it is not necessary that the opposite side should consent.[4] At Common Law, the Court will not interfere with the Judge's discretion, unless it be very clear that he was wrong.[5] The Judge will, in general, allow counsel, after he has closed his case, to recall a witness for the purpose of obviating objections which are beside the justice of the case, and little more than mere matter of form;[6] but not to remedy a defect in substance, unless it has arisen from inadvertence on his part.[7]

When points of law arise incidentally during the trial, all the counsel on both sides may be heard by the Court, and the leading counsel of the party making the objections or submitting the point alone replies. If the defendant's counsel take an objection, and the plaintiff's counsel answer it, and, in replying on the objection, the defendant's counsel cite a case, the plaintiff's counsel will be allowed to observe on the case so cited.[8] And when a defendant relies upon a legal objection, and calls evidence to support it, the plaintiff's counsel having answered the objection, the defendant is entitled to be heard on the law in reply.[9] On a question as to which party has the right to begin, one counsel only, in general, is heard on each side.[10] The objection of a *1105 witness to a question * which he considers himself not bound to answer, is not a point on which counsel are heard.[1] And a witness has no right to have the question of his liability to produce a document argued by counsel retained for that purpose.[2] Where a party conducts his case in person, it is questionable how far counsel can be heard for him on a point of law.[3] All preliminary questions of fact on which the admissibility of evidence depends are to be decided by the Judge, and not by the jury.[4]

When a party who opened the cause has gone through his evidence and examined all his witnesses, he asks the counsel on the opposite side whether he will call any witnesses or put in any evidence. If he says he will not, the counsel who began, sums up his evidence, and the other counsel then makes his speech to the jury; but if he says that he will call witnesses, or put in evidence, he addresses the jury, and then calls his witnesses: after which he sums up his evidence, and the counsel who began has the general reply.[5] The witnesses for the

4 Adams *v.* Bankart, 1 C. M. & R. 681; Catlin *v.* Barker, 11 Jur. 1105, C. P.; Taylor, § 1331.

5 Middleton *v.* Barned, 18 L. J. Ex. 433. Giles *v.* Powell, 2 C. & P. 259; Soulby *v.* Pickford, 2 M. & P. 545.

6 Aldred *v.* Halliwell, 1 Stark. 117.

7 Giles *v.* Powell, *ubi sup.*

8 Fairlie *v.* Denton, 3 C. & P. 103; and see Power *v.* Barham, 7 C. & P. 356; 4 A. & E. 473. In practice, it is not usual for more than two counsel on each side to address the Court, on a question of law arising during the trial.

9 Arden *v.* Tucker, 1 M. & Rob. 192.

10 Rawlins *v.* Desborough, 2 M. & Rob. 70; see Bastard *v.* Smith, *ib.* 132.

1 R. *v.* Adey, 1 M. & Rob. 94.

2 Doe d. Rowcliffe *v.* Earl of Egremont, 2 M. & Rob. 386.

3 Shuttleworth *v.* Nicholson, 1 M. & Rob. 254; Moscatti *v.* Lawson, *ib.* 454.

4 Bennison *v.* Jervison, 12 Jur. 485, Ex.; Boyle *v.* Wiseman, 10 Ex. 647; 1 Jur. N. S. 115.

5 17 & 18 Vic. c. 125, § 18; Ord. XLI. 43; see *ante*, p. 1096, n.

defence are examined and cross-examined in the manner already mentioned.

It is in the discretion of the Judge, at the trial, in what order the counsel for different defendants, having different interests, shall cross-examine and address the jury.[6] On the trial of an issue, directed by the Court of Chancery, to try whether the plaintiff was next of kin to J. S. (with the usual order for indorsing any special matter on the record), one defendant, A. B., claimed to be as nearly related to J. S. as the plaintiff was; the other defendant, C. D., set up a claim inconsistent with the cases both of the plaintiff and A. B.: it was held, that, at the close of the plaintiff's case, C. D. should not only open, but prove his case, and that then A. B. should do the like, the plaintiff having the general reply on both.[7]

As we have seen, the plaintiff may, in the first instance, prove only a *primâ facie* case. Where he does so, he may, as a general rule, call witnesses to disprove the defence attempted to be made out by the defendant's witnesses.[8] It is in the discretion of the Judge whether he will allow the plaintiff to give evidence in reply.[9] Such discretion may, it seems, at Common Law, be reviewed by the Court.[10] The plaintiff cannot call evidence in reply, for the mere purpose of confirming the *primâ facie* case made out by him * in the first instance.[1] A *1106 witness may be called in reply to contradict a statement alleged by the defendant's witnesses to have been made in his presence.[2]

Where the Judge decides that there is no evidence in support of the plaintiff's case, his counsel has no right to sum up the evidence adduced.[3] A counsel who has not announced his intention to adduce evidence, in consequence of which the party who began sums up his case, cannot be permitted afterwards to alter his mind and adduce evidence.[4]

If the counsel for the defence has examined any witnesses, or adduced any evidence in support of it, the opposite party is entitled to the reply, as of right: otherwise not, unless when the Queen is a party, and the privilege of replying is claimed by the Attorney-General in right of his office.[5] But where the counsel for the defendant states facts to the jury, or the Court, as the case may be, which he calls no witnesses to prove, it is in the discretion of the Judge to permit the plaintiff's counsel to reply.[6] Where the defendant proves a payment to the plaintiff, by

[6] Fletcher *v.* Crosbie, 2 M. & Rob. 407; see R. *v.* Barber, 1 C. & K. 434.

[7] Phillips *v.* Willetts, 2 M. & Rob. 319.

[8] See Taylor, §§ 357–361; Best, § 633; Powell, 451; Penn *v.* Jack, L. R. 2 Eq. 314, V. C. W.

[9] Wright *v.* Wilcox, 19 L. J. C. P. 333.

[10] *Ibid.*

[1] Jacobs *v.* Tarleton, 11 Q. B. 421; 12 Jur. 517; see Darch *v.* Toyer, 13 Jur. 959, Q. B.; R. *v.* Hilditch, 5 C. & P. 299.

[2] Cope *v.* The Thames Haven Dock Company, 2 C. & K. 758; Jacobs *v.* Tarleton, *ubi sup.*

[3] Hodges *v.* Ancrum, 1 Jur. N. S. 547, Platt B. diss.

[4] Darby *v.* Ouseley, 1 H. & N. 1; 2 Jur. N. S. 497.

[5] R. *v.* Earl of Abingdon, Peake N. P. C. 236; 1 Esp. 226; R. *v.* Marsden, 1 M. & M. 439; R. *v.* Bell, *ib.* 440; and see Rowe *v.* Brenton, 3 M. & R. 304. As to the right of reply, see Taylor, §§ 361, 362; Best, § 633; Powell, 451.

[6] Crerar *v.* Sodo, 1 M. & M. 8; see R. *v.* Bignold, 4 D. & R. 70; R. *v.* Horne, 20 How. St. Tr. 763; Naish *v.* Browne, 2 C. & K. 219; Faith *v.* M'Intyre, 7 C. & P. 44.

showing the particulars of demand delivered under a Judge's order, in which the plaintiff has credited the defendant: this is evidence for the defendant, and entitles the plaintiff to a reply.[7] If certain parts of a book are used to refresh the memory of a witness for the plaintiff, and the defendant's counsel in his address to the jury, or to the Court, observes upon the general state of the book and refers to other parts of it, such observations do not give the plaintiff's counsel the right of reply.[8] And if a document is called for, after notice to produce by the plaintiff, the defendant does not give the plaintiff's counsel a right to reply by producing evidence, during the plaintiff's case, to show that the document is lawfully out of his possession.[9] Evidence may in some cases be given in answer to the defendant's case. When evidence is so given, the defendant's counsel does not sum up his evidence at the close of the case; but waits until the plaintiff has given his additional evidence, and then addresses the jury or the Court: summing up his own evidence, and replying on the plaintiff's additional evidence;[10] after *1107 * which the plaintiff's counsel replies on the whole case. The reply closes the case on both sides.

When the case is closed on both sides, the Judge, if the trial is by a jury, sums up the evidence (as it is termed): that is, he states to the jury the matters really in dispute between the parties, calls to their attention such parts of the evidence as he thinks proper, and makes his remarks on it, when necessary; and he may, if he thinks it necessary, tell the jury the impression the evidence has left upon his mind.[1] If any question of law be mixed up with the questions of fact, he states to them the principles of law upon which the case must be decided, and the manner in which they must be applied to, and their effect upon, it;[2] and, lastly, he states to them, if necessary, the form in which they are to give their verdict. As all this, however, is intended merely as an assistance to the jury, the Judge, in his discretion, will omit any part of it he may think unnecessary. Where the case is very clear both in point of law and fact, and it is apparent that the jury have already determined on a verdict in accordance with the justice and merits of the case, the Judge will omit the summing up altogether.[3]

After the evidence is given, and the Judge has summed it up, the jury proceed to consider of their verdict, and either give such verdict without quitting the jury box, or, in cases of difficulty, or where there is a difference of opinion among them, they may withdraw to a room provided for that purpose, in order to deliberate on their verdict. Where

[7] Rymer *v.* Cook, 1 M. & M. 86, n.
[8] Pullen *v.* White, 3 C. & P. 434.
[9] Harvey *v.* Mitchell, 2 M. & Rob. 366, per Parke B.
[10] See 17 & 18 Vic. c. 125, § 18, and Ord. XLI. 43; Stark. Ev. 608; Meagoe *v.* Simmons, 1 M. & M. 121; 3 C. & P. 76; Doe Goslee *v.* Goslee, 9 C. & P. 46; Furze *v.* Asker, 3 C. & K. 73. The defendant will not be allowed to adduce further evidence. Penn *v.* Jack, L. R. 2 Eq. 314, V. C. W.
[1] Davidson *v.* Stanley, 3 Sc. N. R. 49.
[2] See Parmiter *v.* Coupland, 6 M. & W. 105; Baylis *v.* Lawrence, 11 A. & E. 920; 3 P. & D. 526; Panton *v.* Williams, 2 Q. B. 169.
[3] As to the duty of the Judge in summing up, see Taylor, §§ 23, 24; Best, § 82; Powell, 10.

they thus retire from the Court, they are taken charge of by the Usher,[4] and the jury must be kept together, without meat, drink, or fire (candlelight only excepted), until they have delivered their verdict: unless otherwise ordered by the Judge; and they must not be allowed to speak with any person whatever until they have agreed upon their verdict: between which time and the time of delivering their verdict they may speak with the Usher who keeps them, but with no other person; and before the Jury retire, the Usher is sworn in open Court, by the Registrar to keep them thus.[5] If they eat or drink at their own expense, or at the expense of either of the parties, they subject themselves to be fined; and if at the expense of the party for whom they afterwards give their verdict, it also avoids the verdict.[6]

*Where, however, a trial was not concluded on the first day, *1108 but the Court adjourned to the day following, and in the mean time the jury separated and went to their respective homes, without the assent or knowledge of the defendant, still the Court held it to be no ground for granting a new trial, unless it could also be shown that some improper attempt had been made to practise upon or tamper with the jury, whilst they were thus separated.[1] And where two of the jury, during the progress of a trial which lasted two days, dined and slept at the house of the defendant on the evening of the first day, and consequently before the summing up, it was held that this did not avoid a verdict found for the defendant.[2]

If the jury determine their verdict by lots, the verdict may be set aside, and the jurors fined.[3]

When the jury withdraw, they may take with them documents put in evidence in the cause;[4] but they cannot take with them documents which have not been proved;[5] and if the party for whom the verdict is afterwards given, delivers such documents to the jury after they have left the box, it will avoid the verdict; but if delivered by the opposite party, or produced by one of the jurors without having received it from the parties, it will not.[6] If, also, the jury examine witnesses after they have left the box, even to the same points to which the same witnesses were examined before in Court, it will avoid the verdict;[7] but they may return into Court to hear evidence as to any matter of which they are in doubt,[8] or to ask any questions of the Court.[9] After

[4] Ord. XLI. 44.

[5] For form of oath, see Ord. Sched. N., No. 10; and Vol. III.

[6] See Everett *v.* Yowells, 4 B. & Ad. 681; Morris *v.* Vivian, 10 M. & W. 137; 2 Dowl. N. S. 235; Mounson *v.* West, 1 Leon. 132; Gee *v.* Swan, 9 M. & W. 686, per Parke B.; see Cooksey *v.* Haynes, 27 L. J. Ex. 371. [But under the Juries Act of 1870, 33 & 34 Vic. c. 77, § 23, the jury may, at the discretion of the Judge, be allowed a fire and reasonable refreshment. See Commonwealth *v.* Roby, 12 Pick. 496; Stone *v.* State, 4 Humph. 27.]

[1] R. *v.* Kinnear, 2 B. & Ald. 462; 3 Pri. 536; see R. *v.* Fowler, 4 B. & Ald. 273; 2 Doug. 416; Co. Litt. 227.

[2] Morris *v.* Vivian, 10 M. & W. 137; 3 Dowl. N. S. 235.

[3] Fry *v.* Hardy, T. Jon. 83; R. *v.* Lord Fitzwater, 2 Lev. 140; Foster *v.* Hawden, *ib.* 205; Hale *v.* Cove, 1 Stra. 642.

[4] Vicary *v.* Farthing, Cro. El. 411; R. *v.* Burdett, 1 L. Raym. 148; Co. Litt. 227, b.

[5] 2 Ro. Abr. 686.

[6] Graves *v.* Short, Cro. El. 616.

[7] Vicary *v.* Farthing, *ubi sup.*; see R. *v.* Fowler, *ubi sup.*

[8] 2 Ro. Abr. 676.

[9] 2 Hale, 296.

the jury have had the case summed up to them, and have retired, the Judge will not allow them to see a treatise on the law of the subject, even with the consent of the parties; they should state their difficulty to the Judge, and receive his direction as to the law.[10] Any irregularity, however, of the above description cannot, at Common Law, be made the subject of a motion in arrest of judgment, or of proceedings in error, unless it appears upon the record.[11]

If one of the jury happen to be taken suddenly ill, so as to be incapable of remaining until the verdict is agreed on, the Court may discharge that jury, and charge another with the cause.[12]

*1109 * When the jury return to the box, their names are called over,[1] and they are asked if they have agreed upon their verdict, and whether they find for the plaintiff or the defendant. The foreman of the jury, in the presence and hearing of the remainder of the jurors,[2] then delivers the verdict, and it is recorded. The verdict is either general or special; general, when the jury find generally for the plaintiff or for the defendant; special, when they find the facts of the case specially, as proved.[3] The verdict is also either public or privy. A public verdict is that which is given by the jury in open Court, whilst the Court is sitting. A privy verdict is given before the Judge, after the Court has risen; and it must be confirmed by the jury in open Court, before it can be recorded: before which time, the jury may vary from it if they think proper;[4] but after a verdict is recorded, no alteration however slight can be made in it.[5] Before the verdict is recorded, the jury are also at liberty to vary from the first offer of their verdict, and to tender a new verdict; and the verdict which is recorded stands.[6] At Common Law, the practice now is, if the jury are not ready to deliver their verdict before the Judge leaves the Court, for them to deliver it in open Court, in the presence of the associate.[7]

The jury should find their verdict upon all the issues joined. By consent, however, of the parties, they may be discharged from giving their verdict on certain issues; but without such consent, it seems that the Judge should not so discharge them.[8]

If the jury find a verdict manifestly against the evidence, the Court may send them back to reconsider it, before it is recorded; but not afterwards.[9] This, however, is very unusual.

It is said that a jury may ground their verdict on their own knowledge of the facts of the case;[10] but this doctrine, although generally enter-

[10] Burrows *v.* Unwin, 3 C. & P. 310.

[11] Graves *v.* Short, Cro. El. 616; see Gee *v.* Swann, 9 M. & W. 685, per Parke B.

[12] R. *v.* Edwards, 4 Taunt. 309; 3 Camp. 207; R. *v.* Scalbert, 2 Leach, 620.

[1] See Torbock *v.* Lamy, 5 Jur. 318, Q. B.

[2] See R. *v.* Wooller, 2 Stark. 111; Cogan *v.* Ebden, 1 Bur. 318; 2 Ld. Ken. 24.

[3] As to the verdict in general, and the difference between a general and special verdict, see Chitty's Arch. 448 *et seq.*

[4] Co. Litt. 227.

[5] *Ibid.*

[6] *Ib.* b.; Napier *v.* Daniel, 3 Bing. N. C. 77; 3 Sc. 417.

[7] Doe Lewis *v.* Barter, 5 A. & E. 129; see Bentley *v.* Fleming, 1 C. B. 479.

[8] See Tinkler *v.* Rowland, 4 A. & E. 868; Empson *v.* Fairfax, 8 A. & E. 296; Rex *v.* Johnson, 1 Rob. 1; 5 A. & E. 488; Powell *v.* Sonnett, 1 Bligh N. S. 302.

[9] 2 Hawk. c. 47, § 11; see Napier *v.* Daniel, 3 Bing. N. C. 77.

[10] Trial per Pais, 239, 279; Smith's case, 1 Vent. 67; Anon., 1 Salk. 405.

tained, appears to be questionable. It seems to be contrary to these words in the juror's oath, "and a true verdict give according to the evidence:" for to say that the word "evidence" here, includes any thing which the jurors may know of their own knowledge of the subject, and which has not been disclosed to the Court, would be giving a construction to the word very different from its common and legal acceptation. If a juror knows any thing respecting the case, the proper course to pursue seems to be, for the juror to state to the Court that he has such * knowledge, *1110 and thereupon to be examined and cross-examined as a witness.[1]

The verdict or finding of the jury, or of the Court, as the case may be, is indorsed by the Registrar on the record for trial, and signed by him, and then returned to the office of the Clerks of Records and Writs to be filed; and if the trial has been by a jury, then with the jury panel, and the names of the jurors who were sworn, indorsed thereon.[2]

Section III. — *Trials of Questions of Fact at the Assizes, or at Nisi Prius.*

We have seen that, where the Court considers that any question of fact may, under the particular circumstances of the case, be more conveniently tried by a jury at the Assizes, or at any sitting in London or Westminster for the trial of issues at Common Law, it may direct an issue to try such question;[3] and, subject to such general orders, if any,

[1] 6 Howell's State Trials, 1012, n.; Mauley *v.* Shaw, Car. & M. 361, per Tindal C. J.; Anon., 1 Salk. 405; and see Taylor, § 1244; Best, § 187.

[2] Ord. XLI. 45. For form of indorsement, see Seton, 971.

[3] Chamberlain *v.* Juppiers, 11 Iowa, 513. A motion is the proper form in which to bring the question of issues before the Court. Hoitt *v.* Burleigh, 18 N. H. 300, per Parker C. J. The Court may direct issues on its own motion. Tappan *v.* Evans, 11 N. H. 311, 334; Hoitt *v.* Burleigh, *supra;* Black *v.* Shreve, 2 Beasley (N. J.), 455, 478; Black *v.* Lamb, 1 Beasley (N. J.), 108; Trenton Bank *v.* Woodruff, 1 Green Ch. 117; Bassett *v.* Johnson, 2 Green Ch. 421, 422; see Smith *v.* Croom, 7 Florida, 180.

In Massachusetts, "the Court may frame issues of fact to be tried by a jury, in an Equity cause, when requested by a party, and direct the same to be tried in the county where such cause is pending, at the bar of the Supreme Judicial Court or the Superior Court." Genl. Sts. c. 113, § 22. And by rule of Court, "whenever it shall be necessary or proper to have any fact tried and determined by a jury, the Court will direct an issue for that purpose, to be framed by the parties, containing a distinct affirmation and denial of the points in question, or in such form as the Court shall order; and the issue thus framed and joined shall be submitted to a jury and tried upon the like evidence as in a suit at Law, together with such part of the answers, depositions, and other proceedings in the cause, as the Court shall direct." Rule 36 of the Rules of Practice in Chancery.

In general, according to the practice in Chancery, a cause will be brought to a formal hearing, before an issue is directed. But in a case where it was conceded, that the only material question was that of sanity, a fact peculiarly fit and suitable for a trial by jury, the Court said: "There seems to be no objection to ordering an issue, before a general hearing." Eames *v.* Eames, 16 Pick. 141; Charles River Bridge *v.* Warren Bridge, 7 Pick. 344; see Waterman *v.* Dutton, 5 Wis. 413; New Orleans G. L. & B. Co. *v.* Dudley, 8 Paige, 452; *ante*, p. 1079, note.

Such issues may be directed in Massachusetts by the Court when holden by a single Judge. Eames *v.* Eames, *ubi supra;* Genl. Sts. (Mass.) c. 113, § 6; see Duncan *v.* King, 1 Overton, 79. It was formerly held, that they should be framed and filed at a jury term, and not at a law term of the Court. Coffin *v.* Easton, 12 Cush. 107. But since the recent enactments in Massachusetts, which confer on the Court and on the Justices thereof full power to make and enter all decrees in Equity, either interlocutory or final, at any time, irrespective of the regular terms established by law for the transaction of business on the common-law side of the Court, the Court of Chancery is always open for the direction of such issues. See Thompson *v.* Goulding, 5 Allen, 83, 84.

as may be made in relation thereto, the former practice of the Court in reference to the trial of issues is to prevail in reference to the trial of any issues so directed.[4]

*1111 *The order by which the issue is directed, after stating that the Court is desirous of having the question of fact stated therein tried by a jury, directs a writ of summons to be sued out of one of the Superior Courts of Common Law, pursuant to the Act 8 & 9 Vic. c. 109;[1] and the parties are directed to proceed to trial at the Sittings or Assizes named in the order.[2]

The order not unfrequently imposes terms on the party who is to act as plaintiff in the issue.[3]

The party supporting the affirmative of the question to be tried is usually directed to be the plaintiff in the issue. This is generally the plaintiff in Equity; but the Court will direct any other party to be plaintiff at Law, if the issue can be thus more conveniently raised;[4] and where the plaintiff in Equity, who had been ordered to act as plaintiff in the issue, refused to proceed with the trial, other persons were, on their application, allowed to be substituted for him, on giving security for the costs of the trial.[5]

One or more issues will be directed, according to the number of substantial points upon which it is necessary to take the opinion of a jury; and where the point to be decided embraces several circumstances, an issue will be directed upon each of those circumstances. Thus, in *Bryan* v. *Parker*,[6] a double issue was directed to try the validity of a farm *modus;* the inquiry being, first, as to the existence of the ancient farm; and, secondly, as to the payment of the *modus*. The Court has also directed an issue as to a particular clause in a will.[7]

[4] 25 & 26 Vic. c. 42, § 2; *ante*, p. 1071. No general orders under this Act have been issued.

[1] See Chitty's Arch. 890, 891; and for form of issue, see Chitty's Forms, 455.

[2] For forms of order, see Seton, 975 *et seq.*

[3] Bowser *v.* Colby, 1 Hare, 109, 143, 145; *post*, p. 1112, note.

[4] Chapman *v.* Smith, 2 Ves. S. 506, 516; see Mott *v.* Blackwall Railway Company, 2 Phil. 632. As to who should be parties to an issue, in the case of tenants in common, see Attorney-General *v.* Flint, 4 Hare, 147, 159.

[5] Elliott *v.* Ince, 7 De G., M. & G. 489, n. (*a*).

[6] 1 Y. & C. Ex. 170; see also Bailey *v.* Sewell, 1 Russ. 239.

[7] Hippesley *v.* Horner, Seton, 984; see also Earl of Newburgh *v.* Countess of Newburgh, 5 Mad. 364. Issues should be specific and distinct. Hall *v.* Doran, 6 Clarke (Iowa), 433; see Black *v.* Lamb, 1 Beasley (N. J.), 114, 115. Objections to their form should be made before trial. Bassett *v.* Johnson, 1 Green Ch. 155; Black *v.* Lamb, 1 Beasley (N. J.), 108, 115. And in the Court from which they are sent. Bell *v.* Woodward, 47 N. H. 539, 542. The issues may consist of a series of specific questions. Black *v.* Lamb, *ubi supra*.

Where the pleadings present the question of one particular fraud only, an issue on the general question whether there was any fraud, is not warranted. Brink *v.* Morton, 2 Clarke (Iowa), 411. An issue as raised by the pleadings in Equity, if it be single and sufficiently explicit, may go to the jury. Savings Bank *v.* Benton, 2 Met. (Ky.) 240; Black *v.* Lamb, 1 Beasley (N. J.), 114, 115.

In Massachusetts, the statute directs that the Court may frame issues of fact in Equity suits. Genl. Sts. c. 113, § 22. By the Rule of Court it is provided that whenever it is proper to have any fact tried and determined by a jury, the Court will direct an issue for that purpose, to be framed by the parties. Rule 36 of the Rules for Practice in Chancery.

An issue may be amended in a proper case when an application therefor is seasonably made. Waterman *v.* Dutton, 5 Wis. 413; see Appx., 5 R. I. 596. Special issues may be framed to have a special verdict. Brewster *v.* Bours, 8 Cal. 501. For forms of orders for various issues, see Seton, 983 *et seq.* Every issue presented must be separately passed upon. Dunn *v.* Dunn, 11 Mich. 284.

*Formerly, the plaintiff was entitled to elect out of which of *1112 the Courts of Common Law the writ of summons should be sued ;[1] and issues concerning lands or other hereditaments were, except under special circumstances, directed to be tried in the county where the same were situated.[2] Now, however, it seems that the Court of Chancery will direct the issue to be tried at the Assizes for the county, or at any Sittings in London or Middlesex, where the same may be most conveniently tried.[3]

In general, all applications relative to the course of proceeding in the issue should be made in the Court of Chancery.[4]

It is said, that the Court seldom or never directs a trial at bar, but only intimates that it would be desirable ;[5] this, however, is not strictly correct: for although the Court, owing to the great increase of expense attendant upon trials at bar, is very cautious in directing an issue so to be tried, yet instances are to be found in which such trials have been directed ;[6] and, it seems, that even new trials may be directed of issues which have been tried at bar.[7] In *Baker* v. *Hart*,[8] Lord Hardwicke directed the trial to be at the bar of the Court of King's Bench, provided the party praying it would consent that, if he prevailed, he would be contented with *Nisi Prius* costs.

In directing an issue, the Court will order the parties to make such admissions as are necessary to raise the question to be determined,[9] but it will not order the admission of any fact not in issue

All the jury have to do is to return a finding on each issue. The consequences resulting from their findings are to be determined by the Court of Equity. It is not for the presiding justice at a jury trial to say that issues sent from a Court of Equity are so improperly framed that they are not distinct from each other. Objections to the form of the issues should be made in the Court from which they are sent, and which alone possesses the power to modify them. Bell *v.* Woodward, 47 N. H. 539, 542. Where two issues are sent from the Court of Equity, it is competent for the jury to find either of the issues for the plaintiff, and the other for the defendant. Bell *v.* Woodward, 47 N. H. 539.

[1] Antrobus *v.* East India Company, 5 Mad. 3. In Massachusetts, the Court may direct the trial to be had at the bar of the Supreme Judicial Court or the Superior Court; neither party has a right of selection. See Genl. Sts. c. 113, § 22.

[2] Chapman *v.* Smith, 2 Ves. S. 506, 516; Sparke *v.* Ivatt, 1 S. & S. 366.

[3] See 25 & 26 Vic. c. 42, § 2; *ante*, pp. 1071, 1110; and see, as to *venue* generally, M'Gregor *v.* Topham, 3 Hare, 488, 491; Hopwood *v.* Earl of Derby, 1 K. & J. 255. In Massachusetts, the trial of issues is to be had in the county where the cause is pending. Genl. Sts. c. 113, § 22.

[4] Per Wilde C. J. in Hargrave *v.* Hargrave, 4 C. B. 648, 651; and see Anon., 2 P. Wms. 68.

[5] 2 Mad. Pr. 478, 2d ed.; 625, 3d ed. Trials at bar in this connection are those that take place before all the Judges at the bar of the Court in which the action is brought; Tomlins L. Dict. Tit. Trial; a trial before the full Court in term. Burrill L. Dict. Tit. Trial.

[6] See Baker *v.* Hart, 3 Atk. 542, 546; 1 Ves. S. 28, 30; Hite *v.* Salter, 2 Dick. 495; Richards *v.* Symes, 2 Atk. 319; Attorney-General *v.* Montgomery, *ib.* 378. For form of order for a trial at bar, see Seton, 978, No. 1.

[7] Regina *v.* Ball. de Bewdley, 1 P. Wms. 212; Richards *v.* Symes, and Baker *v.* Hart, *ubi sup.*; Coker *v.* Farewell, 2 P. Wms. 563.

[8] *Ubi sup.*; see also Hite *v.* Salter, *ubi sup.*

[9] Fenwick *v.* James, Seton Dec. 513, last edit.; Elderton *v.* Lack, 2 Ph. 680; Duke of Beaufort *v.* Morris, 2 Ph. 683. So the Court, in directing an issue, may order that a party shall not traverse a particular fact, Hodges *v.* Pingree, Essex Co. Mass. January, 1860; and may impose any other restrictions upon the parties that will prevent fraud and surprise at the trial. See the directions given in Apthorp *v.* Comstock, 2 Paige, 485; and Clark *v.* Congregational Society, 44 N. H. 382; Black *v.* Shreve, 2 Beasley (N. J.), 455, 485. But the Court will not order the admission of any fact in issue in the cause, not clearly admitted on the pleadings. Duke of Beau-

*1113 * in the cause, or not clearly admitted in the pleadings.[1] It will also order the parties to produce, at the trial, all documents in their possession, custody, or power, which the other parties may require, or which the Court may think necessary for a complete investigation;[2] and, if such order does not form part of the original order directing the issue, it may be obtained afterwards, upon motion.[3] It seems, however, that such an order cannot be made, unless all the parties to the issue are also parties to the record.[4] The rule, as to producing papers, on a trial at Law, directed by the Court of Chancery, is, — that all productions which the Court conceives will be useful upon the trial must be made.[5] Upon this principle, the Court will order documents, which are in the possession of another defendant, to be produced at the trial of an issue,[6] even though such defendant declines to be a party to the issue.[7]

Although, in the case of a trial at Law directed by the Court of Chancery, the Court has power over every party in the cause who is interested in the question to be tried, to compel such production as may be necessary for a complete trial, such production will not be ordered of documents which the party holds in a distinct character such as mortgagee.[8] In a case, however, before the Court of Exchequer, the defendants, in a tithe suit, were ordered to produce, at the trial of an issue, deeds produced by them at the hearing, though belonging to their landlord, who was not a party; or, to admit, at the trial, the facts which the deeds were produced at the hearing to prove.[9]

It is to be remarked, that the ordinary order for the production of books, papers, and writings will not be sufficient to compel their production at the trial: such production must be specially ordered, and usually forms part of the order directing the issue; and where that is not the case, a special application, on notice, must be made to the Court,[10] or at Chambers.[11] Where the Court has ordered an issue, with directions for production of papers, a bill of discovery cannot be filed without leave of the Court.[12]

*1114 * If either of the parties desire a special jury, a direction to that effect, with a provision for a *tales*, will be embodied in the order;[1]

fort *v.* Morris, 2 Phil. 683; Rogers *v.* Nowill, 6 Hare, 337; 2 Seton, Dec. (3d Eng. ed.) 980.

[1] Duke of Beaufort *v.* Morris, 2 Phil. 683; 12 Jur. 614; Elderton *v.* Lack, 2 Phil. 680; Rogers *v.* Nowill, 6 Hare, 337; Affd. 11 Jur. 73.

[2] Seton, 980, 981. It has been decided in Virginia, that any papers may be read at the trial of an issue, which were read upon the hearing of the cause, or at a former trial. McCall *v.* Graham, 1 Hen. & M. 13. But it will not be considered an irregularity to omit to read them, unless the order contains a positive direction to that effect. Ford *v.* Gardner, 1 Hen. & M. 72.

[3] Marsh *v.* Sibbald, 2 V. & B. 375.

[4] Johnston *v.* Todd, 3 Beav. 218, 222.

[5] Marsh *v.* Sibbald, *ubi sup.*; and see Twentyman *v.* Barnes, 2 De G. & S. 225; 12 Jur. 743, where an application for production of documents, deposited in Court, to subject them to chemical tests, was refused.

[6] Marsh *v.* Sibbald, *ubi sup.*

[7] Pindar *v.* Smith, 6 Mad. 48.

[8] *Ibid.*

[9] Pulley *v.* Hilton, 10 Pri. 118.

[10] Marsh *v.* Sibbald, *ubi sup.*

[11] Seton, 981.

[12] Cooke *v.* Marsh, 18 Ves. 209; see Few *v.* Guppy, 1 M. & C. 487, 507; and *post*, Chap. XXXIV. § 2, *Bills of Discovery*.

[1] For forms of orders, see Seton, 979, Nos. 2, 3; Lovett *v.* Lovett, 2 Jur. N. S.

or a subsequent application for such a direction may be made, on motion to the Court of Chancery.[2]

The Court will also, on the application of either of the parties, direct that they may be at liberty to apply to the Court of Common Law for the jury to have a view of the premises.[3]

The decree or order directing the issue, always specifies the time when it is to be tried,[4] and it seems that the Court has no power to force the parties to proceed to the trial of the issue. Under special circumstances, leave will be given to postpone the trial.[5] Thus, the probability of the absence of the plaintiff's counsel,[6] or the absence of a material witness,[7] at the time of the trial, has been held a reasonable ground for putting it off. The application for the postponement is made by motion to the Judge who directed the trial.[8]

In *Humpage* v. *Rowley*,[9] the defendant obtained permission from the Court of King's Bench, to carry down the record by *proviso*. Such permission, however, if proper at all, should be given by the Court of Chancery.

It is the duty of the defendant in the issue to name an attorney to appear for him in the Court of Law in which it is to be tried; and, if he neglects to do so, an order may be obtained that he may name an attorney in four days, and that, in default, the issue be taken as tried, and a verdict given for the plaintiff.[10]

If the plaintiff in the issue makes default in proceeding to trial at the time appointed, the issue may, on the motion of the defendant, be ordered to be taken *pro confesso* against the plaintiff in the issue;[11] or in case another trial is directed, he will be ordered * to pay *1115 the costs occasioned by his not proceeding to trial at the appointed time, and the Court will impose such other terms as will, as far as possible, prevent any injury being done to the defendant.[1] After an order to take an issue *pro confesso*, the cause should, if the issue was directed at the hearing, be set down for further hearing, and the issue

1130, V. C. W. For the practice as to praying a *tales*, see Ellis *v.* Bowman, 13 Beav. 318.

[2] Anon., 2 P. Wms. 68. In the case of Apthorp *v.* Comstock, 2 Paige, 485, the order contained a direction that the trial should be by a special jury, if either party should so request. So in Bassett *v.* Johnson, 2 Green Ch. 422.

[3] For form of order, see Seton, 979, No. 5; Chitty's Arch. 892; Ellis *v.* Bowman, *ubi sup.*

[4] In Massachusetts, cases at Law or in Equity are entered indiscriminately upon the docket of the Supreme Judicial Court in each county; and issues in an Equity suit sent to the bar of the Court for trial, take the order of the case upon the docket, unless some special direction is given by the Court. But *appeals* in Equity are by Statute required to be entered in a separate docket. Genl. Sts. c. 113, § 14.

[5] For cases where leave has been granted, see Colvin *v.* Campion, 8 Bligh N. S. 523; Bearblock *v.* Tyler, 1 J. & W. 225; Kebel *v.* Philpot, 9 Sim. 614; where refused, Bickford *v.* Skewes, 10 Sim. 193; 4 M. & C. 498; Hargrave *v.* Hargrave, 9 Beav. 153.

[6] Bearblock *v.* Tyler, *ubi sup.*

[7] Kebel *v.* Philpot, *ubi sup.*

[8] *Ibid.* For form of notice of motion, see Vol. III.

[9] 4 T. R. 767, cited 1 J. & W. 226.

[10] Wilson *v.* Ginger, 2 Dick. 521; Constable *v.* Angel, cited *ib.* n. (*a.*)

[11] Bearblock *v.* Tyler, 1 J. & W. 225; Powell *v.* Wood, 1 R. & M. 354; Casborne *v.* Barsham, 5 M. & C. 113, 117; Johnston *v.* Todd, 3 Beav. 218, and cases cited *ib.* 223, n.; Hartland *v.* Dancocks, 5 De G. & S. 561; see Bassett *v.* Johnson, 1 Green Ch. 154. For form of notice of motion, see Vol. III.

[1] Hargrave *v.* Hargrave, 8 Beav. 280; Reeve *v.* Hodson, 10 Hare Ap. 24; 17 Jur. 344; and see Anon., 4 Mad. 255.

will then be taken *pro confesso* pursuant to the order.[2] If the issue was directed on an interlocutory application before the hearing, the cause should be brought on for hearing in the usual manner.[3]

Any application for the costs occasioned by the plaintiff in the issue not proceeding to trial, should be made in the Court of Chancery, and not in the Court of Common Law.[4]

It may be stated here, that a Judge at Law, trying an issue has no authority to decline trying it, or to refer it to another mode of trial: as by arbitration. It may, however, be referred to arbitration by consent:[5] the effect of which is to abandon, not merely the direction to try the issue, but the whole proceeding.[6]

The course of proceeding upon the trial of an issue is generally the same as that adopted in ordinary trials at Law, except where the Court of Chancery has given any special directions upon the subject.[7]

*1116 It is, however, to be remarked, that, where a devisee * seeks to

[2] Anon., 20 Dec., 1813, cited 1 Newl. 573. For mode of setting down cause for further hearing, see *post*, p. 1041.

[3] See *post*, p. 1040.

[4] Anon., 2 P. Wms. 68.

[5] Master *v.* Hamilton, 3 Jur. N. S. 722, Ex.

[6] Woodley *v.* Johnson, 1 Moll. 394.

[7] For the practice at Law, see Chitty's Arch. 890 *et seq.* Where a feigned issue for the trial of a fact is directed by the United States Circuit Court for the third circuit, in an Equity suit, the case is put on the trial list, and the jury sworn to try the issue, in the words of the order of issue itself. Wilson *v.* Barnum, Wallace Jr. 342.

"After the issue is settled or agreed upon, the subsequent proceedings are regulated by the practice of the Court in which it is to be tried; subject, however, to the control of the Court of Chancery over the parties, as to the mode and terms of trying such issue. 1 Hoff. Ch. Pr. 511. The Court of Law knows nothing of the equitable proceedings in the case, or whether there are any, or what are the pleadings in the Court of Equity. The Court must try the issue, not as an equitable proceeding, nor regulated by any statutes or rules which are applicable to proceedings of an equitable nature. The issue must be tried as a strict issue at Law." Black *v.* Lamb, 1 Beasley, 123; Black *v.* Shreve, 2 Beasley, 455, 485; Carlisle *v.* Foster, 10 Ohio (N. S.), 198.

[Instructions outside of the pleadings will be no ground of reversal if not prejudicial to the complaining party. Rowell *v.* St. Louis, 50 Mo. 92.]

As to the testimony, it is the right and the usual course in the trial of an issue out of Chancery, to examine the witnesses *vivâ voce*. Paul *v.* Paul, 2 Hen. & M. 525.

In Massachusetts, the issue is to be tried upon the like evidence as in a suit at Law, together with such part of the answers, depositions, and other proceedings in the cause, as the Court shall order. Rule 33 of the Rules for Practice in Chancery. Such is the practice in New Jersey. Black *v.* Lamb, 1 Beasley, 106. The answer cannot be read unless the Chancellor so order. Black *v.* Lamb, *supra*. It is the province of the Chancellor to determine what evidence shall be read before the jury. Black *v.* Shreve, 2 Beasley, 255.

In New Hampshire, in the case of Marston *v.* Brackett, 9 N. H. 337, the Court held, that if a party, after the evidence in Chancery has been closed, has a trial by jury, the case is to be tried before the jury upon the evidence taken for the hearing in Chancery, unless the Court, upon cause shown, otherwise order. But the Court may make an order permitting further evidence to be introduced, or may order the parties to be examined, if the case appears to require it.

This latter order would of course be unnecessary in any State where parties to a cause are made witnesses by the general law.

In Clark *v.* Congregational Society in Keene, 44 N. H. 382, it was held that where issues are awarded in a suit in Equity, after proofs are taken, the Court may in its discretion direct, that on the trial of those issues, the depositions already taken may be read, unless the attendance of the witnesses is actually procured, — and also that such further evidence may be adduced, including the testimony of the parties, as, by Law, would be competent on the trial of such issues. See the decree of the Court in this case. See also Bell *v.* Woodward, 47 N. H. 539.

It is within the discretion of the Judge to allow the jury to take out papers ordered to be read to them. Black *v.* Lamb, 1 Beasley, 108.

In Tennessee, the jury are not bound by the strict rule that an answer responsive to the bill shall be taken as true unless contradicted by two witnesses, or one witness and corroborating circumstances, but they may decide upon all the evidence in the case. Lancaster

establish a will of real estate against the heir, the rule of the Court requires that the due execution of the will should be proved by the examination of all the attesting witnesses to it, who are in existence, or capable of being examined; and that the same course is also necessarily required upon the trial of an issue *devisavit vel non*;[1] except when the circumstances are such that, by the common rules of evidence, proof of the witness's handwriting may be substituted for the testimony of the witness himself: as, where the witness is dead or abroad, or is insane,[2] or where, after diligent search, he cannot be found.[3]

This rule, however, applies only to the case of a bill filed to establish a will, and an issue directed by the Court upon that bill. Thus, where the bill was filed, by the heir-at-law, to restrain the devisee from setting up a legal estate as a bar to any action at Law which he might commence: upon the hearing, an issue *devisavit vel non* was directed, in which the devisee was plaintiff; and upon a motion for a new trial, on the ground that all the attesting witnesses had not been examined, it was held, that the case stood upon a ground directly opposed to that upon which the ordinary cases of bills to establish wills rested: inasmuch as, so far from the heir-at-law being bound by the decree which he sought to obtain, it was he who sought to bind the devisee; and such was * the form of his application that, if he failed upon *1117 that issue, he would not be bound himself.[1]

The strict method of proving depositions taken in the Court of Chancery, upon the hearing of a cause in another Court, is by producing a certified copy of the bill and answer, if one has been put in:[2] which is done, for the purpose of laying a foundation for the introduction of such evidence, by showing that there has been matter in issue between the parties; this rule has, however, gradually been relaxed, and, in directing an issue to be tried at Law, the Court will order the depositions

v. Ward, 1 Overton, 430; [Humphreys v. Blevins, 1 Tenn. 178; Richmond v. Richmond, 10 Yerg. 343.

In Virginia, upon an issue out of Chancery, an answer which is responsive must be taken as true, unless contradicted by two witnesses, or one witness with corroborating circumstances. Powell v. Manson, 22 Gratt. 177; Beverley v. Walden, 20 Gratt. 147; Fant v. Miller, 17 Gratt. 187.]

In Black v. Lamb, 1 Beasley, 123, the Chancellor in New Jersey said: "The rules of Law in regard to evidence, its admissibility, and the weight of it, govern the proceedings, except so far as they have been otherwise regulated by the terms of the issue out of this Court. It is a principle upon which Equity jurisprudence is administered, as inflexible in its application as any statute could make it, that in Equity a defendant is entitled to the benefit of his answer, and that where it is responsive to the bill, it must be overcome by the oaths of two witnesses, or of one confirmed by strong circumstances. But if the issue is made up without any order to read the answer at the trial, the Court will not hear it." See Black v. Shreve, 2 Beasley, 455.

[1] Townsend v. Ives, 1 Wils. 216; Ogle v. Cook, 1 Ves. S. 177; Bullen v. Michel, 2 Pri. 399; Bootle v. Blundell, 19 Ves. 494; note (*b*), 500; G. Coop. 136; M'Gregor v. Topham, 3 H. L. Ca. 132; see the cases to this point in note to *ante*, p. 810; Powell v. Cleaver, 2 Bro. C. C. 504, n. (*b*).

[2] Powell v. Cleaver, 2 Bro. C. C. 499, Perkins's ed. 504, n. (*b*); Lord Carrington v. Payne, 5 Ves. 404, Perkins's note (*b*) and cases cited, 411; Bernett v. Taylor, 9 Ves. 381; 2 Greenl. Ev. § 694 note; 2 Story Eq. Jur. § 1447.

[3] James v. Parnell, T. & R. 417.

[1] Tatham v. Wright, 2 R. & M. 1, 12, 15.

[2] See *ante*, pp. 866, 867.

taken in the cause to be read at the trial of the issue,[3] so as to dispense with the strict proof, which would otherwise be required, of the bill and answer.[4] The object of the Court, however, in making such an order, is merely that of dispensing with the strict legal proof of the record;[5] and it is not intended to authorize the reading of the depositions of witnesses, in cases in which the Court of Law would not admit them to be read upon proof of the record, in the ordinary way: that is, unless proof be given that the witness is dead, or abroad, or otherwise unable to attend. A direction is, therefore, generally added to the order, that the depositions of the witnesses shall be read at the trial of the issue, in case such witnesses or either of them shall be dead at the time of the trial, or shall be proved, at such trial, to be in such state of health as not to be capable of attending the trial.[6]

The effect of such an order is to leave the question, as to the admissibility of the depositions, to the determination of the Judge before whom the issue is tried: who will require strict proof, before he admits the depositions, of the death of the witness, or of his inability to attend.

In *Jones* v. *Jones*,[7] a motion was made, before Lord Thurlow, for *1118 leave to read the deposition of a witness in the * cause, on the ground of his age or inability to attend; but his Lordship thought the application should be made to the Judge at the trial, and refused to make any order upon the subject. It seems, however, that there is no absolute rule, requiring that the inability of a witness to attend shall be left to the decision of the Judge at *Nisi Prius:* the fact of a witness's capacity being equally within the province of the Court directing the issue. Where, therefore, the Court can be satisfied that the question of the ability or inability of the witness to attend can have but one conclusion, it will itself decide it, without imposing upon the party the necessity of trying that fact before the Judge at *Nisi Prius:* who would be the person to try it, and not the jury. This principle was laid down and acted upon by Lord Eldon, in *Corbett* v. *Corbett:*[1] who directed the depositions of two witnesses (who were proved, by affidavit, to be of such ages and in such a state of health, as to be unable to travel, with

[3] If the Chancellor directs certain depositions to be read at the trial, the Judge must admit them. An order made by the Court of Chancery that certain evidence shall be read at the trial, is binding on the Judge who conducts the trial, and he has nothing to do with the admissibility of the whole or any part of the evidence. Black *v.* Lamb, 1 Beasley, 108. The Chancellor may give directions to the Court to which the issue is sent for trial to disregard the strict rules of Law; he may direct the admission of evidence which the rules of Law would exclude; he may direct that one or both of the parties may be examined in the trial in States where the parties would not otherwise be legal witnesses. 1 Beasley, 113; Black *v.* Shreve, 2 Beasley, 455, 479, 485; Ringwalt *v.* Ahl, 36 Penn. St. 336; Yingling *v.* Hesson, 16 Md. 112; Bell *v.* Woodward, 47 N. H. 539.

[4] See *ante*, p. 867. The answer cannot be read unless the Chancellor so order. Black *v.* Lamb, 1 Beasley, 108, 123, 127; Gresley Eq. Ev. 227; see Rule 36 of the Mass. Prac. in Ch. *ante*, 1115, 1116, note.

[5] Gordon *v.* Gordon, 1 Swanst. 166, 170.

[6] Palmer *v.* Lord Aylesbury, 15 Ves. 176; Bellingham *v.* Pearson, 1 V. & B. 339, n.; Wray *v.* May, *ibid.;* Turner *v.* Maule, 2 De G. & S. 209; 12 Jur. 860; Watkins *v.* Atchison, 10 Hare Ap. 46; Black *v.* Shreve, 2 Beasley (N. J.), 455, 479; [Powell *v.* Manson, 22 Gratt. 188.] For forms of order, see Seton, 981, Nos. 12 and 13; 982, No. 14; and see Penny *v.* Watts, 2 De G. & S. 501.

[7] 1 Cox, 184.

[1] 1 V. & B. 335, 341.

safety, to the assize town), to be read at the trial of the issue, and also the depositions of such other persons as should be proved at the trial to be dead or unable to attend.

Where a witness who has been examined in a cause, and afterwards *viva voce* upon the trial of an issue, dies, and a new trial of the issue is directed, not only his depositions in the cause may be read at the new trial, but what he swore at the former trial may be given in evidence.[2] Where a person, not a party to the suit in Equity, is ordered to be plaintiff in the issue, an order to read the evidence of deceased witnesses will not be made.[3]

The rules with regard to the examination of witnesses *de bene esse*, with a view to using their depositions upon the trial of an issue,[4] as well as the admissibility of such depositions upon trials at Law, have been before discussed.[5] When depositions *de bene esse* have been read at the hearing of a cause, it is a matter of course to order them to be read at the trial of the issue, notwithstanding an irregularity in the examination; and the Court refused to discharge the order, on the ground of such irregularity, * although the party complaining *1119 of it did not know of the irregularity in question till after the hearing, and the time was very short between the closing of the evidence and the hearing of the cause: because the party complaining of the order might have applied for time, to enable him to examine whether the depositions had been regularly taken.[1]

A person who is interested in the result of an issue, but who refuses to be a party to it, may, nevertheless, be allowed to attend the trial by counsel;[2] and he will, in such case, be included in the common order for the production of documents.[3]

After the trial has been had, the Judge before whom it has been tried, certifies, on the *postea*, how the verdict was found; but judgment is not entered up on the verdict.[4] Any special circumstances which are found by the jury, or which the Judge may think it right to report to the Court,

[2] Coker *v.* Farewell, 2 P. Wms. 563; Baker *v.* King, 6 Yerger, 402. The rule at Law, also, is, that the decease of a witness will let in evidence of what he swore at a former trial. Glass *v.* Beach, 5 Vt. 172; Jackson *v.* Bailey, 2 John. 17; Miles *v.* O'Hara, 4 Binn. 108, 111; White *v.* Kibling, 11 John. 128; Beals *v.* Guernsey, 8 John. 446; Wilber *v.* Selden, 6 Cowen, 162; Crary *v.* Sprague, 12 Wend. 41; Hobson *v.* Doe, 2 Blackf. 308; 1 Greenl. Ev. §§ 163, 164, 165, 166, and notes. Upon the question, whether this kind of evidence is admissible in any other contingency, except the death of the witness, there is some discrepancy among the American authorities. See this subject discussed, and the cases cited in which it has been allowed or disallowed, in 1 Greenl. Ev. §§ 163, 167, notes; Chess *v.* Chess, 17 Serg. & R. 409; Irwin *v.* Reed, 4 Yeates, 512; Wilber *v.* Selden, 6 Cowen, 162; Le Baron *v.* Crombie, 14 Mass. 234; Drayton *v.* Wells, 1 Nott & M'C. 409; Finn's Case, 5 Rand. 701; Crary *v.* Sprague, 12 Wend. 41; Magill *v.* Kauffman, 4 Serg. & R. 317; Carpenter *v.* Groff, 5 Serg. & R. 162; Miller *v.* Russell, 7 Martin, 266, N. S.; Noble *v.* Martin, 7 Martin, 282; 1 Phil. Ev. 231, note 441, by Cowen & Hill.

[3] Johnson *v.* Todd, 3 Beav. 218, 222.

[4] *Ante*, p. 932 *et seq.*

[5] *Ante*, p. 939.

[1] Gordon *v.* Gordon, 1 Swanst. 166, 171; *ante*, p. 941.

[2] For form of order, see Seton, 980, No. 6; Lord Trimleston *v.* Lloyd, 1 Bligh N. S. 427; S. C. *nom.* Lord Trimleston *v.* D'Alton, 1 Dow & Cl. 85; Chitty's Arch. 893; Pindar *v.* Smith, 6 Mad. 48; Malone *v.* Malone, 8 Cl. & Fin. 179.

[3] *Ante*, p. 1113.

[4] O'Connor *v.* Malone, 6 Cl. & Fin. 572; Chitty's Arch. 893; 1 Newl. 573; Gresley Eq. Ev. 161, note.

should be indorsed on the *postea:* and the Court, in ordering an issue, usually directs any special circumstances found by the jury which may be material in measuring the extent of the relief to be given on further consideration, to be indorsed on the *postea.*[5]

A bill of exceptions for an alleged misdirection of the Judge, upon the trial of an issue, will not lie;[6] the regular course being to apply to the Court which directed the issue, for a new trial. In *Armstrong* v. *Armstrong*,[7] however, a bill of exceptions was tendered, and signed by the Judge; and the objection to its regularity having been waived, it was argued and decided upon in the Exchequer Chamber.[8]

*1120 * It has been before stated that, after the trial of an issue, a plaintiff cannot move to dismiss his own bill with costs: although he might have done it before the trial actually took place.[1]

A party does not, by proceeding to trial pursuant to an order directing an issue, deprive himself of his right to appeal from it.[2]

Section IV. — *New Trials.*

If any party is dissatisfied with the verdict of the jury, or of the Judge, he must apply for a new trial.

Under the former practice, the Court of Chancery, in granting new

[5] White *v.* Lisle, 3 Swanst. 342, 345; Chitty's Arch. 893. The *postea* should be returned to the Chancery Court. Trenton Banking Co. *v.* Rossell, 1 Green Ch. 492. The Judge, before whom the issue is tried, should not only return the *postea*, but go further, and furnish to the Court of Chancery a fair statement of the trial. His certificate has always its weight. Bassett *v.* Johnson, 1 Green Ch. 154. It is not necessary that the report of the Judge should state the evidence and give a minute history of the trial. But he should state the general character of the evidence offered, the part objected to, and the decision made upon the objection, with his charge to the jury. If any difficulty exist in relation to the report of the Judge, the Court will not, for this cause alone, grant a new trial, but will call on the Judge for an additional report of the case. *Ibid.* The Court will send for minutes of Judges and counsel. Gresley Eq. Ev. 527. The finding of the jury must appear by the record, certified by the Judge. A certificate of the Judge made from memory will not be sufficient. Baker *v.* King, 6 Yerger, 402; Black *v.* Shreve, 2 Beasley, 455, 484. As to the form of a verdict, see State *v.* Farish, 23 Miss. 483. For form of order, see Seton, 983, No. 15.

[6] Clayton *v.* Nugent, 1 Coll. 362, 364; 8 Jur. 867. Nor can an appeal be taken. S. C. Railroad Co. *v.* Toomer, 9 Rich. Eq. (S. C.) 270. In *Ex parte* Story, 12 Peters, 343, Taney C. J. said: "A bill of exceptions is altogether unknown in Chancery practice."

[7] 3 M. & K. 45, 52.

[8] The case of Pingree *v.* Hodges, an Equity suit on which issues were framed by the Court, and tried by a jury in Essex County, Mass., 1861, went before the full bench *on exceptions* taken to the rulings of the Judge who presided at the trial. No objection was made, and the point was not considered before the full bench. The case is not reported.

In Dodge *v.* Griswold, 12 N. H. 573, it was held that where an issue in a suit in Chancery is sent to the Court below for the verdict of a jury, exceptions to the testimony submitted must be taken and certified back to the Court, or such exceptions will be considered as waived. Upham J. said: "In no other mode can we obtain the proper and authentic evidence of what transpired at the trial." See Fitzhugh *v.* Fitzhugh, 11 Grattan (Va.), 210; Lansing *v.* Russell, 13 Barb. 510; Stannard *v.* Graves, 2 Call, 369; Ford *v.* Gardner, 1 Hen. & M. 72.

Where exceptions are taken on the trial of an issue out of Chancery, and made part of the record, the certificate to the verdict by the Court of Law is a certificate to the whole record, and the exceptions, though not expressly certified, become a part of the Chancery record. Watkins *v.* Carlton, 10 Leigh, 560.

[1] *Ante*, p. 793.

[2] Butlin *v.* Masters, 2 Phil. 290; *ante*, p. 1083.

trials, acted upon rules which differed materially from those which guide Courts of Common Law; but by the Chancery Amendment Act, 1858, it is enacted, that where the trial is had by a jury before the Court, the Court in respect of new trials shall have the same jurisdiction, powers, and authority in all respects as belong to any Superior Court of Common Law, or to any Judge thereof, for the like purpose;[3] and that where the trial is had before the Court itself without a jury, the proceedings upon and after such trial, as to the power of the Court, the evidence, and otherwise, shall be the same as in the case of a trial by jury under the Act.[4] It appears to be doubtful whether it was intended by these provisions to enact that the Court of Chancery, in granting new trials, should be guided by the rules adopted at Law, instead of those upon which it formerly acted. It is obvious, however, that when the issue is tried before the Court itself, it is, in dealing with the question of a new trial, in a very different position from that in which it is, when the trial has been had before another Court.[5]

It is proposed, therefore, in considering this subject, first to state the rules upon which the Court of Chancery formerly acted in granting new trials of issues (and which still apply to issues * directed *1121 to Courts of Common Law);[1] and then to set out the rules which guide the Courts of Common Law upon similar applications.

The Court of Chancery directs issues to be tried at Law, to inform the conscience of the Court as to facts doubtful before; and therefore expects, in return, such a verdict, and on such a case, as shall satisfy the conscience of the Court to found a decree upon.[2] Hence, upon any material and weighty reason, if the verdict is not such as to satisfy the Court that it ought to found a decree upon it, there are several cases in which this Court has directed a new trial for further satisfaction, notwithstanding it would not be granted in a Court of Common Law: because it is *diverso intuitu*, and because the Court proceeds on different grounds.[3] Acting upon this principle, the Court will grant a new trial, not only in cases where the verdict is against the evidence, but it will nicely balance the evidence on both sides; and where it finds that the verdict is contrary to the weight of evidence, it will direct the issue to be tried over again.[4] And the practice has always been not to consider merely whether there was evidence which would support the finding of the jury, and, in that case, refuse a new trial, but to consider whether,

[3] 21 & 22 Vic. c. 27, § 3.

[4] 21 & 22 Vic. c. 27, § 5; and see Fernie *v.* Young, L. R. 1 H. L. Cas. 63; 12 Jur. N. S. 437.

[5] [Penn *v.* Bibby, L. R. 2 Ch. App. 127; Simpson *v.* Holliday, L. R. 1 H. L. 315.] See Clark *v.* Society, 45 N. H. 331; [Code of Tenn. § 4465; James *v.* Brooks, 6 Heisk. 150.]

[1] 25 & 26 Vic. c. 42, § 2.

[2] Black *v.* Shreve, 2 Beasley (N. J.), 455.

[3] Per Lord Hardwicke, in Stace *v.* Mabbot, 2 Ves. S. 553. But see Clark *v.* Society, 45 N. H. 331, in which it was decided, that, in determining a motion for a new trial of issues awarded in Equity, upon the ground that the verdict is against evidence, the Court will ordinarily be governed by the rules and principles applied to such motions in suits at Law, and will not grant a new trial merely because, in weighing the evidence, the Court would have reached a different result. See Doe *v.* Vallejo, 29 Cal. 385.

[4] Lord Faulconberg *v.* Peirce, Amb. 210; Cleeve *v.* Gascoigne, *ib.* 323; and see Locke *v.* Colman, 2 M. & C. 42, 46.

having regard to the entire subject-matter, and to the whole of the evidence given at or before the trial, and what has since become known, the Court is satisfied that full and complete justice has been done between the parties, and that no further investigation is necessary for the purpose of attaining that end; and unless it is so satisfied, the Court requires that the matter shall be again tested by an examination before a jury, with such directions and modifications as it may consider desirable for the fair, thorough, and impartial sifting of the whole matter.[5] Generally, however, where the application rests solely on the ground that the verdict was against the evidence, and the Judge certifies that he is not dissatisfied with the verdict, the Court will not direct a new trial.[6]

The Court will, however, grant a new trial, upon the production of new evidence, which was not before the jury upon the original *1122 * trial;[1] or where the Court is satisfied that evidence which was discredited for want of corroboration may be corroborated;[2] or it appears probable that more evidence can be adduced as to a custom;[3] and so, where, after a trial, a witness is convicted of perjury, or a party of forgery.[4] But the Court will not set aside a trial at Law for any matter which might have been made use of at the trial;[5] or where it is of opinion that the evidence, though newly discovered, will not afford a foundation for a different verdict.[6]

Where it can be shown that a party has been taken by surprise, and evidence produced at the trial which he could have no reason to expect would be produced, the Court has directed a new trial.[7] Thus, where, at a trial of a question of legitimacy, a witness was called to prove a fact (showing that there might have been access between a husband and wife at a particular time and place): which witness had not been examined in a suit in the Ecclesiastical Court, to which the mother of the child whose legitimacy was disputed was a party, and in which his evidence would have been material to her, nor was any attempt made by her in that suit to establish the case of access which his testimony went to make out: Lord Lyndhurst held that the testimony of this witness was a surprise upon the party against whom it was produced; and its accuracy being impeached by affidavit, he directed a new trial of the issue.[8]

The Court will also grant a new trial, in cases in which a fraud has been practised upon the party applying.

[5] Per Sir J. Romilly M. R. in Swinfen *v.* Swinfen, 27 Beav. 148, 152; see also Waters *v.* Waters, 2 De G. & S. 591; *Ex parte* The Freemen, &c., of Sunderland, 1 Drew. 184.

[6] Lord Faulconberg *v.* Peirce, *ubi sup.*; Gibbs *v.* Hooper, 2 M. & K. 353; Swinfen *v.* Swinfen, 27 Beav. 148; see Dunn *v.* Dunn, 11 Mich. 284; Clayton *v.* Yarrington, 33 Barb. (N. Y.) 144.

[1] Gibbs *v.* Hooper, 2 M. & K. 353, 356; and see Ansdell *v.* Ansdell, 4 M. & C. 449; Sewel *v.* Freeston, 1 Cha. Ca. 65.

[2] Shields *v.* Boucher, 1 De G. & S. 40.

[3] Locke *v.* Colman, *ubi sup.*

[4] Tilly *v.* Wharton, 2 Vern. 378; see also Coddrington *v.* Webb, *ib.* 240.

[5] Curtess *v.* Smalridge, 1 Cha. Ca. 43; Freem. 178; Montgomery *v.* Attorney-General, 9 Mod. 388.

[6] Colegrave *v.* Juson, 3 Atk. 197.

[7] Exton *v.* Turner, 2 Cha. Ca. 80; see also Willis *v.* Farrer, 3 Y. & J. 264; M'Gregor *v.* Bainbrigge, 7 Hare, 166, n.

[8] Gibbs *v.* Hooper, 2 M. & K. 353, 356.

Although surprise or fraud is in general considered a sufficient ground for directing a new trial, the Court has refused to grant a new trial, upon a mere suggestion that the plaintiff was not apprised of some particular evidence which was made use of at the trial, and, therefore, was not prepared to answer it: because it appeared, that the evidence by which the plaintiff was surprised, was that of a witness who was brought to swear that one of the most material witnesses for the plaintiff was not in England at the time when the transaction to which he deposed was alleged to have taken place, and it was proved, by affidavit, that, a fortnight before the trial took place, notice was given to the plaintiff of the intention of the defendant to prove that the witness was abroad; which, though it was not so particular as to point out the very
* place where he would be shown to be, was held, by Lord Hard- *1123
wicke, to be sufficient notice to prepare the plaintiff to encounter the evidence.[1] A new trial will not be granted, where a party is in possession of evidence, which, either in the exercise of discretion or from neglect, he does not produce at the trial;[2] nor where it can be shown that, though he was not in possession of it himself, he had full notice that it was in the power of the other side to produce it. Upon this ground, the circumstance of evidence, which was discovered after the answer of the defendant was put in, having been made use of at the trial, was held not a sufficient reason for directing a new trial: there having been no surprise upon the party applying, who, before the trial, had opposed a motion made by the other party, for the express purpose of having the trial postponed, in order that the issue might be rectified.[3] Where the plaintiff in the issue was dead at the time of trial, but the fact was not known to the parties, the Court refused to grant a new trial.[4]

As the Court will not grant a new trial upon the mere production of new evidence, unless it can be shown that there was a fraud or surprise upon the party applying, so it will not permit a party who has practised a fraud, and set up documents which were proved to be forgeries, and by that means prejudiced his own case, to say that, whether the documents were true or false, there is other evidence which makes them immaterial.[5]

The Court will grant a new trial, on the ground that a material witness for the party was absent from the trial; but it will not do so on the mere ground that the testimony of the witness who was absent would only corroborate that of several others to a fact. It must be shown that there is something particular in his evidence which is of importance, and that it was not in the power of the party to have the trial put off.[6]

A new trial may also be directed, on the ground of a misdirection of

1 Richards *v.* Symes, 2 Atk. 319.
2 Standen *v.* Edwards, 1 Ves. J. 133.
3 Legard *v.* Daly, 1 Ves. S. 192; Yates *v.* Monroe, 13 Ill. 212.
4 Bird *v.* Kerr, 4 K. & J. 270.
5 Kemp *v.* Mackrell, 2 Ves. S. 580.
6 Cleeve *v.* Gascoigne, Amb. 323.

the jury by the Judge who tried the issue;[7] and if the Court feels satisfied, from the report of the Judge, that the points in the case have not been distinctly presented to the jury, it will, without entering into the question whether the verdict was or was not satisfactory upon the facts, direct a new trial.[8]

The Court will also order a new trial of an issue, where it sees reason to be dissatisfied with the conduct of the jury,[9] or where *1124 * there has been an irregularity in the trial. It has been said, that to induce the Court to set aside a former trial for irregularity, and for that cause to grant a new one, there must be ordinarily a certificate in writing, from the Judge or Court before whom it was tried, of a verdict against evidence, or other misbehavior of the jury, or such like.[1] This, however, does not appear to be the present practice; and the Court has set aside the verdict in such cases, without any such certificate by the Judge.[2]

A new trial may also be granted, because evidence which was tendered was improperly rejected: though it seems that the Court will not direct a new trial upon the latter ground only, if it is satisfied that the verdict is right, upon considering all the evidence, including that which was rejected.[3] Where, also, an application is made to the Court to grant a new trial, on the ground of an improper summing up by the Judge, the Court will not accede to it, if it is satisfied that, upon the evidence as it stands, the jury could not, if the case had been properly summed up, have given a different verdict.[4]

Where the matter related to the right to land, the Court frequently directed new trials of issues, even in cases in which the issue has been properly tried, and the verdict was satisfactory upon the evidence: the Court formerly being unwilling to make a decree binding the inheritance, where there had been but one trial at Law.[5] It must not, however, be supposed that a second trial of an issue can be demanded as a right: for even where the object is to establish a will against an heir-at-law,

[7] *Ibid.*; Bearblock *v.* Tyler, Jac. 571; see Dodge *v.* Griswold, 12 N. H. 573.

[8] O'Connor *v.* Cook, 8 Ves. 535.

[9] East India Company *v.* Bazett, Jac. 91, 93; Pleasants *v.* Ross, 1 Wash. 156; Dodge *v.* Griswold, 12 N. H. 576.

[1] Wyatt's P. R. 263.

[2] See East India Company *v.* Bazett, *ubi sup.*; Stace *v.* Mabbot, 2 Ves. S. 553.

[3] Hampson *v.* Hampson, 3 V. & B. 41; Warden and Minor Canons of St. Paul's *v.* Morris, 9 Ves. 155, 167; Bootle *v.* Blundell, 19 Ves. 500, 503; Barker *v.* Ray, 2 Russ. 63, 75; Pemberton *v.* Pemberton, 11 Ves. 50, 52; Muloch *v.* Muloch, 1 Edw. Ch. 14; Apthorp *v.* Comstock, 2 Paige, 482; Humphreys *v.* Blevins, 1 Tenn. 178; Lee *v.* Beatty, 8 Dana, 207; Black *v.* Lamb, 1 Beasley (N. J.), 108, 113, 114; Basset *v.* Johnson, 1 Green Ch. 155; Van Alst *v.* Hunter, 5 John. Ch. 149. [See Powell *v.* Manson, 22 Gratt. 192.] The object of an issue at Law is to inform the conscience of the Court; and if the Court can be satisfied, that substantial justice has taken place, the verdict will not be disturbed on mere technical grounds. Black *v.* Lamb, 1 Beasley (N. J.), 114; Black *v.* Shreve, 2 Beasley (N. J.), 455; Trenton Banking Co. *v.* Rossell, 1 Green Ch. 511; Basset *v.* Johnson, 1 Green Ch. 154; see Lansing *v.* Russell, 15 Barb. 510: Thomasson *v.* Kennedy, 3 Rich. Eq. 440; and see Kidney *v.* Cockburn, 2 R. & M. 167.

[4] Tatham *v.* Wright, 2 R. & M. 31; and see Ringrose *v.* Todd, 12 Pri. 650; Barker *v.* Ray, *ubi sup.*; Slaney *v.* Wade, 7 Sim. 595, 610.

[5] Earl Darlington *v.* Bowes, 1 Eden, 270; Stace *v.* Mabbot, 2 Ves. S. 553: and see Edwin *v.* Thomas, 2 Vern. 75, in which it was thought to be a sufficient ground for a new trial, that the result concerned all the copyholders of a manor; see also Locke *v.* Colman, 2 M. & C. 42, 46.

who, but for the interference of the Court, would be entitled to take the successive opinions of juries by new ejectments, the Court, if it sees no reason to be dissatisfied with the first verdict, will refuse him a second trial.[6] When a new trial is granted, and it happens that one verdict * goes one way, and the other another way, then the *1125 Court will ordinarily, on motion, order a third trial: which is commonly conclusive.[1] But in the case of a will, even after two trials, in both of which the verdict has been in favor of the will, the Court, where it was not satisfied with the manner in which the last trial was conducted, has directed a third trial.[2]

It seems also, that even after three trials, the Court has power, if it sees reason to be dissatisfied with the verdict, to grant a fourth. An application for this purpose was made to the Court in *Pemberton* v. *Pemberton*,[3] and no objection was raised to the power of the Court to direct a fourth trial: though the result of the case was, that Lord Erskine, being satisfied with the verdict, refused the motion. The Court will not, however, direct a new trial after a third, unless upon some special ground; and in *Attorney-General* v. *Montgomery*,[4] Lord Hardwicke said, that where there had been two trials, the last of which was at bar, the Court had suffered the last to prevail; and that to lay down a rule that there must be three, would be attended with great expense. In *The Warden and Minor Canons of St. Paul's* v. *Morris*,[5] after two trials, at bar, a third trial was refused: although evidence had been rejected at the last, which the Court thought ought to have been received; and in *Bates* v. *Graves*,[6] the Court refused a third trial of an issue as to the validity of a will of real estate: although neither of the former trials had been at bar.[7]

The rules which regulate the Court of Chancery in granting new trials of issues directed to Courts of Common Law having been considered, it is now proposed to state those upon which the Courts of Common Law act in granting new trials at Law.

For certain mistakes made by the Judge during the course of the trial, a new trial may be granted. Thus, if a Judge at the trial, admit

[6] Wilson *v.* Beddard, 12 Sim. 28, 32; Winchelsea *v.* Wauchope, 3 Russ. 441, 445; White *v.* Wilson, 13 Ves. 88; Johnston *v.* Todd, 5 Beav. 597, 606; Hitch *v.* Walls, 10 Beav. 84, 89; Swinfen *v.* Swinfen, 27 Beav. 148; M'Gregor *v.* Topham, 3 Hare, 488, 496; 3 H. L. Ca. 132; Waters *v.* Waters, 2 De G. & S. 591; see Van Alst *v.* Hunter, 5 John. Ch. 152. The Court will not feel itself bound by a single verdict either way, if it is not entirely satisfactory; but will direct new trials, until there is no longer any reasonable ground for doubt. 2 Story Eq. Jur. § 1447, and notes; New Orleans Gas Light Co. *v.* Dudley, 8 Paige, 452; Binford *v.* Dommett, 4 Sumner's Ves. 756, and note (*a*); Lansing *v.* Russell, 3 Barb. Ch. 325; Nell *v.* Snowden, 5 Geo. 1; Clark *v.* Society, 45 N. H. 331.

[1] Wyatt's P. R. 265.

[2] Pemberton *v.* Pemberton, 13 Ves. 290; see Clark *v.* Society, 45 N. H. 331, 335. After two concurring verdicts for the same party, on an issue directed by the Chancellor to be tried at Common Law, he is not bound to direct a new trial, notwithstanding the verdicts were in opposition to the opinions of the Judges, before whom the issues were tried, and a verdict had originally been rendered in favor of the other party. M'Rea *v.* Wood, 1 Hen. & M. 548.

[3] 13 Ves. 290, 302, 313.

[4] 2 Atk. 378.

[5] 9 Ves. 155, 171.

[6] 2 Ves. J. 287, 293.

[7] An issue directed out of Chancery may be withdrawn by the Chancellor at any time, and decided by himself. Cook *v.* Bay, 4 How. (Miss.) 485.

improper evidence,[8] or reject evidence which ought to be ad-
*1126 mitted,[9] by which means the result of the trial might have * been different, the Court will, in general, grant a new trial.[1] In some cases, however, the Court may refuse a new trial, though evidence has been improperly rejected: as where the fact which such evidence was offered to establish was proved by other means, or was not disputed,[2] or was admitted by the opposite counsel;[3] or where, assuming the rejected evidence to have been received, a verdict in favor of the party offering it would have been clearly and manifestly against the weight of evidence, and certainly set aside, on application to the Court, as an improper verdict,[4] and the Court has refused a new trial on the ground of the improper admission of evidence, where there clearly appeared to be sufficient evidence to support the verdict, independently of the evidence so admitted.[5] It may here be stated, that no new trial will be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient, or that the document does not require a stamp.[6]

If the Judge misdirect the jury,[7] a new trial may be granted. Where there is a misdirection on a point immediately in issue, and for which a bill of exceptions will lie, a new trial is a matter of right, but this is not so where the Judge makes a mistake on some collateral point. In the latter case, a new trial will only be granted if the Court is satisfied that injustice has been done by the misdirection.[8] Where the Judge's direction was correct, but the Court thought the jury might have misunderstood it, a new trial was granted: the costs to abide the event.[9] An incorrect direction to the jury upon a point which could not have influenced their verdict, is not a ground for a new trial;[10] nor is a wrong observation on a matter of fact, which is left to the jury;[11] and the Court refused a new trial where there had been misdirection

[8] Tutton *v.* Andrews, Barnes, 448; Baron de Rutzen *v.* Farr, 4 A. & E. 53; 5 N. & M. 617; Doe Tatham *v.* Wright, 1 H. & W. 729; 7 A. & E. 313.

[9] Smedley *v.* Hill, 2 W. Bl. 1105; Boyle *v.* Wiseman, 10 Ex. 647; 1 Jur. N. S. 115.

[1] See Robinson *v.* Williamson, 9 Pri. 136; Freeman *v.* Arkell, 2 B. & B. 494; Gravenor *v.* Woodhouse, 1 Bing. 31; Crease *v.* Barrett, 1 C. M. & R. 919; Baily *v.* Haines, 14 Jur. 80, 81, Q. B., where it was held to be immaterial that the jury professed to have given their verdict independently of the evidence improperly received.

[2] Edwards *v.* Evans, 3 East, 451; Rex *v.* Teal, 11 East, 311; Alexander *v.* Barker, 2 C. & J. 133; Strudt *v.* Roberts, 5 D. & L. 460, B. C.; Doe Walsh *v.* Langfield, 16 M. & W. 497.

[3] Mortimer *v.* M'Callan, 6 M. & W. 58; see Stracy *v.* Blake, 1 M. & W. 168.

[4] Per Parke B., 1 C. M. & R. 933; Baron de Rutzen *v.* Farr, 4 A. & E. 53; 5 N. & M. 617; Doe Tatham *v.* Wright, 1 H. & W. 729; 7 A. & E. 313; Bosanquet *v.* Shortridge 14 Jur. 71, Ex.; Darch *v.* Tozer, 13 Jur. 959, Q. B.; Ferrand *v.* Milligan, 10 Jur. 6, Q. B.

[5] Horford *v.* Wilson, 1 Taunt. 12; and see Doe Tynham *v.* Tyler, 6 Bing. 561; 4 M. & P. 377.

[6] 17 & 18 Vic. c. 125, § 31; and see Eames *v.* Smith, 1 Jur. N. S. 1025, Ex., where the Judge reserved for the opinion of the Court, the question whether a stamp was sufficient.

[7] Anon., 2 Salk. 649; How *v.* Strode, 2 Wills. 269, 273.

[8] Black *v.* Jones, 6 Ex. 213; see Edmondson *v.* Machell, 2 T. R. 4; and per Tindal C. J. in Moore *v.* Tuckwell, 15 L. J. C. P. 153; 1 C. B. 607; Cox *v.* Kitchin, 1 B. & P. 338; Calcraft *v.* Gibbs, 5 T. R. 20; Robinson *v.* Cook, 6 Taunt. 636; Wicks *v.* Clutterbuck, 2 Bing. 483; 10 Moore, 63; Twigg *v.* Potts, 1 C. M. & R. 89; Duke of Newcastle *v.* Inhabitants of Broxtowe, 1 N. & M. 598; [Henman *v.* Lester, 12 C. B. N. S. 776, 789].

[9] Toulmin *v.* Hedley, 2 C. & K. 157; see Lord *v.* Wardle, 4 Sc. 402.

[10] Bessey *v.* Windham, 6 Q. B. 166.

[11] Taylor *v.* Ashton, 12 L. J. N. S., Ex. 363; 11 M. & W. 401.

with respect * to one item only of the plaintiff's demand: the *1127
plaintiff consenting to reduce the damages by the whole sum, in respect of which the misdirection took place.[1] Where the defendant obtained a verdict in a case in which the plaintiff ought to have been nonsuited, there being no evidence in support of his case, the Court refused a rule *nisi* for a new trial, on the ground of misdirection, but granted a rule *nisi* to enter a nonsuit.[2] If the Judge does not give the jury a sufficient direction, a new trial may sometimes be granted.[3]

If the Judge leaves a question to the jury which he ought to decide himself as a point of law, and the jury decide the question correctly, the Court will not grant a new trial.[4]

The Court will not grant a new trial for an objection, either to the direction of the Judge at the trial,[5] or to the admission[6] or rejection[7] of evidence, unless such objection was distinctly raised at the trial. Where evidence is tendered for a purpose for which it is not admissible, and rejected, a new trial will not be granted merely because such evidence was admissible for another purpose not stated at the trial.[8] An objection to the admissibility of evidence must be made before the summing up.[9] The Court will not grant a new trial upon an objection which has been waived at *Nisi Prius;*[10] nor on the ground that the Judge has refused to recall a witness, unless it is very clear that he was wrong.[11]

If the Judge improperly discharges the jury from giving a verdict on one or more of the issues, the Court may grant a new trial.[12] Where, however, there were two issues, and the jury found upon both, but the Judge, under a misapprehension that the finding upon the first issue rendered the second useless, discharged the jury upon the second issue, it was held, that the proper course was * to apply to the *1128
Judge to have the verdict entered according to his notes, and not to move for a new trial.[1]

[1] Moore *v.* Tuckwell, *ubi sup.;* see Mayfield *v.* Wadsley, 3 B. & C. 357.

[2] Vane *v.* Cobbold, 1 Ex. 798.

[3] Elliot *v.* The South Devon Railway Company, 17 L. J. Ex. 262; Hadley *v.* Baxendale, 18 Jur. 358, Ex., where the Judge omitted to give a sufficient direction as to the mode of measuring the damages. As to the effect of non-direction, see Ford *v.* Lacy, 7 Jur. N. S. 684, Ex.

[4] Doe Strickland *v.* Strickland, 19 L. J. C. P. 89.

[5] Robinson *v.* Cook, 6 Taunt. 336; Morrish *v.* Murray, 13 M. & W. 52; 2 D. & L. 199; Wardman *v.* Bellhouse, 9 M. & W. 596; Hazledine *v.* Grove, 3 Q. B. 997; Watson *v.* Whitmore, 8 Jur. 964, Ex.; Hearne *v.* Stowell, 6 Jur. 458, Q. B.; Brown *v.* Storey, 1 Sc. N. R. 9; Doe Strickland *v.* Strickland, 8 C. B. 725; Horlor *v.* Carpenter, 27 L. J. C. P. 1.

[6] Malin *v.* Taylor, 2 Hog. 3; Williams *v.* Wilcox, 8 A. & E. 314; Walker *v.* Needham, 1 Dowl. N. S. 220; Doe Gilbert *v.* Ross, 7 M. & W. 102; Doe Phillips *v.* Benjamin, 9 A. & E. 649; Foss *v.* Wagner, 7 A. & E. 116, n.; Kenn *v.* Neck, 3 Dowl. 163.

[7] Gibbs *v.* Pike, 9 M. & W. 351; 1 Dowl. N. S. 409; Goslin *v.* Corry, 8 Sc. N. R. 24; Sorden *v.* Conton, 3 Jur. 1027, Q. B.; [Penn *v.* Bibby, L. R. 2 Ch. App. 127; Shadden *v.* Patrick, L. R. 1 Sc. & D. 470, 542]. If a document has been rejected as not being evidence, a new trial will not be refused merely because it was not duly stamped, if it can be stamped at the trial, under the C. L. P. Act, 1854 (17 & 18 Vic. c. 125), § 27; Whitehouse *v.* Hemmant, 27 L. J. Ex. 295; and see *ante*, pp. 880, 881.

[8] Rex *v.* Grant, 3 N. & M. 106; Doe Kinglake *v.* Bevis, 18 L. J. C. P. 628.

[9] Abbott *v.* Parsons, 7 Bing. 563.

[10] Shirley *v.* Matthews, 1 Jur. 57, Ex.; Malin *v.* Taylor, 2 Hog. 3; Morrish *v.* Murray, *ubi sup.*

[11] Middleton *v.* Barned, 18 L. J. Ex. 433; *ante*, p. 1104.

[12] Tinkler *v.* Rowland, 4 A. & E. 868.

[1] Iles *v.* Turner, 3 Dowl. 211; and *post*, p. 1135.

It seems that a new trial may be granted, if the Judge improperly refuses to postpone the trial.[2]

A new trial will not be granted because the Judge has improperly allowed a party to begin: unless clear and manifest injustice was occasioned thereby.[3]

In some cases, where there has been a mistake in the taking or entry of the verdict, a new trial will be granted.[4] On a motion for a new trial upon the ground that the verdict was entered by mistake, the Court will receive the affidavit of a juryman as to what occurred in open Court upon the delivery of the verdict.[5]

If a juror has been sworn on the jury by a wrong surname (particularly if he is not the person summoned or intended to be sworn), a new trial may be granted;[6] but otherwise if sworn by a wrong Christian name.[7] It is discretionary, however, with the Court to grant a new trial in such a case or not; and it will not do so, unless the mistake as to the juror has been productive of some injustice.[8]

In an action against a provisional committeeman of a proposed railway company, for goods supplied in the course of its formation, in which there was a verdict for the defendant, the Court granted a new trial upon the ground that the foreman of the jury was a provisional committeeman of the same company, but only on payment of costs: as it appeared that the plaintiff's attorney was aware of the foreman's *1129 interest.[9] The Court refused to set aside a *trial upon the ground that one of the jurors had served the defendant with process in the action.[1]

If the jury return a perverse verdict, the Court will grant a new trial, and, in general, without payment of costs.[2]

[2] Goldient *v.* Beagin, 11 Jur. 544, Ex., where it was contended that certain observations made by the Judge before the trial, were calculated to prejudice the case.

[3] Brandford *v.* Freeman, 5 Ex. 734; 20 L. J. Ex. 36; Leete *v.* Gresham Life Insurance Society, 15 Jur. 1161, Ex.; Doe Bather *v.* Brayne, 5 C. B. 655; 17 L. J. C. P. 127; Edwards *v.* Matthews, 4 D. & L. 721; 11 Jur. 398; Geach *v.* Ingall, 14 M. & W. 95; Haikman *v.* Fernie, 3 M. & W. 505.

[4] See Bentley *v.* Flemming, 9 Jur. 402; 1 C. B. 479, where the associate received the verdict in the absence of the Judge.

[5] Roberts *v.* Hughes, 7 M. & W. 399; 1 Dowl. N. S. 82; Dauntley *v.* Hyde, 6 Jur. 133, Ex.; and see Davis *v.* Taylor, 2 Chit. 268. The affidavit of a juryman to the effect that he would not have agreed to the answers given by the foreman of the jury to the Court, if he had known they would have entitled the plaintiff to a verdict, held, if admissible, no ground for disturbing the verdict. Raphael *v.* the Bank of England, 25 L. J. C. P. 33. As to when the affidavit of a juryman is inadmissible, see *post*, pp. 1130, 1131.

[6] Norman *v.* Beaumont, Willes, 484; Barnes, 453; Wray *v.* Thorn, *ib.* 454; Parker *v.* Thornton, 1 Str. 640; 2 Ld. Raym. 1410; and see Dovey *v.* Hobson, 6 Taunt. 460; Gee *v.* Swan, 9 M. & W. 686, per Parke B.

[7] Hill *v.* Yates, 12 East, 231, n.; and see Wray *v.* Thorn, Willes, 488.

[8] Hill *v.* Yates, 12 East, 229; see Dickenson *v.* Blake, 7 Bro. P. C. 177; Torbock *v.* Laing, 5 Jur. 318, Q. B., where the objection was taken before the verdict was recorded. Earl of Falmouth *v.* Roberts, 1 Dowl. N. S. 663; 9 M. & W. 469. As to granting a new trial upon the ground that a person who appeared on the jury was not on the panel, see Carne *v.* Nicholl, 3 Dowl. 115; Hill *v.* Yates, and Dovey *v.* Hobson, *ubi sup.*

[9] Baily *v.* Macauley, 14 Jur. 80, Q. B. The Court refused to receive affidavits from the jurymen that the foreman did not influence the verdict. See Williams *v.* The Great Western Railway Company, 28 L. J. Ex. 2.

[1] Prime *v.* Titmarsh, 7 Jur. 202, Ex.

[2] See Harrison *v.* Fane, 1 Sc. N. R. 287; Gibson *v.* Muskett, 3 Sc. N. R. 427; Mould *v.* Griffiths, 8 Jur. 1010, Ex.; Parker *v.* Great Western Railway Company, 3 Railw. Ca. 17, C. P.

If the jury find a verdict contrary to evidence, the Court will, in general, grant a new trial,[3] even in the case of a trial at bar;[4] but not if the verdict was such as the justice of the case required;[5] and it was refused where the credibility of a witness was left to the jury, and they found a verdict against his evidence: although there was no evidence to impeach his credit.[6] Where the evidence is conflicting, a new trial will seldom be granted, unless the evidence against the verdict very strongly preponderates.[7] In a question, however, relating to real property, where the inheritance would have been for ever bound by the verdict, the Court granted a new trial: although the case had been left to the jury upon conflicting evidence.[8] In granting a new trial upon the ground that the verdict is against the evidence, the Court is, in a great measure, guided by the opinion of the Judge who tried the cause whether the verdict is satisfactory or not.[9]

For excessive damages the Court will grant a new trial as of course, or set aside the execution of a writ of inquiry, in all cases where the damages may be ascertained by mere calculation;[10] and in other cases of actions *ex contractu*, if it appears clearly that the damages are excessive;[11] but a new trial has been refused in an action on a bill or note, where the jury found for no greater amount than the bill or note, though it was alleged that less was due;[12] and where the value on which the damages were calculated was assented to by both sides at the trial, the Court refused to reduce the damages on the ground that the basis of the calculation * was erroneous.[1] In actions *ex* *1130 *delicto*, such as actions for trespass,[2] for diverting a watercourse,[3] or the like, where there is no certain measure of damages,[4] a new trial is seldom granted on this account: unless the damages are outrageous;[5]

[3] Bright *v.* Eynon, 1 Burr. 390; Miller *v.* Taylor, 4 Sc. 513; Levy *v.* Milne, 12 Moore, 418; Morris *v.* Cleasby, 1 M. & Sel. 576; see Glynn *v.* Houston, 2 Sc. N. R. 548.

[4] Musgrave *v.* Nevinson, 2 Ld. Raym. 1358.

[5] Wilkinson *v.* Payne, 4 T. R. 468; Sampson *v.* Appleyard, 3 Wills. 273; Goslin *v.* Wilcock, 2 *id.* 302; Aylett *v.* Lowe, 2 W. Bl. 1221; Foxcraft *v.* Devonshire, 2 Burr. 936; Denn *v.* Barnard, Cowp. 597; Boulton *v.* Pritchard, 4 D. & L. 117, B. C.; but see 3 B. & Ald. 692.

[6] Lacey *v.* Forrester, 3 Dowl. 688; but see the observations of Tenterden C. J. and Bayley J. in Davis *v.* Hardy, 6 B. & C. 231.

[7] Ashley *v.* Ashley, 2 Str. 1142; Doe Mason *v.* Mason, 3 Wils. 63; Swain *v.* Hall, *ibid.*; Anon., 1 *id.* 22; see Norris *v.* Freeman, 3 *id.* 38; Melin *v.* Taylor, 3 Bing. N. C. 109.

[8] Swinnerton *v.* Marquis of Stafford, 3 Taunt. 91; see *ib.* 232; Lee *v.* Shore, 2 D. & R. 198; 1 B. & C. 94; Hodgson *v.* Forster, 1 D & R. 221; 1 B. & C. 110; Lowdon *v.* Hierons, 2 Moore, 102.

[9] See Lake *v.* Deer, 1 Jur. 983, Q. B. Where a trial has been had before a Judge under the Common Law Procedure Act, 1854, the verdict cannot be questioned upon the ground of its being against the weight of evidence. See 17 & 18 Vic. c. 125, § 1.

[10] See Day *v.* Edwards, 1 Taunt. 491; Sowerby *v.* Lockerby, 1 Jur. 796, Q. B.

[11] See Wood *v.* Hurd, 2 Bing. N. C. 166; Harrison *v.* Cage, Carth. 467.

[12] Selly *v.* Powis, 1 H. & W. 2.

[1] Hilton *v.* Fowler, 5 Dowl. 312.

[2] Benson *v.* Frederick, 3 Burr. 1845; Ducker *v.* Wood, 1 T. R. 277; Merest *v.* Harvey, 5 Taunt. 442; 1 Marsh. 139; Lockley *v.* Pye, 8 M. & W. 133.

[3] Pleydell *v.* Earl of Dorchester, 7 T. R. 529; 1 Chit. 729, n. (*a*).

[4] See Bennett *v.* Allcott, 2 T. R. 166; Day *v.* Holloway, 1 Jur. 794, Q. B.

[5] Price *v.* Severne, 7 Bing. 316; 5 M. & P. 125; Sharp *v.* Brice, 2 W. B. 942; Leith *v.* Pope, *ib.* 1327; Pleydell *v.* Earl of Dorchester, 7 T. R. 529; Bruce *v.* Rawlins, 3 Wils. 61; Williams *v.* Currie, 1 C. B. 841; Briton *v.* South Wales Railway Company, 27 L. J. Ex. 355.

or the Court is satisfied that the jury acted under the influence of undue motives, or of gross error or misconception;[6] and the same as to the execution of writs of inquiry.[7] A very clear case of excess must be made out;[8] and it may be here mentioned that, for this purpose, the Court will not receive affidavits of the defendant's witnesses, to explain or add to evidence given by them at the trial.[9] It is very usual, where an excessive verdict has been given, for the Judge to suggest to the counsel to agree on a sum, to prevent the necessity of a new trial.[10]

A new trial will sometimes also be granted, or the execution of a writ of inquiry set aside, and a fresh inquiry granted, if it appears clear to the Court that the damages are too small;[11] or if the smallness of the damages has arisen from some mistake upon the part either of the Court,[12] or the jury,[13] or from some unfair practice upon the part of the defendant.[14] Where, in an undefended action on a mortgage deed, a verdict was taken for the plaintiff by mistake for the principal only, the Court refused to increase the damages by adding the interest, but offered to grant a new trial.[15] But, as a general rule, the Court will not grant a new trial, in an action for a tort, on account of the smallness of the damages.[16]

For the misconduct of the jury, also, the Court will, in general grant a new trial, if the misconduct be such as to satisfy the Court that the verdict has been determined on without that grave and serious deliberation, that right exercise of judgment, and that total absence of all partiality, so necessary to the proper execution of *1131 * the important duties of jurymen. Thus, if the jurors eat or drink, after the summing up, at the expense of the party for whom they afterwards find a verdict; or if they determine their verdict by lots; or if they or any of them have previously declared that the plaintiff should never have a verdict;[1] or the like: the Court may set aside the verdict, and grant a new trial.[2] Where two of the jury, during the progress of a trial, which lasted two days, dined and slept at the house of the defendant on the evening of the first day, and, consequently, before the summing up, the Court held that it was dis-

6 Chambers *v.* Caulfield, 6 East, 244; Edgell *v.* Francis, 1 Sc. N. R. 118; Creed *v.* Fisher, 18 Jur. 228, Ex.

7 Benson *v.* Frederick, and Bruce *v.* Rawlins, *ubi sup.*; Irwin *v.* Dearman, 11 East, 23.

8 Lathbury *v.* Brown, 10 Moore, 106.

9 Phillips *v.* Hatfield, 8 Dowl. 882.

10 Per Alderson J., 7 Bing. 320; see Leeson *v.* Smith, 4 N. & M. 301.

11 Armytage *v.* Haley, 4 Q. B. 917; 7 Jur. N. S. 671; Wilson *v.* Hicks, 26 L. J. Ex. 242; Nichol *v.* Bestwick, 28 L. J. Ex. 4.

12 Markham *v.* Middleton, 2 Str. 1259; Noble *v.* Kennoway, 2 Doug. 510.

13 Woodford *v.* Eades, 1 Str. 425; Levy *v.* Baillie, 7 Bing. 349; 5 M. & P. 208.

14 Wits *v.* Polehampton, 2 Salk. 647; see Hall *v.* Stone, 1 Str. 515.

15 Baker *v.* Brown, 2 M. & W. 199; 5 Dowl. 313.

16 Manton *v.* Bates, 1 C. B. 444; Gibbs *v.* Turmaley, *ib.* 640; Mauricet *v.* Brecknock, 2 Doug. 509; Richards *v.* Rose, 9 Ex. 218; 23 L. J. Ex. 3; Apps *v.* Day, 14 C. B. 112.

1 Dent *v.* Hundred of Hertford, 2 Salk. 645; 2 Comyn, 601; see Gainsford *v.* Blachford, 6 Pri. 36; [Mynatt *v.* Hubbs, 6 Heisk. 320].

2 *Ante*, p. 1107; see Hughes *v.* Budd, 8 Dowl. 315; Cooksey *v.* Haynes, 27 L. J. Ex. 371. For a case where all the jury were not present when the verdict was given, see Rex *v.* Wooler, 2 Stark. 111; 6 M. & S. 366.

cretionary whether the verdict should be set aside and a new trial granted; and as the party making the application did not entertain any belief that the jurors, in giving their verdict, were influenced by their visit, and there were no grounds for suspicion of unfairness, the Court refused to do so.[3] The Court will not receive affidavits made by any of the jurymen,[4] or affidavits of what any of the jurors have said, respecting such misconduct;[5] it must be proved in some other way;[6] and this is the case, though the misconduct is, in some degree, confirmed *aliunde*:[7] though it seems that where, in moving for a new trial, affidavits imputing personal misconduct to a jury are used, affidavits of any of the jury rebutting such imputation may be used in answer.[8]

If the cause be tried in the order in which it is inserted in the cause list, in the absence of the opposite party,[9] or his counsel, the Court will not grant a new trial, unless under very special circumstances; and then, as a general rule, only on an affidavit of merits, and on payment of costs.[10]

If the party for whom a verdict is afterwards given, deliver to * the jury, after they have left the box, evidence which has *1132 not been shown to the Court,[1] or if he has used improper influence with the jury, to induce them to give a verdict in his favor, a new trial will be granted. Where handbills reflecting on the plaintiff's character were distributed in Court, and shown to the jury on the day of the trial, a verdict against him was set aside, and a new trial granted, although the defendant, by his affidavit, denied all knowledge of the handbills.[2] But merely desiring a juror to attend at the trial of the cause is no ground for a new trial .[3]

Where, by a fraudulent trick upon the part of the defendant, the plaintiff's counsel were taken by surprise, and the defendant thereby

[3] Morris *v.* Vivian, 10 M. & W. 137; 2 Dowl. N. S. 235; see R. *v.* Kinnear, 2 B. & A. 468; 1 Chit. 401.

[4] Harvey *v.* Hewitt, 8 Dowl. 598; Roberts *v.* Hughes, 7 M. & W. 399; Vaise *v.* Delaval, 1 T. R. 11; Onions *v.* Naish, 7 Pri. 203; Hartwright *v.* Badham, 11 Pri. 383; R. *v.* Wooler, 6 M. & S. 366; Bridgwood *v.* Wynn, 1 H. & W. 574; Baily *v.* Macauley, 14 Jur. 80, Q. B. [See *contra*, Wade *v.* Ordway, 1 Baxt. 229.]

[5] Harvey *v.* Hewitt, *ubi sup.*; Straker *v.* Graham, 7 Dowl. 223; 4 M. & W. 721; Burgess *v.* Langley, 6 Sc. N. R. 518; 1 D. & L. 21; 12 L. J. N. S. C. P. 257; Addison *v.* Williamson, 5 Jur. 466, Ex.; Davis *v.* Taylor, 2 Chit. 268.

[6] See Harvey *v.* Hewitt, *ubi sup.*, where affidavits were made by persons who witnessed the jury drawing lots for their verdict.

[7] Owen *v.* Warburton, 1 B. & P. N. R. 326; see Hindle *v.* Birch, 8 Taunt. 26; 1 Moore, 455.

[8] Standewicke *v.* Watkins, 2 D. & L. 502; see Taylor *v.* Webb, Trials per Pais, 24. As to the Court receiving the affidavit of a juryman, to show that the verdict has been entered by mistake for the wrong party, see *ante*, p. 1128.

[9] See Cook *v.* Beardsall, 29 L. J. Ex. 35, where the defendant intended to conduct his cause in person, and there were two Courts sitting.

[10] See Anon., 2 Salk. 645; Third *v.* Goodier, 1 Pri. 717, Ex.; Bland *v.* Warren, 7 A. & E. 13; Watson *v.* Reeve, 5 Bing. N. C. 112; 7 Dowl. 127; Breach *v.* Casterton, 7 Bing. 224; 4 M. & P. 867; Masters *v.* Barnwell, *ib.* n.; Gwilt *v.* Crawley, 8 Bing. 144; 1 M. & Sc. 229; R. *v.* Richardson, 8 Dowl. 511; Nash *v.* Swinburn, 4 Sc. N. R. 326; 3 M. & G. 630; 1 Dowl. N. S. 190, where the defendant's attorney's clerk misread the notice of trial. Curtis *v.* March, 4 Jur. N. S. 1112, Ex., where the clocks differed.

[1] *Ante*, p. 1108.

[2] Coster *v.* Merest, 3 B. & B. 272; 7 Moore, 87; and see Spencer *v.* De Willott, 3 Smith, 321.

[3] Snell *v.* Timbrell, 1 Str. 643.

obtained a verdict, the Court granted a new trial.[4] Where a plaintiff was nonsuited, in consequence of a refusal by the defendant's counsel at the trial to admit certain documents in evidence, which had been agreed to be admitted by the defendant's attorney's agent, the Court granted a new trial, with costs to be paid by the defendant.[5]

A new trial has been granted on account of the non-attendance of a material witness; and the Court in one case granted it without costs, where a material witness for the defendant was kept out of the way by the contrivance of the plaintiff, to prevent him from being served with a *subpœna;* but, in a later case, where a witness for the plaintiff was kept out of the way by the contrivance of the defendant, the Court refused a new trial: observing, that the plaintiff ought to have applied for a postponement of the trial, or withdrawn the record.[6] And the general rule is, that a new trial will not be granted, on the ground that evidence has not been given, that might have been given at the trial;[7] and the Court will not, on motion for a new trial, hear affidavits of any facts which might have been brought forward at *Nisi Prius*.[8] The plaintiff ought, if unprepared with his evidence, either to make application to put off the trial before the jury are sworn, or should withdraw his record, and not take the chance of a verdict.[9]

The Court has granted a new trial where it appeared clearly that the plaintiff's case was a mere fiction supported by perjury, which *1133 the defendant could not, at the time of the trial, be prepared *to answer.[1] It will, however, not in general be satisfied with the mere affidavit of the party making the application, contradicting the witnesses on the other side:[2] the witnesses must in general be indicted and convicted;[3] or some other satisfactory proof of the perjury must be offered to the Court. Even where the witnesses were indicted, the Court refused to stay execution until the indictment should be tried.[4]

Where a witness made a mistake in his evidence, by reason of which a verdict was given against the party who called him, the Court refused a new trial: although the mistake was explained by the affidavit of the witness himself;[5] but, under similar circumstances, the Court of Com-

[4] M. S. E. 1814; See Anderson *v.* George, 1 Burr. 352; Edie *v.* East India Company, 1 W. Bl. 298; Hewlett *v.* Cruchley, 5 Taunt. 277; Lernane *v.* Mealin, 11 Jur. 168, B. C.; and see Long *v.* Bilke, 1 Sc. N. R. 176, where the effect of a judgment produced in evidence was misrepresented.

[5] Doe Tindal *v.* Roe, 5 Dowl. 420.

[6] Turquand *v.* Dawson, 1 C. M. & R. 709; and see Edwards *v.* Dignum, 2 Dowl. 642; Packham *v.* Newmam, 3 *id.* 165; Henning *v.* Samuel, 2 Dowl. 766; 3 M. & Sc. 818.

[7] Cooke *v.* Berry, 1 Wils. 98; and see 1 C. M. & R. 710, n.; Macbeath *v.* Ellis, 4 Bing. 573; see also *ante*, p. 1016.

[8] Hope *v.* Atkins, 1 Pri. 143.

[9] Harrison *v.* Harrison, 9 Pri. 89; Edwards *v.* Dignum, *ubi sup.;* Emslie *v.* Wildman, 8 Taunt. 236; 2 Moore, 179; see Hoare *v.* Silverlock, 19 L. J. C. P. 215.

[1] Fabrilius *v.* Cock, 3 Burr. 1771. If the plaintiff has sworn falsely on a matter not material to the merits of the cause, a new trial will not be granted. Honeyman *v.* Lewis, 23 L. J. Ex. 204.

[2] Feize *v.* Parkinson, 4 Taunt. 640; see Aliken *v.* Howell, 1 N. & M. 191; Sprague *v.* Mitchell, 2 Chitt. 271; but see Lister *v.* Mundell, 1 B. & P. 427.

[3] Beerfield *v.* Petrie, 2 Tidd, 938; Seeley *v.* Mahew, 4 Bing. 561; Hampshire *v.* Harris, 3 Jur. 980, C. C.

[4] Chitty's Arch. 591; Warwick *v.* Bruce, 4 M. & S. 140; see Thurtell *v.* Beaumont, 1 Bing. 339; 8 Moore, 612.

[5] Huish *v.* Sheldon, Say. 27.

mor. Pleas granted a new trial.[6] Where a defendant insisted that he was surprised by a misstatement made by one of the plaintiff's witnesses, the Court refused a new trial: the misstatement having been made in answer to a question that was collateral, and beside the issue.[7]

In some cases, where a party is taken by surprise, at the trial, the Court will grant a new trial.[8] Thus, it will be granted, if, by a fraudulent trick upon the part of the defendant, the plaintiff's counsel was taken by surprise, and the defendant thereby obtained a verdict.[9] But the Court never grants a new trial upon the ground of surprise, unless satisfied that the verdict was substantially wrong;[10] and it was refused where, by reason of the defendants having insufficiently disclosed their case to their attorneys, the latter were taken by surprise, and unprepared to prove a certain document at the trial, and a verdict was given for the plaintiff.[11] So, a party nonsuited for non-production of a document from a public office, is not entitled to a new trial on the ground of surprise, where he has served a clerk in the office with a *subpœna duces tecum* to produce the document, but has omitted to apply to the head of the office for permission for its production.[12] And where, at the trial, the defendant produced a deed which he had had notice to produce, and there being an attesting witness to it who was not called, the plaintiff was nonsuited, it was held, that the plaintiff was not entitled to a new trial on the ground of surprise, * though he was not *1134 aware, before the trial, that there was an attesting witness: it not appearing that he had made any inquiry upon the subject.[1]

A new trial will seldom be granted, where a verdict has been given against a party, or a plaintiff has been nonsuited, for want of evidence which might have been produced at the trial: because it would tend to introduce perjury;[2] even although the evidence was briefed; and his counsel thought fit not to produce it;[3] unless the verdict is manifestly against the justice and equity of the case.[4] But if new evidence, discovered after the trial, is such, as to satisfy the Court that, if the party had had it at the trial, he must have had a verdict, the Court will grant a new trial upon payment of costs, in order to do justice between the parties.[5] The discovery of witnesses, who can contradict those produced on the former trial, seems to be no ground for a new trial.[6]

6 Richardson *v.* Fisher, 7 Moore, 546; 1 Bing. 145; *post*, p. 1137.

7 Magnay *v.* Knight, 2 Sc. N. R. 71; 1 M. & G. 944.

8 See Todd *v.* Emby, 2 Dowl. N. S. 570; Belle *v.* Thompson, 2 Chitt. 194; Harrison *v.* Harrison, 9 Pri. 89; Long *v.* Bilke, 1 Sc. N. R. 176.

9 *Ante*, pp. 1131, 1132.

10 Tharpe *v.* Stallwood, 6 Sc. N. R. 730; 1 D. & L. 24, per Coltman J.

11 *Ibid.*

12 Austin *v.* Evans, 4 M. & G. 430; 2 Dowl. 408.

1 Rearden *v.* Minter, 2 M. & G. 204; 9 Sc. N. R. 237.

2 Cooke *v.* Berry, 1 Wils. 98; King *v.* Alberton, 3 Salk. 361; see Wits *v.* Polehampton, 2 Salk. 647.

3 Spong *v.* Hogg, 2 W. Bl. 802; Hall *v.* Stothard, 2 Chitt. 267.

4 Martyn *v.* Podger, 5 Burr. 2631.

5 Broadhead *v.* Marshall, 2 W. Bl. 955; Weak *v.* Calloway, 7 Fri. 677; Thurtell *v.* Beaumont, 1 Bing. 339.

6 Dickenson *v.* Blake, 7 Bro. P. C. ed Toml. 177.

A cause having been stopped while a witness was under examination and the plaintiff nonsuited, upon a statement by his counsel of the facts he was prepared to prove, the Court granted a new trial on payment of costs, upon an affidavit that the witnesses could have proved a more complete case than that presented by the counsel.[7]

The Court will not, as a general rule, grant a new trial to let the party into a defence of which he was apprised at the first trial.[8]

If a party is entitled to a new trial, *ex debito justitiæ*, upon one of several issues, the Court cannot confine the new trial to such issue only, but must grant it as to all of them.[9] Therefore, if the Judge at the trial allows evidence, which is inadmissible to be given upon one of several issues,[10] or if he, in his direction to the jury, mistakes the law,[11] or, it seems, makes any other mistake, for which he might have been required to seal a bill of exceptions, a new trial can only be granted upon all the issues.[12] But if the granting of the new trial upon one of several issues is a matter in the discretion of the Court, as if the verdict upon such issue be against evidence or the like, it may be *1135 granted upon such issue only.[13] A jury having * assessed damages upon an erroneous principle, the Court, in granting a new trial, refused to limit the inquiry to the question of damages.[1]

Where, in trespass, there were several issues, one of them on a plea of *liberum tenementum*, and the Judge at the trial improperly rejected evidence applicable to that issue only, the Court discharged a rule for a new trial, after a verdict for the defendant on several issues, on his consenting to the verdict being entered for the plaintiff on that issue, and gave no costs of the rule to either party.[2] Where there were two issues, and the jury found upon both, but the Judge improperly discharged the jury upon the second issue, the Court held that the proper course was to apply to the Judge to have the verdict corrected according to his notes.[3]

If the jury at the second trial finds for the party against whom the former verdict was given, the Court, if the case is doubtful, or the second verdict does not accord with the justice of the case, may be induced, under circumstances, to grant a third trial. It is entirely in the discretion of the Court, however, to do so or not: for the losing party in such a case is not entitled to it by any rule or practice of the Court; it has accordingly been refused, where the second verdict was satis-

[7] Edger *v.* Knapp, 6 Sc. N. R. 707; 1 D. & L. 73.

[8] Vernon *v.* Hunkey, 2 T. R. 113; see Buxton *v.* Mardin, 1 T. R. 84; Ritchie *v.* Bowsfield, 7 Taunt. 309; Pickering *v.* Dawson, 4 Taunt. 779; Bodington *v.* Harris, 1 Bing. 187.

[9] Earl of Macclesfield *v.* Bradley, 7 M. & W. 570; 9 Dowl. 313; Hutchinson *v.* Piper, 4 Taunt. 555.

[10] Bernasconi *v.* Farebrother, 3 B. & Ad. 373.

[11] Hutchinson *v.* Piper, 4 Taunt. 555.

[12] Bernasconi *v.* Farebrother *ubi sup.*

[13] Earl of Macclesfield *v.* Bradley, and Hutchinson *v.* Piper, *ubi sup.*; but see Bull. N. P. 326, b.; and see, as to a *venire de novo*, Davis *v.* Lowndes, 4 Bing. N. C. 478.

[1] Mahoney *v.* Frasi, 1 C. & M. 325.

[2] Hughes *v.* Hughes, 15 M. & W. 701; see Baxter *v.* Nurse, 6 M. & G. 935.

[3] Iles *v.* Turner, 3 Dowl. 211; *ante*, p. 1127.

factory.[4] It is also in the discretion of the Court to grant a third trial after two concurring verdicts;[5] but this is seldom done;[6] and the Court has refused to grant it, after a new trial for excessive damages, and the same damages given by the second verdict.[7] And so also, where the two concurring verdicts were for the defendant: although the Judge, before whom the second trial was had, expressed himself dissatisfied with the verdict.[8] But where, in such a case, the action was brought for a matter savoring of the realty, and the plaintiff would have been concluded by the verdict, the Court, under circumstances, set aside the last verdict, and ordered a nonsuit to be entered: leaving the plaintiff to contest the matter a third time, if he would.[9]

The application for a new trial must be made to the Court of Chancery, whether the trial was had before that Court, or a Court of Common Law.[10]

*Where the trial has been had before the Court of Chancery *1136 without a jury, the application may be made either to the Judge before whom the trial was had, or to the Court of Appeal in Chancery.[1] In all other cases, the application must be first made to the Judge who directed the issue or question of fact, or question as to the amount of damages, to be tried.[2]

The application for a new trial must, in all cases, be made before the cause comes on for further hearing.[3] It is made by motion, of which notice must be given.[4] Where the question has been tried in the Court of Chancery, the notice, whether to the Judge before whom the trial has been had, or the Lord Chancellor, or the Lords Justices, must be given for the times following: if such trial has been had in Hilary, Trinity, or Michaelmas term, then not later than for the third seal after such term; and if such trial has been had in Easter term, or during the

[4] Parker *v.* Ansell, 2 W. Bl. 963.

[5] Goodwin *v.* Gibbons, 4 Burr. 2101; Gibson *v.* Muskett, 3 Sc. N. R. 427.

[6] See Foster *v.* Steele, 3 Bing. N. C. 892.

[7] Clerk *v.* Udall, 2 Salk. 649; Chambers *v.* Robinson, 2 Str. 692.

[8] Swinnerton *v.* Marquis of Stafford, 3 Taunt. 232.

[9] Lee *v.* Shore, 2 D. & R. 198; 1 B. & C. 94.

[10] Fowkes *v.* Chadd, 2 Dick. 576; Bootle *v.* Blundell, 19 Ves. 500; see Doe *v.* Roe, 1 Cowen, 216; Doe *v.* Roe, 6 Cowen, 55; Apthorp *v.* Comstock, 2 Paige, 482; Sinclair *v.* Price, 1 Hill Ch. 443; Taylor *v.* Mayrant, 4 Desaus. 505, 514; Baker *v.* King, 6 Yerger, 402. Where the Court of Chancery directs a suit at Law to be brought, the application for a new trial must be made to the Court in which such action is pending. But where an issue is directed to be tried in a Court of Law, the application for a new trial should be made to the Court which ordered the issue. Apthorp *v.* Comstock, 2 Paige, 482; Sinclair *v.* Price, 1 Hill Ch. 443; Taylor *v.* Mayrant, 4 Desaus. 505, 514; Alexander *v.* Alexander, 5 Ala. 517; Clayton *v.* Yarrington, 33 Barb. (N. Y.) 144; 2 Seton Dec. (3d Eng. ed.) 991.

If the Judge before whom the issue is tried certifies the verdict to be against evidence, the Chancellor will generally direct a new trial. Southall *v.* McKeand, 1 Wash. 336. But this is not a necessary consequence. Grigsby *v.* Weaver, 5 Leigh, 197.

[1] 21 & 22 Vic. c. 27, § 5. [But not, it seems, to the successor of the Judge who directed the trial. Dobson *v.* Bowness, W. N. (1869), 28.]

[2] Ord. VI. 13; 21 & 22 Vic. c. 27, § 3; and see Ord. VI. 5, *ante*, p. 398; Footner *v.* Figes, 2 Sim. 319; and see Reece *v.* Reece, 1 M. & C. 372.

[3] Attorney-General *v.* Montgomery, 2 Atk. 378; Rodgers *v.* Nowell, 6 Hare, 338; and see Johnson *v.* Todd, 5 Beav. 394, as to parties to be heard on the motion. For the practice on the further hearing, see *post*, p. 1146 *et seq.* The motion for a new trial may be made, although the decree has been enrolled. Peirce *v.* Young, L. R. 1 H. L. Cas. 63; 12 Jur. N. S. 437.

[4] For form of notice, see Vol. III.; and for directions as to the briefs, see *ibid.*

sittings after Hilary, Trinity, or Michaelmas term, then not later than for the third motion day in the term then next ensuing.[5]

Where the trial has been had before a Court of Common Law, no positive time is fixed within which the application must be made. In *Legard* v. *Daly*, however,[6] Lord Hardwicke stated, as a reason which weighed greatly with him, in refusing an application for a new trial, the length of time (*viz.*, five years and a half) which had elapsed since the trial, which he said would be an objection even in Courts of Law;[7] and he observed that, although it had not been set down till lately upon the equity reserved, it could not be said that the other side should not have applied for a new trial; for perhaps the defendant might have no reason to set it down.

Upon the application for a new trial, the Judge's notes taken at the trial are the proper evidence of what was then proved:[8] and where the application is made for the new trial of an issue directed to a Court of Common Law, an *ex parte* application should be made to the *1137 Court of Chancery to send to the Judge who tried the issue, * for his notes of the trial.[1] This application is not of course, but must be supported by a statement showing a reasonable ground for questioning the verdict.[2] If the parties agree thereto, the Court will allow copies of the Judge's notes taken at the trial to be made for the parties.[3] The evidence given in the suit may be referred to by either party on the application for the new trial, although it was not actually made use of at the trial.[4] And any facts upon which the application is founded that cannot be collected from the Judge's notes may be proved by affidavit;[5] and so at Law, where the new trial is moved for on the ground of the improper rejection or reception of evidence, or for misdirection, or on account of the verdict being against the evidence, no affidavit is necessary; but where the ground of the motion cannot be collected from the Judge's notes, an affidavit is necessary;[6] and, as a general rule, affidavits of witnesses examined at the trial will not be received to explain or add to their evidence given thereat.[7] At Law the Judge's notes are conclusive as to the evidence; and the Court will not allow them to be contradicted,[8] even upon affidavit; nor can affi-

[5] Ord. XLI. 46.

[6] 1 Ves. S. 192, 194.

[7] See Van Alst *v.* Hunter, 5 John. Ch. 152.

[8] See Ord. 5 Feb., 1861, r. 14. In Chancery, it is a common practice for the parties to agree that notes of the evidence shall be taken by a short-hand writer instead of the Judge; see *ante*, p. 845, n. (*e*).

[1] Chitty's Arch. 895.

[2] Morris *v.* Davies, 3 Russ. 318; see also Memorandum, 6 Mad. 58; Hungerford *v.* Jagoe, 1 Jo. & Lat. 691.

[3] Hargrave *v.* Hargrave, 10 Jur.* 957, M. R.

[4] Slaney *v.* Wade, 7 Sim. 595, 618.

[5] See East India Company *v.* Bazett, Jac. 91; Gibbs *v.* Hooper, 2 M. & K. 353; Wilson *v.* Beddard, 12 Sim. 28; Hargrave *v.* Hargrave, 13 Jur. 463, M. R.; Shields *v.* Boucher, 1 De G. & S. 40; M'Gregor *v.* Topham, 3 Hare, 488, 496. As to the allowance of copies for counsel of the short-hand writers' notes of the evidence on the trial, see Malins *v.* Price, 1 Phil. 590; 9 Jur. 955.

[6] Chitty's Arch. 1524; and see *ante*, pp. 1128, 1131, 1132.

[7] Phillips *v.* Hatfield, 10 L. J. N. S. Ex. 33; 8 Dowl. 882; Edger *v.* Knapp, 7 Jur. 583, C. P.; *ante*, p. 1133.

[8] R. *v.* Grant, 3 N. & M. 106; and see Gibbs *v.* Pike, 1 Dowl. N. S. 409; 9 M. & W. 351; and Ord. 5 Feb., 1861, r. 14.

davits be used to supply alleged omissions of evidence in the Judge's notes.[9]

Upon an application for a new trial, the costs of the previous trial will, in general, be reserved until the further hearing;[10] the Court has, however, under the circumstances of the case, frequently imposed on the applicant the condition of paying the costs of the previous trial.[11] Where a new trial was directed on those terms, and the applicants did not proceed to a new trial, it was held that they were not compellable to pay such costs under the order.[12]

The following are such of the rules as to costs, on which the Courts of Common Law act in granting new trials, as would appear to be applicable, in granting new trials in Chancery. A new * trial will *1138 be granted without costs, where it is a matter of right by reason of the misdirection or other mistake of the Judge, or the like.[1] Where the new trial is granted for the misconduct of the jury, as where the verdict is perverse, or the like,[2] the costs are usually directed to abide the event of the second trial.[3] If a party has obtained a verdict by trick, the Court will grant a new trial without costs, or perhaps, in a very gross case, will oblige him, and sometimes his attorney, to pay the costs.[4] Where the plaintiff had a material witness for the defendant concealed in his house, and prevented him from being served with a *subpœna*, it was granted without costs.[5] If granted on the ground of surprise not fraudulent, it seems to be on payment of costs.[6] Where a new trial is granted on the ground that the verdict is against evidence, the costs of the first trial abide the event, unless the Court otherwise orders.[7] Where the costs are ordered to abide the event of the second trial, if the same party succeed on both trials, he will be allowed the costs of the first as well as the second;[8] but, otherwise, the costs of the first will not be allowed.[9]

Where a rule for a new trial has been obtained on payment of costs,

[9] Coles *v.* Bullman, 12 Jur. 586, C. P.

[10] O'Connor *v.* Malone, 6 Cl. & F. 572, 598; and see Bearblock *v.* Tyler, Jac. 571; White *v.* Lisle, 3 Swanst. 342; Duncan *v.* Varty, 2 Phil. 696; Corporation of Rochester *v.* Lee, 2 De G., M. & G. 427, 431; Beames on Costs, 157; Morgan & Davey, 70.

[11] Edwin *v.* Thomas, 2 Vern. 75; Baker *v.* Hart, 3 Atk. 542; Cleeve *v.* Gascoigne, Amb. 323, 324; Standen *v.* Edwards, Beames on Costs, Ap., No. 17; and see Earl Darlington *v.* Bowes, 1 Eden, 270.

[12] Lambert *v.* Fisher, 7 Sim. 525, 527; and see Howorth *v.* Samuel, 1 B. & Ald. 566; Joliffe *v.* Mundy, 8 L. J. Ex. 100; 7 Dowl. 225; 4 M. & W. 502.

[1] Vale *v.* Bayle, Cowp. 297; Harris *v.* Butterley, 2 *id.* 485; Jackson *v.* Duchaire, 3 T. R. 553; Goodright *v.* Saul, 4 *id.* 359; see Doe Gilbert *v.* Ross, 7 M. & W. 102; Edwards *v.* Scott, 2 Sc. N. R. 266; Lord *v.* Wardle, 3 Bing. N. C. 680; Earl of Macclesfield *v.* Bradley, 7 M. & W. 570; *ante*, p. 1126.

[2] *Ante*, p. 1129.

[3] Hale *v.* Cove, 1 Str. 642; Hodgson *v.* Barvis, 2 Chit. 268; Shillitoe *v.* Claridge, *ib.* 425; see Brown *v.* Clarke, 12 M. & W. 25; 7 Jur. 1043, Ex.

[4] Anderson *v.* George, 1 Burr. 352; Trubody *v.* Brain, 9 Pri. 76; see Hullock, 391; and *ante*, p. 1132.

[5] Bull. N. P. 322; see Turquand *v.* Dawson; 1 C. M. & R. 709; *ante*, p. 1132.

[6] Greatwood *v.* Sims, 2 Chit. 269.

[7] 17 & 18 Vic. c. 125, § 44; see Meule *v.* Goddard, 5 B. & A. 766; Evans *v.* Robinson, 24 L. J. Ex. 212. As to the meaning of "abide the event," see Chitty's Arch. 1530.

[8] Trelawney *v.* Thomas, 1 H. Bl. 641; Canham *v.* Fisk, 2 C. & J. 126; *ib.* 158, n.; Sherlock *v.* Barned, 1 Bing. 21; but see Hudson *v.* Majoribanks, 8 Moore, 440; 1 Bing. 393.

[9] Austen *v.* Gibbs, 8 T. R. 619; Chapman *v.* Partridge, 2 B. & P. N. R. 382; Bird *v.* Appleton, 1 East, 111; Dodd *v.* Neal, 2 C. & M. 225; Evans *v.* Robinson, *ubi sup.*

there is a broad distinction between these costs and costs in the cause. The former costs do not include the costs of the pleadings, or of obtaining admission of documents, or of giving notice to produce, or of the briefs: in some cases, however, something may be allowed for amending the briefs.[10] Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the Master, in taxing costs, may allow fees on the second trial with reference to those given at the first.[11] Where a party who succeeded on the second trial was not entitled to the costs of the first trial, it was held, that the Master was right in allowing the successful party all such costs of the first trial as were available for the second;[12] and, therefore, that he was right in allowing the costs of the briefs, *subpœnas*, and copies
*1139 on the first *trial, but not the fees on the briefs, or the consultation fees, or the costs of serving the *subpœnas* for the first trial.

At Common Law, unless the new trial is a matter of right, as in the case of a misdirection of the Judge,[1] it may be directed upon terms: such as, that witnesses infirm, or going beyond sea, may be examined upon interrogatories, or that their evidence may be read from the Judge's notes of the first trial;[2] that certain documents may be produced at the trial; that certain facts, not intended to be litigated, may be admitted;[3] or that the party may make discovery of certain facts upon oath.

The costs of the application for a new trial will, in general, be directed to follow the costs of the new trial.[4] If the application is refused, the costs are not costs in the cause, and cannot be recovered by the successful party: unless the motion is expressed to be dismissed with costs.[5]

The form of an issue cannot be changed upon a motion for a new trial. If the party is desirous to question the form of the issue, he must do so by presenting a petition for a rehearing of the decree or order directing it.[6] Where a new trial is directed, it is not usual or necessary formally to set aside the previous verdict: as no subsequent proceedings can be based upon it; and it should not be given in evidence at the subsequent trial.[7]

Orders granting or refusing applications for new trials of issues may

[10] Lord *v.* Wardle, 6 Dowl. 174.

[11] Wilkinson *v.* Malin, 2 Dowl. 65; Lord *v.* Wardle, *ubi sup.*

[12] Lambert *v.* Lyddon, 4 D. & L. 400.

[1] See Hawtayne *v.* Bourne, 8 M. & W. 265, n.; Earl Harborough *v.* Shardlow, *ibid.*; Mahoney *v.* Frasi, 1 C. & M. 325; 1 Dowl. 70; De Bernardy *v.* Harding, 22 L. J. Ex. 340.

[2] Anon., 2 Chit. 425; Doe Gilbert *v.* Ross, 7 M. & W. 102; Anon., 7 Jur. 1038; 1 D. & L. 725.

[3] See Thwaites *v.* Sainsbury, 7 Bing. 437.

[4] Duncan *v.* Varty, 2 Phil. 696, 700; and see White *v.* Lisle, 3 Swanst. 356; Beames on Costs, 157, n.; Locke *v.* Colman, 2 M. & C. 42, 48.

[5] White *v.* Lisle, 4 Mad. 214, 226; and see Devie *v.* Lord Brownlow, 2 Dick. 796.

[6] White *v.* Lisle, 3 Swanst. 351, n. (*a*); 1 C. P. Coop. t. Cott. 361; see also Legard *v.* Daly, 1 Ves. S. 192; and *post*, Chap. XXXII., *Rehearings and Appeals.*

[7] O'Connor *v.* Malone, 6 Cl. & F. 572, overruling Baker *v.* Hart, 3 Atk. 542. For form of order, see Seton, 990; [Bovill *v.* Goodier, W. N. (1867), 96.]

be reheard,[8] and appealed from,[9] like other orders; and where the trial has been had by a jury before the Court itself, there is the same right of appeal from any order made by the Court, on an application for a new trial, as from any other order of the Court;[10] and it is presumed that where the trial has taken place before the Court without a jury, an appeal will lie from an order of the Judge before whom the trial was had, granting or refusing the motion for a new trial.[11]

*Section V. — *Assessments of Damages at Nisi Prius, or at the Assizes, or before the Sheriff.* *1140

When the amount of damages is directed to be assessed by a jury before any Judge of one of the Superior Courts of Common Law at *Nisi Prius*, or at the Assizes, or before the sheriff of any county or city,[1] the person to whom such damages have been awarded may sue out, at the office of the Clerks of Records and Writs, a writ of inquiry of damages.[2]

If the writ is to be executed before a Judge of Assize,[3] it is directed to both the sheriff and the Justices of Assize; and after reciting the order awarding damages, commands the sheriff to summon a common or special jury before the Justices of Assize, to inquire and assess the damages; and commands the Justices to certify the inquisition into the Court of Chancery, on the day named in the writ.[4] Where the inquiry is to be had before the sheriff, the writ commands him, by a common or special jury, to inquire what damages have been sustained, and to return the inquisition taken thereupon into the Court of Chancery, together with the writ, on the day therein named.[5] If the inquiry is to be executed in a county palatine, the writ is addressed to the Chancellor thereof or his deputy, commanding him to command the sheriff to execute the writ.[6]

The writ is tested on the day on which it is issued; and by analogy to the practice at Law, may be made returnable, and be returned, on any day certain in term or vacation, to be named in the writ.[7] The return day is usually the day after that on which it is intended to execute the writ; and it must not be before that day.[8]

[8] White *v.* Lisle, 3 Swanst. 342.

[9] M'Gregor *v.* Topham, 4 Hare, 162; 3 H. L. Ca. 132.

[10] 21 & 22 Vic. c. 27, § 3; see *post*, Chap. XXXII., *Rehearings and Appeals.*

[11] 21 & 22 Vic. c. 27, § 5; Curtis *v.* Platt, 1 W. N. 311, H. of L. In New Jersey, after a verdict, the question of a new trial rests entirely in the discretion of the Chancellor, and his action is not appealable. Black *v.* Lamb, 1 Beasley (N. J.), 108.

[1] 21 & 22 Vic. c 27, § 6, *ante*, p. 1082.

[2] Ord. XLI. 47.

[3] No form is given by the Gen. Ord. of a writ to be executed before a Judge at *Nisi Prius;* but it is presumed that, in such a case, the writ should be directed to him, in place of the Justices of Assize, according to the practice at Law; see Chitty's Arch. 986; Chitty's Forms, 520.

[4] 21 & 22 Vic. c. 27, § 6; Ord. XLI. 47, and Sched. N., No. 14. For form of writ, see *ibid.;* and Vol. III.

[5] 21 & 22 Vic. c. 27, § 6; Ord. XLI. 47, and Sched. N., No. 11. For form of writ, see *ibid.;* and Vol. III.

[6] See Ord. XLI. 47, and Sched. N., No. 12. For form of writ, see *ibid.;* and Vol. III

[7] 1 Will. IV. c. 7, § 1; Chitty's Arch. 986.

[8] *Ibid.*

The writ is prepared by the solicitor of the party entitled to sue it out, or by such party himself, where he acts in person; it is engrossed on parchment, and must be indorsed with the name and place of business of such solicitor, and of his agent, if any, or with the name *1141 and place of residence of the party so acting in person, * and in either case, with the address for service, if any.[1] The writ should also be indorsed with a memorandum of the day on which it is to be executed.[2]

If the writ is to be executed before the sheriff, it must be left at the sheriff's or deputy-sheriff's office,[3] at least two days before the day on which it is to be executed, if it is to be executed in the country, and at least one day (but usually two days), if it is to be executed in London or Middlesex;[4] and the sheriff will thereupon summon a jury for the execution of it. Where the writ is to be executed before a Judge at *Nisi Prius* or at the Assizes, it would seem that, besides leaving the writ at the sheriff's or deputy-sheriff's office, the cause must be entered in the same manner as if it were a record.[5]

The rules in force in the Courts of Common Law, relative to notices of inquiry, are applicable to notices of inquiry under any writ of inquiry so issued.[6] The return to the writ of inquiry, of the verdict or inquisition, is engrossed on parchment, and signed and sealed in the name of the sheriff, and of the jurors.[7] The inquisition and return will be delivered at or after the expiration of four days from the return day of the inquiry, on application at the office of the sheriff or under-sheriff.[8] The writ of inquiry, with the return thereto, must be filed, within ten days after the return, at the office of the Clerks of Records and Writs.[9]

The Court has power to set aside the verdict or inquisition on any such inquiry, and to direct a new inquiry, in such manner, and on such terms as the Court shall think fit.[10] The application for that purpose must be made within ten days after the filing of the verdict or inquisition, exclusive of any days on which the Court to which such application ought to be made is not sitting.[11] The application is made by motion;[12] and in dealing with applications of this nature, it is presumed the Court will be guided by the practice at Law in like cases;[13] and that where the inquiry has been had before a Judge of a Court of Common Law, the practice will be the same as in the case of new trials

[1] Ord. III. 2, 5, *ante*, pp. 453, 455. For a form of indorsement, see Vol. III.

[2] Chitty's Arch. 987.

[3] *Ante*, p. 466, n. (2).

[4] Chitty's Arch. 987. When the writ is to be executed in London, it is left at the Secondary's office, No. 5, Basinghall-street. *Ibid.*

[5] See Chitty's Arch. 987.

[6] Ord. XLI. 48. For the practice at Law as to notices of inquiry, see Chitty's Arch. 988; and Chitty's Forms, 512; and as to attending by counsel, and the manner in which the writ is executed, see Chitty's Arch. 988–993; Chitty's Forms, 515, 516.

[7] For forms of inquisition, see Ord. Sched. N., No. 13; and Vol. III.

[8] Chitty's Arch. 993. As to the course, where the sheriff refuses to make his return, see *ante*, p. 470.

[9] Ord. XLI. 49.

[10] 21 & 22 Vic. c. 27, § 6.

[11] Ord. XLI. 50.

[12] For form of notice of motion, see Vol. III.

[13] For the practice at Law in a like case, see Chitty's Arch. 993.

of issues directed to be tried at Law.[14] At Common Law, an application to set aside *an inquisition, and have a new inquiry, *1142 is looked upon as being of the same nature as an application for a new trial.[1] Upon an application for a new trial upon the ground that the damages are excessive or not sufficient, it is in general sufficient to produce the under-sheriff's notes, verified by affidavit.[2] If a misdirection by the sheriff is relied on, the Court can hear from counsel in the cause a statement of what passed at the trial.[3] A motion to set aside an inquiry for excess of damages will not be granted, unless a strong case be made out.[4] Where the Court, upon application, ordered a new inquiry on the ground that, as to part of the damages found, there was no evidence to warrant the finding of the jury, and the defendant, in order to save the expense of a second inquiry, paid the plaintiff the whole of his demand, it was held, notwithstanding, that he was not bound to pay the plaintiff the costs of the first inquiry.[5]

[PURELY STATUTORY.]

SECTION VI. — *Ascertainment of Foreign Law.*

We have seen that questions of foreign law are questions of fact: which must be determined in each case on the evidence adduced in it.[6]

In order to afford facilities for more certainly ascertaining the law administered in one part of her Majesty's dominions, when pleaded in the Courts of another part thereof, it has been enacted that if, in any action depending in any Court within her Majesty's dominions, it shall be the opinion of such Court that it is necessary or expedient, for the proper disposal of such action, to ascertain the law applicable to the facts of the case as administered in any other part thereof, on any point on which the law of such other part is different from that in which the Court is situate, the Court may direct a case to be prepared, setting forth the facts, as these may be ascertained by verdict of a jury or other competent mode, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such Court or a Judge thereof, they are to settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and pronounce *an order remitting the same, together with the case, to the *1143

[14] See *ante*, p. 1120 *et seq.*

[1] For the grounds on which a new trial will be granted, see *ante*, p. 1125 *et seq.*

[2] Stevens *v.* Pell, 2 Dowl. 629.

[3] Per Coleridge J. in Jones *v.* Lewis, 9 Dowl. 145.

[4] Lothbury *v.* Brown, 10 Moore, 106. As to setting aside a perverse verdict, see Weeding *v.* Mason, 2 C. B. N. S. 382.

[5] Porter *v.* Cooper, 3 Dowl. 662. As to the costs of the first trial, where a new trial is granted, see *ante*, p. 1137.

[6] See *ante*, p. 864, and cases cited *ib.* n. (2); Campion *v.* Kille, 1 McCarter (N. J.) 229.

Court in such other part of her Majesty's dominions, being one of the Superior Courts thereof, whose opinion is desired upon the law administered by it as applicable to the facts set forth in such case, and desiring it to pronounce its opinion on the questions submitted to it in the terms of the Act; and any of the parties to the action may present a petition to the Court whose opinion is to be obtained, praying such last-mentioned Court to hear the parties or their counsel, and to pronounce its opinion thereon in terms of the Act, or to pronounce its opinion without hearing parties or counsel; and the Court to which such petition is presented is, if it thinks fit, to appoint an early day for hearing parties or their counsel on such case, and thereafter pronounce its opinion upon the questions of law, as administered by it, which are submitted to it by the Court; and in order to the pronouncing such opinion it is to be entitled to take such further procedure thereupon as to it shall seem proper.[1]

Upon such opinion being pronounced, a copy thereof, certified by an officer of such Court, is to be given to each of the parties to the action by whom the same shall be required, and is to be deemed and held to contain a correct record of such opinion.[2]

Any of the parties to the action, after having obtained such certified copy of such opinion, may lodge the same with an officer of the Court in which the action may be depending, who may have the official charge thereof, together with a notice of motion setting forth that the party will, on a certain day named in such notice, move the Court to apply the opinion contained in such certified copy thereof to the facts set forth in the case before specified; and the Court is thereupon to apply such opinion to such facts, in the same manner as if the same had been pronounced by such Court itself upon a case reserved for opinion of the Court, or upon special verdict of a jury; or such Court may, if it thinks fit, when the opinion has been obtained before trial, order such opinion to be submitted to the jury, with the other facts of the case, as evidence, or conclusive evidence as the Court may think fit, of the foreign law therein stated; and such opinion is to be so submitted to the jury.[3]

In the event of an appeal to the House of Lords in any such *1144 * action, it shall be competent to bring under the review of that House the opinion so pronounced by any Court whose judgments are reviewable thereby; and that House may adopt or reject such opinion, as the same shall appear to it to be well founded or not in law.[1]

[1] 22 & 23 Vic. c. 63, § 1. The word "action" includes every judicial proceeding instituted in any Court, civil, criminal, or ecclesiastical; and the words "Superior Courts" include: in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls or any Vice-Chancellor, the Judge of the Court of Admiralty, the Judge Ordinary of the Divorce Court, and the Judge of the Court of Probate; in Scotland, the High Court of Justiciary, and the Court of Session acting by either of its Divisions; in Ireland, the Superior Courts of Law at Dublin, the Master of the Rolls, and the Judge of the Admiralty Court; and in any other part of her Majesty's dominions, the Superior Courts of Law or Equity therein. *Ib.* § 5.

[2] 22 & 23 Vic. c. 63, § 2.

[3] 22 & 23 Vic. c. 63, § 3.

[1] 22 & 23 Vic. c. 63, § 4. The Privy Council has the like power as to the opinions of Courts whose judgments are reviewable thereby. *Ibid.*

Under this Act, cases have been sent by the Court of Chancery for the opinion of the Court of Session in Scotland,[2] and of the Supreme Court (now High Court) of Judicature at Fort William in Bengal.[3] The Court of Chancery has declined to decide, on a case sent from Scotland, whether an English County Court would have jurisdiction, in a particular case, over an English Friendly Society.[4] Where the Court directs a case to be prepared and settled by the Judge under the above Act,[5] a certified copy of the order is left at his Chambers, and a summons to proceed thereon is taken out and served.[6] Upon the return of the summons, the draft of the case is directed to be prepared and left, and the summons is adjourned for that purpose.[7] When the draft is ready, the case, together with the questions of law upon which the opinion is desired, is settled at Chambers, with or without the personal attention of the Judge. A fair copy of the case, including the questions, is then made; and is identified, by the signature of the Chief Clerk to a memorandum at the foot or in the margin thereof, as being the case remitted, pursuant to the order.[8] The case, with the original order, or an office copy thereof annexed, is then usually sent by the person having the conduct of the inquiry to some practitioner of the Court whose opinion is to be obtained; and the necessary steps are taken by him to obtain the opinion;[9] and he returns a certified copy thereof,[10] when obtained, to the person having the conduct of the inquiry. The certified copy is then filed at the Record and Writ Clerks' office.[11] An office copy of the opinion is taken from that office; and any party to the proceeding may move the Court, on notice, to apply the opinion to the facts set forth in the case.[12] If the opinion is required for the purpose of an inquiry or other proceedings at Chambers, the office copy of the opinion must be produced there; and the Chief Clerk will make his certificate accordingly.[13]

In order to afford the like facilities for the better ascertainment, * in similar circumstances, of the law of any foreign coun- *1145
try or State, with the government of which her Majesty may enter into a convention for the purpose of mutually ascertaining the law of such foreign country or State, when pleaded in actions depending in any Courts within her Majesty's dominions, and the converse, it has been enacted that, if in any such action, it shall be the opinion of the Court that it is necessary or expedient, for the disposal of such action, to ascertain the law applicable to the facts of the case as administered in any foreign State or country with the government of which her Majesty

[2] Lord *v.* Colvin, 1 Dr. & S. 24; 6 Jur. N. S. 189; Seton, 974; *Re* Oswald, M. R., 3 May, 1862.
[3] Login *v.* Princess of Coorg, 30 Beav. 632; and see Seton, 974, No. 2.
[4] Brodie *v.* Johnson, 30 Beav. 129.
[5] See Lord *v.* Colvin, *ubi sup.*
[6] See *post*, Chap. XXIX., *Proceedings at Chambers.*
[7] For forms of case, see Vol. III.
[8] For form of memorandum, see Vol. III.
[9] See *ante*, pp. 1142, 1143.
[10] *Ibid.*
[11] See Ord. I. 35.
[12] 22 & 23 Vic. c. 63, § 3, *ante*, p. 1143. For form of notice of motion, see Vol. III.
[13] See *post*, Chap. XXIX., *Proceedings at Chambers.*

shall have entered into such convention, such Court may direct a case to be prepared and approved, and settle the questions of law arising thereout, in the manner before mentioned; and pronounce an order remitting the same, together with the case, to such Superior Court in such foreign State or country as shall be agreed upon in such convention, whose opinion is desired upon the law administered by such foreign Court as applicable to the facts set forth in such case, and requesting them to pronounce their opinion on the questions submitted to them; and upon such opinion being pronounced, a copy thereof, certified by an officer of such Court, is to be deemed and held to contain a correct record of such opinion.[1]

The certified copy of the opinion of the foreign Court is to be filed in the Record and Writ Clerks' office; and it is conceived that the subsequent proceedings will be the same as in the case of an opinion of a Court in another part of her Majesty's dominions;[2] but if the Court is not satisfied that the facts have been properly understood by the foreign Court, or shall, on any ground whatsoever, be doubtful whether the opinion so certified does correctly represent the foreign law as regards the facts to which it is to be applied, it may remit the case, either with or without alterations or amendments, to the same or to any such Superior Court in such foreign State; and so from time to time as may be necessary or expedient.[3]

If in any action depending in any Court of a foreign country or State, with whose government her Majesty shall have entered into a convention as above mentioned, such Court shall deem it expedient to ascertain the law applicable to the facts of the case as administered in any part of her Majesty's dominions, and if such foreign Court remits to the Court in her Majesty's dominions whose opinion is desired a case
*1146 setting forth the facts, and the * questions of law arising out of the same, on which it desires to have the opinion of a Court within her Majesty's dominions, any of the parties to the action may present a petition to the Court, whose opinion is to be obtained, praying such Court to hear the parties or their counsel, and to pronounce its opinion thereon in terms of the Act, or to pronounce its opinion without hearing parties or counsel; and such Court is to consider the same, and, if it thinks fit, is to appoint an early day for hearing the parties or their counsel on such case, and pronounce its opinion upon the questions of law as administered by it which are submitted to it by the foreign Court; and in order to its pronouncing such opinion the Court is to be entitled to take such further procedure thereupon as to it seems proper; and upon such opinion being pronounced, a copy thereof, certified by an

[1] 24 & 25 Vic. c. 11, § 1. The words "action" and "Superior Courts," in this Act, have the same meaning as in 22 & 23 Vic. c. 63; see *ante*, p. 1143, n. (1); and the latter words include also, in a foreign country or State, any Superior Court or Courts which shall be set forth in any such convention between her Majesty and the government of such foreign country or State. 24 & 25 Vic. c. 11, § 24.

[2] 24 & 25 Vic. c. 11, § 2, *supra*.

[3] 24 & 25 Vic. c. 11, § 2.

officer of such Court, is to be given to each of the parties to the action by whom the same may be required.[1]

As before stated,[2] it is believed that no convention has yet been entered into under this Act, with any foreign country or State; and, consequently, the Act is at present in abeyance.

Section VII. — *Further Hearing after the Trial.*

If the order for the trial of a question of fact has been made before the hearing, the cause must be brought to a hearing in the usual way; and the verdict upon the trial will form part of the evidence;[3] but if the trial or assessment of damages has been directed at the hearing, the cause must be set down for further hearing[4] before the Judge to whose Court the cause is attached.[5]

The party desiring to set it down must, if the cause is attached to the Court of one of the Vice-Chancellors, present a petition of course to the Lord Chancellor, or, if to the Rolls' Court, to the Master of the Rolls, praying that it may be so heard.[6] The petition is left at the Order of Course seat in the Registrars' office, or at the office of the Secretary at the Rolls, as the case may be; and the order to set the cause down will be thereupon drawn up. If * the cause is attached to *1147 one of the Vice-Chancellors' Courts, it will be set down forthwith; if to the Rolls' Court, the order must be subsequently left for that purpose at the Order of Course seat in the Registrars' office.[1] The order in either case, must be served on the solicitor of the other parties, or on any of the parties themselves who act in person,[2] in the same manner as a proceeding which does not require personal service.[3]

Before the hearing, a copy of the decree, and of the record and verdict thereon, must be left with the Under Secretary at the Rolls, or with the Usher of the Vice-Chancellor, as the case may be, for the Judge.[4] The cause may be set down as soon as the trial has taken place.[5]

The Court may not stay the further hearing of the cause because an appeal from an order refusing a new trial is pending.[6]

1 24 & 25 Vic. c. 11, § 3.

2 *Ante*, p. 864, n. (2).

3 It can never be known what effect is given to the verdict, or whether any is given to it, until the subsequent hearing upon the merits, and a decree rendered thereon by the Court. Until the verdict has been sanctioned and established by the Court, it is no proof of any fact, but that it was actually rendered in the case, and not proof of the facts found thereby. The verdict, independent of the adoption and sanction of it by the Court, can establish nothing in the case. Allen *v.* Blunt, 3 Story, 746, 747. For form of order, directing motion for injunction to stand over till after trial, and then, by consent, be turned into a motion for decree, see Seton, 869, No. 7.

4 See Seton, 971, 992–994.

5 Ord. VI. 5.

6 Ord. XXI. 9. Causes are thus set down to be heard on further directions. For form of petition, see Vol. III.

1 Reg. Regul. 15 March, 1860, rr. 1, 9.

2 See Braithwaite's Pr. 438.

3 See *ante*, pp. 453–455; Ord. III. 4, 6; XXXVII. 2.

4 1 Harr. by Newl. 508.

5 Rodgers *v.* Nowell, 6 Hare, 338. For directions as to counsel's briefs, see Vol. III.

6 McGregor *v.* Topham, 4 Hare, 162.

The decree of the Court at the further hearing[7] is usually in accordance with the finding of the Court or jury upon the question of fact, or, if there have been more trials than one, with the last finding.[8] The Court, however, will, even then, if it thinks that the question of fact has not been satisfactorily determined at the trial, direct a new trial or new issue, in such form as may suit the justice of the case;[9] or give a decision contrary to the verdict.[10] Thus in *Armstrong* v. *Armstrong*,[11]

Sir John Leach M. R., without directing a new issue, decided at *1148 once against the parties in whose * favor the verdict was found,

and his Honor's decision was supported, upon appeal, by Lord Brougham; but it is right to observe that, in that case, the issues appear to have been so framed that the verdict threw very little light upon the question which it was important to decide, and the whole matter was before the Court with sufficient precision to enable it to come to a decision without another reference to a jury. Where also, in a suit for specific performance, the agreement found by the jury was of such a nature that the Court would not enforce it, the bill was dismissed.[1]

If, after a question of fact has been directed to be tried, the cause is brought on for further hearing, and it appears that the parties have not gone to trial, the Court, if it is dissatisfied with the grounds upon which the trial was not suffered to take place, will still direct it to be tried. Thus, where an issue was directed to try the validity of a debt claimed against a testator's estate, and, at the trial of the issue, the executor

[7] See *post*, Chap. XXX., *Further Consideration*. For forms of orders, see Seton, 971, 972, 992, 993.

[8] See Hoffman *v.* Smith, 1 Md. 475. In Massachusetts, the finding of the jury upon the issue submitted to them, if not set aside for good cause shown, will be regarded as settling the facts in issue conclusively. Franklin *v.* Greene, 2 Allen, 519. So in Virginia, Paul *v.* Paul, 2 Hen. & M. 525; Fitzhugh *v.* Fitzhugh, 11 Grattan (Va.), 210. So in Missouri, O'Bryne *v.* O'Bryne, 13 Mo. 16. So in New York, Griffith *v.* Griffith, 9 Paige, 315. See Dodge *v.* Griswold, 12 N. H. 573; McDaniel *v.* Marygold, 2 Clarke (Iowa), 500; Halcomb *v.* Managers New Hope D. B. Co., 1 Stockt. (N. J.) 457; Carter *v.* Campbell, Gilmer, 159; Clark *v.* Society, 45 N. H. 331. If an issue is directed in a Chancery suit at a time or stage in the progress of the suit, when, on the state of the proofs, the bill ought to have been dismissed; even if a verdict is found for the plaintiff, the bill shall, notwithstanding, be dismissed at the hearing. Smith *v.* Betty, 11 Grattan (Va.), 752.

[9] See Blackburn *v.* Gregson, 1 Bro. C. C. 420, 423, 424; [*Ex parte* Morgan, 2 Ch. Div. 72].

[10] Such is the rule in some other Courts, see U. States *v.* Samperyac, 1 Hemp. 118; Scheetz's Ap. 35 Penn. (State) 88; Sibert *v.* McAvoy, 15 Ill. 106; Love *v.* Braxton, 5 Call. 537; Allen *v.* Blunt, 3 Story, 746, 747; Freeman *v.* Staats, 1 Stockt. (N. J.) 821; [Basey *v.* Gallagher, 20 Wall. 670; Bates *v.* Gage, 4 Cal. 127; Durkee *v.* Chambers, 57 Mo. 575; Burlen *v.* Shannon, 99 Mass. 206; Austin *v.* Bainter, 50 Ill. 308; Lowe *v.* Trayner, 6 Coldw. 633; Russell *v.* Fanning, 2 Ill. App. 632; Stahl *v.* Gotzenberger, 45 Wis. —]. A verdict upon an issue ordered by a Court of Equity, is, in no just sense, final upon the facts it finds, or binding upon the judgment of the Court. The Court may at its pleasure set it aside, and grant a new trial, or, disregarding it, may proceed to hear the cause and decide in contradiction to the verdict; or it may adopt the verdict, *sub modo*, and give it a limited effect only. Story J. in Allen *v.* Blunt, 3 Story, 746; [Humphreys *v.* Blevins, 1 Tenn. 178]. See Adams *v.* Soule, 33 Vt. 538. The fact that the Chancellor informed his conscience by a verdict, in a case, where there was no need of a jury, does not vitiate a decree. Pfeiffer *v.* Riehn, 13 Cal. 643. And it is too late to object on error that there was no formal order directing an issue, and that the Court had without such order considered the finding of the jury. Williams *v.* Bishop, 15 Ill. 533.

[11] 3 M. & K. 45, 62, 68. [See Gass *v.* Mason, 4 Sneed, 497.]

[1] Morrison *v.* Barrow, 1 De G., F. & J. 633.

entered into a compromise with the debtor, subject to the opinion of the Court: upon the case coming on again for hearing, Sir William Grant M. R., being of opinion that the compromise was improper, directed the parties to proceed to try the issue: the executor paying all the costs of the former proceedings at Law.[2]

The costs of an issue are in the discretion of the Court,[3] and do not follow the verdict as a matter of course.[4] In general, they will only be disposed of at the further hearing of the cause.[5] If, however, the issue has been directed on an interlocutory application, they may be disposed of previously.[6]

But although the costs of an issue, directed by the Court, are said to be discretionary, the general rule of the Court in awarding them is, that they follow the event, and are given to the successful party.[7] This rule, however, is liable to exceptions; thus, in the case of a bill to establish a will against an heir-at-law, he has a right to be satisfied how he is disinherited; and if an issue is directed to try the will, he will have his costs, although the will is established: unless there are any special circumstances in the case which will induce the Court to refuse them.[8] The most usual case for refusing an heir-at-law his costs of an issue, is where he sets *up insanity and fails to prove it: in *1149 such cases, the heir is not considered entitled to his costs of the issue;[1] he has, however, been allowed them even in such a case.[2] In some cases, the Court has gone the length of compelling an heir to pay the costs of an issue, but it must be a very strong case to induce the Court to do so: such as misconduct,[3] the spoliation or secreting of a will,[4] or where he vexatiously contests the will, by setting up a case of insanity, knowing that the devisor was perfectly sane.[5] The Court will, however, on the ground of vexation, decree the costs of an issue against an heir who fails, where he himself has filed the bill to set aside the will for insanity, instead of proceeding by ejectment;[6] and it seems that, even where the heir could not have proceeded by ejectment, in consequence of outstanding terms, and the Court, for that reason, dismisses the bill without costs, it still will order him to pay the costs of the issue.[7]

2 Legh *v.* Holloway, 8 Ves. 213.

3 2 Harr. ed. Newl. 570; Decker *v.* Caskey, 2 Green Ch. 446.

4 See Seton, 978; Corporation of Rochester *v.* Lee, 2 De G., M. & G. 427, 431; Stacey *v.* Spratley, 4 De G. & J. 199; 5 Jur. N. S. 503; and see *post*, Chap. XXXI., *Costs.*

5 Standen *v.* Edwards, 1 Ves. J. 133, 135; Boyse *v.* Colclough, 1 K. & J. 124, 144.

6 Duncan *v.* Varty, 2 Phil. 696, overruling Malins *v.* Price, 2 Coll. 190; 9 Jur. 650; Rigby *v.* Great Western Railway Company, 14 Jur. 710, 712, V. C. W.

7 Beames on Costs, 187; Morgan & Davey, 69; [Carpenter *v.* Easton and Amboy R. Co., 1 Stew. Eq. 390].

8 Berney *v.* Eyre, 3 Atk. 387; Wright *v.* Wright, 5 Sim. 449; see also Webb *v.* Claverden, 2 Atk. 424; Crew *v.* Jolliff, Prec. in Ch. 93; Wilson *v.* Metcalf, 3 Mad. 45; Grove *v.* Young, 5 De G. & S. 38, 40; Stacey *v.* Spratley, 4 De G. & J. 199; 5 Jur. N. S. 503.

1 White *v.* Wilson, 13 Ves. 87, 92; Smith *v.* Dearmer, 3 Y. & J. 278.

2 Roberts *v.* Kerslake, 1 K. & J. 751.

3 Middleton *v.* Middleton, 5 De G. & S. 656.

4 Berney *v.* Eyre, 3 Atk. 387.

5 White *v.* Wilson, *ubi sup.*

6 Webb *v.* Claverden *ubi sup.*; Scaife *v.* Scaife, 4 Russ. 309; Swinfen *v.* Swinfen, 27 Beav. 148.

7 Tatham *v.* Wright, 2 R. & M. 1, 32.

Where a new trial has been directed in consequence of the misdirection of the Judge,[8] or the miscarriage of the jury,[9] no order will in general be made as to the costs of the previous trial. The order on a further hearing cannot be appealed from on the ground that the findings are wrong; the proper course is to move for a new trial.[10]

[8] Bearblock *v.* Taylor, Jac. 571; White *v.* Lisle, 3 Swanst. 342, 343; Corporation of Rochester *v.* Lee, 2 De G., M. & G. 427, 431.

[9] Duncan *v.* Varty, 2 Phil. 696, 700.

[10] Fernie *v.* Young, L. R. 1 H. L. Cas. 63; 12 Jur. N. S. 437; [*Ex parte* Morgan, 2 Ch. Div. 72.]

* CHAPTER XXVIII. *1150

PROCEEDINGS UNDER DECREES FOR A PARTITION, TO SETTLE BOUNDARIES, AND TO ASSIGN DOWER.

SECTION I. — *Proceedings under Decrees for a Partition.*

IN the case of the partition of an estate, where the titles of the parties are in any degree complicated, the difficulties which occurred in proceeding at Common Law led to applications being made for that purpose to Courts of Equity[1] where the object is effected by first ascertaining the rights of the several persons interested, and then making a partition of the estate according to such rights.[2] Formerly, a

[1] Thayer *v.* Lane, Harring. Ch. 247; Dinckle *v.* Timrod, 1 Desaus. 109. In Massachusetts, there is no general jurisdiction in Equity to make partition of lands, there being a complete and adequate remedy at Common Law. Whiting *v.* Whiting, 15 Gray, 503. But all persons who are interested as joint tenants, tenants in common, or otherwise, in any mill-privilege, water-right, or other incorporeal hereditament, may be compelled to divide the same, either by suit in Equity, in the Supreme Judicial Court, or in the manner provided for the division of land in the Courts of Common Law. In the latter case, the commissioners appointed to make partition shall set forth in their return the best method of setting off to the several parties their respective shares, or interests, and thereupon the Court may require the parties interested to perform such acts as justice and equity may require, and may make all such orders and decrees in the premises, according to the course of proceedings in Equity, as may be necessary to do justice between the parties; and under these provisions, partition may be made of the water of a natural stream not navigable, the banks of which are owned by different riparian proprietors. Genl. Sts. c. 136, §§ 77, 78; see Hodges *v.* Pingree, 10 Gray, 14. As to the Equity jurisdiction in other States and Courts in cases of partition, see Mundy *v.* Mundy, 4 Sumner's Ves. 122, note (*b*); Graham on Jurisdiction (ed. 1839), 364, 365; Hewitt's Case, 3 Bland, 184; Fisher *v.* Hopper, 2 Head. (Tenn.), 253; [Ferriss *v.* Lewis, 2 Tenn. Ch. 292;] Miller *v.* Chittenden, 2 Clarke (Iowa), 315; Althause *v.* Radde, 3 Bosw. (N. Y.) 410; Page *v.* Webster, 8 Mich. 263; Matthews *v.* Matthews, 1 Edw. Ch. 568; Cheeseman *v.* Thorne, 1 Edw. Ch. 629; 1 Story Eq. Jur. § 646 *et seq.*; 4 Kent, 364, 365, and notes; Coleman *v.* Hutchinson, 3 Bibb, 209. In Massachusetts, Maine, New Hampshire, Ohio, Illinois, Georgia, and probably in most of the other States, partition may be obtained by petition to the Courts of Law without suit. Morrill *v.* Morrill, 5 N. H. 134. Partition may also be effected in New Hampshire by petition in Equity. Whitton *v.* Whitton, 38 N. H. 127. In New York, the Court of Chancery had a concurrent jurisdiction with the Courts of Law, in suits for partition, and an objection in Chancery, that a perfect remedy may be obtained at Law, could not be sustained. Jenkins *v.* Van Shaack, 3 Paige, 245. So in New Jersey. Hartshorne *v.* Hartshorne, 1 Green Ch. 349; Hay *v.* Estell, 3 C. E. Green, 251. The advantages of proceeding in Equity for partition rather than at Law, are set forth and illustrated by Mr. Justice Story, in 1 Story Eq. Jur. Ch. 14, § 653 *et seq.*

[2] Agar *v.* Fairfax, 17 Ves. 552; Ld. Red. 120. By 3 & 4 Will. IV. c. 27, § 36, the writ of partition at Law is abolished. As to partition in Equity, see Seton, 574 *et seq.*; 2 L. C. Eq. 394 *et seq.*; Story Eq. Jur. § 646 *et seq.*; and see 6 Jarm. Conv. by Sweet, 586 *et seq.*; Sugd. Pow. 386 *et seq.*; Smith's Comp. 680–685. As to copyholds, see 4 & 5 Vic. c. 35, § 85; and as to partitions, reserving the minerals, see 25 & 26 Vic. c. 108.

*1151 commission was always issued to make * the partition required; and upon the return of the commission, and confirmation of the return by the Court, the partition was finally completed by mutual conveyances, of the allotments to the several parties;[1] except in the case of an advowson: for there the practice has always been to direct a partition by the decree.[2] Now, however, the partition is more usually made in Chambers; but sometimes at the hearing;[3] and where a commission is directed, liberty is sometimes reserved to the parties, before the commission is issued, to carry in a scheme for the partition before the Judge in Chambers.[4]

When the partition is to be made by commission, and the title of the plaintiff and of all the other parties is clear upon the record, the Court will, at the original hearing, order a commission of partition to issue, in the first instance, without any previous inquiry.[5] If the titles are not clear, the Court will direct an inquiry as to them.[6] The plaintiff must, however, state upon the record his own title and the titles of the defendants; and must show that he and the defendants are among them entitled to the whole estate.[7] If necessary, the Court will *1152 direct an inquiry to * ascertain the shares in which they are so entitled; and then order a partition according to the rights of all or such of them as appear entitled: dismissing the bill as against those

[1] Ld. Red. 120. In certain cases, the Inclosure Commissioners have jurisdiction. 11 & 12 Vic. c. 99, § 13; 20 & 21 Vic. c. 31, §§ 7, 8; see also 8 & 9 Vic. c. 118, § 90; Cooke on Inclosures, 142, 143.

[2] Bodicoate *v.* Steers, 1 Dick. 69; Johnstone *v.* Baber, 22 Beav. 562; 6 De G., M. & G. 439; 2 Jur. N. S. 1053; Seton, 585–588.

[3] Stanley *v.* Wrigley, 3 Sm. & G. 18, 20; 1 Jur. N. S. 695; Shepherd *v.* Churchill, 25 Beav. 21; Bowles *v.* Rump, 9 W. R. 370, V. C. S. In Howard *v.* Barnwell, 1 N. R. 172, the Lords Justices intimated an opinion that, where an infant is a party, a commission should issue. See, however, Seton, 572, 576; and Clarke *v.* Clayton, 2 Giff. 333; 6 Jur. N. S. 1238; Greenwood *v.* Percy, 26 Beav. 572. For forms of decrees for a partition at the hearing, and in Chambers, see Seton, 571, 572.

[4] Seton, 572.

[5] Phelps *v.* Green, 3 John. Ch. 302.

[6] The estate and interest of the parties must be ascertained before a commission is awarded to make partition. Phelps *v.* Green, 3 John. Ch. 302. Where the title is denied, or suspicious, Courts of Equity will not interfere until the party seeking a partition has had an opportunity to try his title at Law. Manners *v.* Manners, 1 Green Ch. 384; Hay *v.* Estell, 3 C. E. Green, 251; Wells *v.* Beall, 2 Gill & J. 468; Straughan *v.* Wright, 4 Rand. 494; Stuart *v.* Colter, 4 Rand. 74; Wilkin *v.* Wilkin, 1 John. Ch. 111; Phillips *v.* Thompson, 1 John. Ch. 132; Phelps *v.* Green, 3 John. Ch. 302; Martin *v.* Smith, Harper S. C. 106; Jenkins *v.* Van Shaack, 3 Paige, 245; Hitchcock *v.* Skinner, 1 Hoff. Ch. 21; Clapp *v.* Bromagham, 9 Cowen, 530; Mohawk Bridge Case, 6 Paige, 563; Jarrett *v.* White, 3 Ired. Ch. 131; Bruton *v.* Rutland, 3 Humph. 435; Pierpont *v.* Fowle, 2 Wood. & M. 23, 36, 37. If the right of the plaintiff is not admitted by the answer, he is bound to make such proof of title as would entitle him to recover in ejectment. Larkin *v.* Mann, 2 Paige, 27, 28. If an issue of fact is joined, the Court may award a feigned issue for the trial thereof. *Ibid.* Equity has not jurisdiction to try the legal title to lands. Manners *v.* Manners, 1 Green Ch. 384; Obert *v.* Obert, 2 Stockt. 98. Where the question arises on an equitable title, set up by the defendant, Chancery must decide on the title. Coxe *v.* Smith, 4 John. Ch. 271; Lucas *v.* King, 2 Stockt. 277; see Hitchcock *v.* Skinner, 1 Hoff. Ch. 21. A single recovery in ejectment, if not further controverted at Law, is a sufficient establishment of the title at Law upon a bill for partition. Obert *v.* Obert, 1 Beasley, 423.

[7] See Larkin *v.* Mann, 2 Paige, 27. The Master's report should, as far as practicable, give an abstract of the conveyances of the several undivided shares or interests of the parties in the premises from the time the several shares were united in one common source. Hamilton *v.* Morris, 7 Paige, 39. And the Master should require the plaintiff to trace his title to the common source of title of the tenants in common. Hamilton *v.* Morris, *supra.*

who do not appear to have any right.[1] The Court will not, however, grant such a reference, in order to enable the plaintiff to complete his own title.[2]

Where the Court directs such inquiries by the decree, it generally goes on, by the same decree, to order a partition to take place, in the shares to which the parties are certified to be entitled, and the commission to issue; but further consideration should be adjourned, in case all parties interested are not parties to the suit.[3] The Court, however, sometimes abstains from ordering the commission to issue until the cause comes on for further consideration:[4] though this should not be done except in special cases, in consequence of the delay and expense it will occasion.

Where more than one commission is required, it may be ordered or provided for by the original decree; or a subsequent order for it may be obtained on summons in Chambers.[5]

The commission is usually prepared and sued out by the solicitor[6] of the plaintiff; but if he neglects so to do, the defendant may obtain an order that he may be at liberty so to sue it out.[7]

The names of the commissioners should be agreed upon between the parties, who join and strike names. Each party appearing by a separate solicitor is entitled to name four commissioners; but two only of each set of four can be retained; and not less than four names will be inserted in the commission,[8] unless the Court or Judge otherwise directs.[9] If the parties cannot agree upon the names, the Judge at Chambers will determine who shall be named, on a summons being taken out for that purpose.[10] To save expense, however, it is very common for the parties to agree, amongst themselves, upon two persons to act as commissioners: in which case, two fictitious names must be added, so as to preserve the form of the writ.[11]

The commission will be sealed at the Record and Writ Clerks' office, on production of the decree or order directing it to issue, *and on a *præcipe* being left. If the decree or order directs a *1153 preliminary inquiry, the result of such inquiry, as it appears in the Chief Clerk's certificate, must be embodied in the writ.[1]

[1] Per Lord Eldon, in Agar *v.* Fairfax, 17 Ves. 552.

[2] Jope *v.* Morshead, 6 Beav. 213, 219.

[3] Agar *v.* Fairfax, 17 Ves. 533, 553; Seton, 578, 579, and cases there cited. The practice as stated in Cole *v.* Sewell, 15 Sim. 284, and Attorney-General *v.* Hamilton, 1 Mad. 214, is now not followed.

[4] Attorney-General *v.* Hamilton, 1 Mad. 215; and see Seton, 578.

[5] Seton, 576.

[6] Ord. III. 1.

[7] Hand, 123, 124.

[8] Braithwaite's Pr. 235; and see Ord. III. 1. In Galloway *v.* Mackersey, the commissioners were named in the decree directing the partition. The lands partitioned were in Tasmania; and the return was filed 18th January, 1864.

[9] See Watson *v.* Duke of Northumberland, 11 Ves. 153, 163; Howard *v.* Barnwell, 2 N. R. 414, V. C. S.

[10] Morewood *v.* Hall, and other cases cited in Seton, 582; Howard *v.* Barnwell, *ubi sup.*; Braithwaite's Pr. 235. For form of summons, see Vol. III.

[11] Braithwaite's Pr. 235.

[1] Braithwaite's Pr. 235; and see Curzon *v.* Lyster, Seton, 1st ed. 188. The commission must be engrossed on parchment; and be stamped with a 1*l.* Chancery fee fund stamp. Regul. to Ord. Sched. 4. For forms of writ and *præcipe*, see Vol. III.

The proceedings under the commission are open, and not secret; and no oath of secrecy is required to be taken by the commissioners, or those employed under them.[2] To enable the commissioners to perform their duty, they are armed by the commission with power to cause all such witnesses as they may see occasion for, to come before them to be examined. This may be done by service of a *subpœna* and notice, in like manner as a *subpœna* and notice are served to procure the attendance of witnesses before an Examiner;[3] and, upon the witness attending, the oath may be administered to him by two or more of the acting commissioners: the oath being *mutatis mutandis*, the same in form as that administered by the Examiner.[4] The attendance of the witness may be enforced, in the same manner as the attendance of a witness before the Examiner.[5]

The commissioners should, it seems, examine the witnesses apart from each other, if they have any suspicion of manufactured evidence; but otherwise, their proceedings should be open, as they act in a judicial capacity, in the nature of a Court, at which the parties and their agents have a right to be present, as was expressly directed by the writ of partition at Common Law.[6]

The commissioners themselves examine the witnesses; and Lord Redesdale was of opinion that it would not be advisable for the commissioners to let the solicitors for the parties put the questions: though he was not clear whether the parties had not a right, to such assistance, if they thought proper to use it.[7] The witnesses may be examined upon interrogatories; but in that case, a direction to that effect must be inserted in the decree and commission.[8] The commissioners are not bound, personally, to take the depositions: that is, to write down the answers of the witnesses; but they may employ clerks to do this part of the business. The clerks, however, must act entirely by their direction, and write the substance of what falls from the witnesses, in the language the commissioners direct. If any dispute arises, as to the evidence given by a witness, the commissioners must agree *1154 amongst themselves * upon the words of the deposition, and, having done so, the deposition must be read over to the witness, and ought to be signed by him before he is dismissed.[1] If any of the commissioners propose to receive evidence touching any matter not relevant to the business before them, the other commissioners should object to receiving such evidence, and may refuse to sign the depositions if taken, and to annex them to the return.[2]

2 See Lord Redesdale's opinion upon the commission in Curzon *v.* Lyster, Seton, 1st ed. 191.

3 *Ante*, pp. 906, 907. For form of *subpœna*, see Ord. Sched. E., No. 2; and for forms of *subpœna* and notice, see Vol. III.

4 For form of oath administered by an Examiner, see Vol. III.

5 *Ante*, p. 908.

6 Lord Redesdale's opinion, in Curzon *v.* Lyster, Seton, 1st ed. 192.

7 Lord Redesdale's opinion, in Curzon *v.* Lyster, Seton, 1st ed. 196.

8 Braithwaite's Pr. 234.

1 Lord Redesdale's opinion, *ubi sup.*, 196, 197.

2 *Ib.* 195.

The depositions on behalf of the different parties should be kept distinct. The depositions must be written on foolscap paper, bookwise, or briefwise, as the commissioners may think fit;[3] and they should, according to the directions in the decree and commission, be returned with the commission.[4]

According to the usual form of decrees made in cases of partition, all deeds and writings relating to the estates to be divided in the custody of any of the parties, are to be produced before the commissioners, upon oath, as the commissioners shall require;[5] and the method of compelling the production of the documents thereunder appears to be, by serving an indorsed copy of the decree on the party in whose custody they are, and then proceeding by attachment and other process of contempt against him.[6]

The commissioners, when once they are appointed, though named by the different parties, are commissioners for all the parties.[7] In fact, they are to act as Judges: the whole power of the Court being delegated to them; and, if four act, and there is a difference of opinion amongst them, one being of one opinion and three of another, the three make the return; and so, if three are present, and two concur in opinion against the third, that is sufficient; but the commission does not authorize two out of four to act, where all four are present; and, therefore, it does not authorize a double return by two commissioners one way, and by the other two another way: though if two only are present, a return by them will be good.[8]

As the commissioners act as a Court, their proceedings ought to be open. The parties or their solicitors should attend them; * should point out what may tend to give the commissioners *1155 full information on the subject; should produce their deeds and other evidence, as well written as oral; should know what evidence is given on both sides; should be at liberty to cross-examine the witnesses under the control of the commissioners; and take every step necessary to discover the truth, and enable the commissioners to make a proper return.[1]

The commission itself ought to be produced to the commissioners when they meet, and should remain with them till their proceedings are closed, and their return annexed.[2]

[3] Ord. 6 Mar., 1860, r. 16; *ante*, p. 911.

[4] Braithwaite's Pr. 234. In Watson *v.* Duke of Northumberland, 11 Ves. 153, it was stated, at the bar, that upon very few commissions has any return been made of the evidence, *ib.* 157; and Lord Eldon said, he believed the practice to be as stated, that the return was made without the evidence; *ib.* 161. A compliance with the directions of the commission, would, however, appear to be the proper course, and that now adopted. Braithwaite's Pr. 237, 238.

[5] Seton, 571; see Larkin *v.* Mann, 2 Paige, 27, 28.

[6] Trigg *v.* Trigg, 1 Dick. 325; Ord. XXIII. 10, *ante*, p. 1043. A time for doing the act must be limited; see *ibid.*

[7] Per Lord Eldon, in Watson *v.* Duke of Northumberland, 11 Ves. 153, 160.

[8] *Ib.* 158, 162. In New York, all the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met will be valid. 2 Rev. Stat. §§ 31, 32. So in Massachusetts. Genl. Sts. c. 136, § 24. So in New Hampshire. Odiorne *v.* Seavey, 4 N. H. 53.

[1] See Lord Redesdale's opinion in Curzon *v.* Lyster, Seton, 1st ed. 192.

[2] *Ib.* 197.

The course to be pursued by the commissioners, under a commission of partition, is very clearly pointed out by the terms of the commission. In the first place, they are directed to meet together, at some certain place by them appointed, and are from thence to "go to, enter upon, and walk over the estate."[3] In order that they may do this, they must first ascertain the estate which is the subject of the commission; and for that purpose, they must look into the bill and answers; and if, from thence, they can ascertain the property, they must stop there: if they find the descriptions in those instruments not sufficiently accurate to enable them to proceed, they must endeavor to supply the defect in the pleadings by evidence. But the pleadings must still be their guide as to what evidence they shall receive: for they are to divide "the estates in question in the cause,"[4] and no others; any evidence, therefore, touching estates not in question in the cause will be irrelevant to the business before the commissioners, and ought to be rejected by them, except so far as it may be necessary for the purpose of ascertaining what are the estates in question; and such evidence may be necessary, if there is any confusion or intermixture of boundaries,[5] between the estates in question and those not in question.

Having ascertained what the estate is, which is to be the subject of the partition, the next thing the commissioners have to do is, to make "a fair partition, division, and allotment, thereof," into as many shares and proportions as the decree or order, under which the commission issues, directs. In doing this the commissioners must exercise "the best of their skill, knowledge, and judgment;" and, provided they do that, and act fairly, the Court will not, it seems, distrust their *1156 return upon the mere allegation *of conflicting opinions by different surveyors, with respect to the comparative value of the several lots,[1] the Court considering that, as the commissioners are named by the parties, and are, therefore, Judges of their own choice, the principles which apply to arbitrators are properly applicable to them.[2] Where, however, it can be shown that the commissioners have committed a gross error in judgment (although there is no proof of partiality), the Court will set aside their adjudication.[3]

[3] See form in Vol. III.

[4] In the modern form of commission, the estate to be partitioned is referred to by its description in the decree; to which the words "in the decree, and in the pleadings of the cause, more particularly mentioned," are superadded; see Braithwaite's Pr. 233; and form in Vol. III.

[5] Lord Redesdale's opinion in Curzon *v.* Lyster, Seton, 1st ed. 195.

[1] See in the Matter of the Division of the Real Estate of Thompson, 2 Green Ch. 637. The question to be considered by the Court, on motion to quash the partition, is, whether the inequality is more than can fairly be accounted for by the difference in judgment between men of discretion in valuing the property. Hay *v.* Estell, 4 C. E. Green, 133. To set aside a partition for mere inequality, where there is no partiality or improper conduct of the commissioners, the proof must be clear and the inequality considerable. *Ibid.*

[2] Jones *v.* Totty, 1 Sim. 136; see also Manners *v.* Charlesworth, 1 M. & K. 330; Coop. t. Brough. 52. But the theory that commissioners in partition are, like arbitrators, judges voluntarily chosen by the parties to decide between them, and therefore they are concluded by their judgment, whether right or wrong, if not given corruptly or through favor, was dissented from in Hay *v.* Estell, 4 C. E. Green, 133.

[3] Story *v.* Johnson, 1 Y. & C. Ex. 538; see Jewett *v.* Scott, 19 Texas, 567; Geer *v.* Winds, 4 Desaus, 85; Hay *v.* Estell, 4 C. E. Green, 133. It was held in Riggs *v.* Dickin-

It is to be observed, that, in making a partition in Chancery, every part of the estate need not be divided, but that it will be sufficient if each party have his proper share of the whole.[4] Thus, where two-thirds of an estate belonged to the plaintiff, and one-third to the defendant, and the estate consisted, amongst other things, of a mansion-house and of farms and lands about it, and the defendant insisted that he was entitled to have one-third of each allotted to him, Lord Mansfield said, that although in making the partition care must be taken that the defendant should have a third part in value of the estate, there was no color of reason that any part of the estate should be lessened in value in order that the defendant should have his third of it: which, if he should have one-third of the house and of the park, would very much lessen the value of both.[5] So, if there be three houses of different values to be divided amongst three, it will not be right to divide each house: for that would be to spoil every house; but some recompense should be made, either by a sum of money or * rent, for owelty of partition, to those who have the houses *1157 of less value.[1] The commissioners, however, have no power to award sums to be paid by way of owelty, unless authorized by the decree.[2]

It has, however, sometimes happened, that the estate to be divided consists of one entire thing, such as a house,[3] or a cold bath:[4] in such

son, 2 Scam. 438, that inequality of value, as well as inequality of quantity, is good cause for setting aside a report of commissioners of partition; and such inequality may be shown by affidavit. The regularity of proceeding in partition cannot be inquired into collaterally. Wilson *v.* Bull, 10 Ohio, 250.

[4] Earl of Clarendon *v.* Hornby, 1 P. Wms. 446; Sugd. Pow. 918; and see Peers *v.* Needham, 19 Beav. 316; see Larkin *v.* Mann, 2 Paige, 29; Smith *v.* Barber, 7 Ohio, 118; Brookfield *v.* Williams, 1 Green Ch. 341; [Haulenbeck *v.* Cronkright, 11 C. E. Green, 159]. In Massachusetts, in proceedings for partition, if there are several petitioners, they may at their election have their shares set off together or in severalty. Genl. Sts. c. 136, § 25. But the commissioners are to set off only the share or shares of the petitioner or petitioners, which shall be expressed in the warrant. Genl. Sts. c. 136, § 21; see Shull *v.* Kennon, 12 Ind. 34. The commissioners may give to the share of one tenant a right of way over land assigned to the other tenants. Cheswell *v.* Chapman, 38 N. H. 14, 17; see Hoffman *v.* Savage, 15 Mass. 130; Davenport *v.* Lamson, 21 Pick. 72; Chandler *v.* Goodrich, 23 Maine, 78; White *v.* Story, 2 Hill, 549.

[5] Earl of Clarendon *v.* Hornby, 1 P. Wms. 446.

[1] Earl of Clarendon *v.* Hornby, 1 P. Wms. 446; Peers *v.* Needham, 19 Beav. 316. To make the value of the several shares equal, one party may be required, under certain circumstances, to pay money on his share to those who receive a share of less value. Brookfield *v.* Williams, 1 Green Ch. 341; see Graydon *v.* Graydon, 1 McMullan, 63: Williamson *v.* Swindle, 1 McMullan, 67; [Robertson *v.* Robertson, 2 Swan, 197].

A decree in proceedings for the partition of the real estate of a person deceased, awarding the property to one of the heirs at the appraisement, is conclusive of the title, as against all parties claiming under the deceased or his heirs, and cannot be collaterally impeached. Such decree divests the title of the other heirs, and all claiming under them. Merklein *v.* Trapnell, 34 Penn. St. 42.

[2] Mole *v.* Mansfield, 15 Sim. 41; Seton, 579. For form of decree, see *ib.* 580, No. 3.

[3] Turner *v.* Morgan, 8 Ves. 143, 145. The end of that case was, that the commission having been executed, an exception was taken by the defendant, on the ground that the commissioners had allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase in the house, and all the conveniences in the yard; and the exception was overruled by Lord Eldon, who said he did not know how to make a better partition for the parties; that he granted the commission with great reluctance, but was bound by authority; and that it must be a strong case to induce the Court to interfere, as the parties ought to agree to buy and sell. See 11 Ves. 157, n.

[4] Warner *v.* Baynes, Amb. 589. [Or a mineral spring. Ferriss *v.* Lewis, 2 Tenn. Ch. 292.]

cases, the partition must nevertheless be made, and the difficulty of doing it will be no reason for not effecting it. So, the rent payable in respect of water pipes, by a public company for supplying water, laid through the land, has been divided, by apportioning it between the parties, according to their respective quantities of the land through which the pipes ran.[5] In like manner, a mill may be divided, by giving to the parties every alternate toll dish: as was done at Common Law, in the case of a writ *de partitione facienda*.[6] In the case of advowsons, the partition is effected by directing alternate presentation: which, as we have seen, is done by the decree, without issuing a commission.[7]

So, also, there may be a partition of a manor.[8]

*1158 * The commissioners having apportioned and divided the property, should proceed to set apart and allot the shares to the parties. This they should do, when it can be accomplished, by lot: for which purpose they should call in some indifferent person, and require that person to draw lots for the shares of each party.[1] It is to be observed, however, that the course of making the choice of shares, by lot, should not be resorted to where it cannot be done with fairness, and with due regard to the situation of the parties, and of the shares; but only when there are no circumstances to induce the commissioners to allot the shares otherwise.[2] In such cases, it is the duty of the commissioners to assign the shares to those parties to whom they would be of most value (independently of their value in the market), with refer-

[5] *Ibid.*

[6] Earl of Clarendon *v.* Hornby, *ubi sup.*

[7] Seton, 585–588; Bodicoate *v.* Steers, 1 Dick. 69; Johnstone *v.* Baber, 22 Beav. 562; 6 De G., M. & G. 439; 2 Jur. N. S. 1053; *ante*, p. 1150.

[8] Hanbury *v.* Hussey, 14 Beav. 152; Seton, 585; Cattley *v.* Arnold, 4 K. & J. 595; see 1 Story Eq. Jur. § 656. Where a mill, mill-dam, and mill-stream constitute one entire tenement, held by tenants in common, a petition for partition of the dam and water alone cannot be sustained. It is questionable whether a mill-dam and mill-stream are property of such a nature as to be capable of partition by metes and bounds. Miller *v.* Miller, 13 Pick. 237; see Brown *v.* Turner, 1 Aik. 350. In Massachusetts, when the premises, of which partition is demanded by the petition, consists of a mill or other tenement, which cannot be divided without damage to the owners, or when any specific part of the estate is of greater value than either party's share, and cannot be divided without damage to the owners, the whole estate, or the part thereof so incapable of division, may be set off to any one of the parties who will accept it, he paying to any one or more of the others, such sums of money as the commissioners may award, to make partition just and equal; or the commissioners may in such case assign the exclusive occupancy and enjoyment of the whole, or any part, as the case may be, to each of the parties, alternately, for certain specified times, in proportion to their respective interests therein. Genl. Sts. c. 136, § 26; see Co. Litt. 164 *b.*; Bishop of Salisbury *v.* Phillips, Carthew, 505; Morrill *v.* Morrill, 5 N. H. 134; Thayer *v.* Thayer, 7 Pick. 209; Lister *v.* Lister, 3 Y. & C. 540; Brookfield *v.* Williams, 1 Green Ch. 341; Larkin *v.* Mann, 2 Paige, 27. A partition of a mill-privilege was sustained where it was made, by assigning to each of the owners so much water as would run through a gate of certain dimensions, such division not being shown to be very injurious to the estate. Morrill *v.* Morrill, 5 N. H. 134; see Smith *v.* Smith, 1 Hoff. Ch. 506; *ante*, p. 1150, note.

In New Jersey, commissioners of partition, where directed to sell, have power to sell one part, with an easement in another part annexed to it, and to sell the servient parcel subject to such servitude. Rosenkrans *v.* Snover, 4 C. E. Green, 420.

[A sale, instead of a partition, was held proper, in the case of two tracts of land containing the big trees of Calaveras, in California. Bridges *v.* Sperry, 95 U. S. 401. Laws authorizing sale for division are not unconstitutional. Metcalf *v.* Hoopingardner, 45 Iowa, 510.]

[1] Lord Redesdale's opinion, in Curzon *v.* Lyster, Seton, 1st ed. 197.

[2] Canning *v.* Canning, 2 Drew. 434; 18 Jur. 640. The Court will not give any special direction as to the allotment, on the application of a stranger. Wright *v.* Vernon, 1 Dr. & S. 231.

ence to their respective situations in relation to the value of the property before the partition took place. Thus, where commissioners were directed to divide lands equally between A., B., and C., and they accordingly divided the lands into portions of equal value in the market, but assigned to A. an inn of which C. had been for many years the occupier, on which he had expended money in improvements, and adjoining to which he had purchased property for the purpose of his occupation, it was held by the L. C. B., Lord Abinger, that the adjudication of the commissioners was wrong, and a fresh commission was directed to new commissioners.[3]

The commissioners, having divided and allotted the estate, should prepare their certificate: which must detail their proceedings, and appoint the shares of each party, according to their allotments, to be enjoyed by them in severalty: distinguishing each part, if so directed by the commission, by metes and bounds. There is no prescribed form of a certificate: it is in the nature of * a report; and, as *1159 a rule, it should follow, as nearly as may be, the language of the commission; and the particulars, description, and quantities of the several parts of the estate may be described in a schedule.[1] The certificate should be signed and sealed by the commissioners; and each schedule and plan, annexed thereto, should be signed by them; but their signatures need not be attested.[2] The commissioners should also indorse on the commission their return thereto, and sign the same: adding the word "commissioners" after their names.[3] The commissioners are not limited as to time in returning the writ: they should, however, execute it without delay.[4]

If the commissioners cannot agree upon a division or allotment, they must make separate certificates:[5] though the consequence thereof will be, if the commissioners are equally divided, that both returns will be quashed.[6]

[3] Story *v.* Johnson, 1 Y. & C. Ex. 538, 546. [Improvements erected by one tenant in common should, if possible, be included in his share. Reeves *v.* Reeves, 11 Heisk. 669. But see Yancy *v.* Batte, 48 Tex. 46; Acklin *v.* Paschall, 48 Tex. 147. And land wasted by one tenant by cutting the timber should be assigned to him, or the purchaser of his interest at execution sale. Polhemus *v.* Emson, 3 Stew. Eq. 405.] Where a person takes possession of, and makes improvement upon, land, supposing himself exclusively entitled, but afterwards discovers title in another to a portion of the land, he will, upon partition, be entitled to have the improved portion set off to himself. St. Felix *v.* Rankin, 3 Edw. Ch. 323; see Brookfield *v.* Williams, 1 Green Ch. 341; Borah *v.* Archer, 7 Dana, 176; Louvalle *v.* Menard, 1 Gilman, 39.

Where the part on which improvements have been made by one of the tenants in common, cannot be set off to him with the improvements, he should have an allowance for them. Borah *v.* Archer, *supra;* Hitchcock *v.* Skinner, 1 Hoff. Ch. 21; Sneed *v.* Atherton, 6 Dana, 276. And the party receiving the improvements should pay for them. Respass *v.* Breckenridge, 2 A. K. Marsh. 581. But the improver who has been in possession should pay rent for the premises. McClanahan *v.* Henderson, 2 A. K. Marsh. 388; Respass *v.* Breckenridge, *supra;* Doughaday *v.* Crowell, 5 Stockt. (N. J.) 201.

[1] Braithwaite's Pr. 236, n. For a form of certificate, see Vol. III.

[2] Braithwaite's Pr. 238.

[3] *Ibid.* For form of indorsement, see Vol. III.

[4] Braithwaite's Pr. 238. For form of order *nisi* to compel return, see Seton, 583, No. 14.

[5] Lord Redesdale's opinion, in Curzon *v.* Lyster, Seton, 1st ed. 197.

[6] Watson *v.* Duke of Northumberland, 11 Ves. 153, 162.

The certificate having been signed and sealed by the commissioners, must, together with any plans therein referred to, and the depositions of the witnesses, be annexed to the commission:[7] which must then be closed up and sealed by the acting commissioners. It seems that if, by mistake, any document referred to by the commissioners in their certificate has been omitted to be annexed thereto, the Court will, upon motion, direct it to be added.[8] If there are two certificates, they must both be annexed to the commission.

The commission, and certificate, and other documents annexed, sealed up as above mentioned, are then transmitted by the commissioners to the Record and Writ Clerks' office, and there filed; and any party may obtain an office copy.[9]

The commission having been returned and filed, an order to confirm the certificate *nisi* may be obtained, on motion of course. This is generally done by the party suing it out; but if he neglects to do it, the other side may obtain the order.[10]

If any ground exists for objecting to the certificate, such as irregularity in its execution, or misconduct or partiality on the part of the commissioners, a special motion must be made on notice, and supported by affidavits, to quash or suppress the certificate.[11] For-
*1160 merly, exceptions could be taken to the certificate, but * now it is conceived that, where the certificate is objected to, but it is not desired to suppress it, a motion should be made to vary it.[1]

So, if there be a double return, and if one party alone applies to quash one of the certificates only, the Court will, if it sees proper, order that certificate to be quashed. This appears to have been done in *Randle* v. *Adams*,[2] where two certificates were made, and, upon the application of the plaintiff, one of those certificates was suppressed and the other established: the former being considered, though nominally a return, as no return in fact; and therefore to be suppressed, as if never annexed to the commission. It does not appear, from the statement of the above case in *Watson* v. *The Duke of Northumberland*, what the nature of the return suppressed was; but, in all probability, it was

[7] In the following order: 1. The commission; 2. The certificate; 3. The plans; and, 4. The depositions. Braithwaite's Pr. 238.

[8] See Manners *v.* Charlesworth, 1 M. & K. 330, 334; Coop. t. Brough. 52, 56.

[9] Braithwaite's Pr. 238.

[10] For form of order, see Seton, 583; and for form of motion paper, see Vol. III.

[11] Peers *v.* Needham, 19 Beav. 316; Watson *v.* Duke of Northumberland, 11 Ves. 155; Jones *v.* Totty, 1 Sim. 136; Manners *v.* Charlesworth, 1 M. & K. 330; Coop. t. Brough. 52; Hay *v.* Estell, 4 C. E. Green (N. J.), 133. The report of commissioners to make partition can be impeached only for fraud, partiality, or gross error of judgment. Jewett *v.* Scott, 19 Texas, 567; Geer *v.* Winds, 4 Desaus. 85. To justify setting aside a partition on the ground of mistake, the mistake must be a serious one, and clearly proved. Matter of Thompson, 2 Green Ch. 637; Bentley *v.* Long Dock Co., 1 McCarter, 480; see Cummins *v.* Nutt, Wright, 713. For form of order to quash, see Seton, 583, No. 17; and for form of notice of motion, see Vol. III.

[1] Bentley *v.* Long Dock Co., 1 McCarter, 480. Exceptions will not lie to the return of commissioners in a suit for partition. The correct practice in such case is by motion to suppress the return. Hay *v.* Estell, 4 C. E. Green, 133; Bentley *v.* Long Dock Co., 1 McCarter, 480. In this latter case it was held that in strictness exceptions in Chancery are limited to *Answers and to Reports of Masters.*

[2] Cited in Watson *v.* Duke of Northumberland, *ubi sup.*

a certificate by one of the commissioners only, in opposition to the certificate of his colleagues: in which case, the return being of one only would be a nullity, not fewer than two being authorized to act. If the return had been by two commissioners against the return of two others, both the returns would, for the reasons before stated, have been nullities, and must have been quashed, as was the case in *Watson* v. *The Duke of Northumberland*,[3] and in *Corbet* v. *Davenant*;[4] in which latter case, the Court of itself refused to proceed, and ordered the return to be quashed.

If the return to a commission is quashed, the Court will order a new commission to issue; and, in *Watson* v. *The Duke of Northumberland*,[5] where there were two returns, each by two commissioners, it ordered the new commission to be directed to five commissioners.

If the certificate of the commissioners is not objected to, the order for confirming it should be made absolute, on a motion of course, supported by an affidavit of service of the order *nisi*, and the Registrar's certificate of no cause shown.[6]

When the decree directs the partition to be made in Chambers, * or where, though a commission is directed to issue, the parties *1161 have liberty to carry in a scheme for the partition in Chambers before the commission is issued, and desire to avail themselves thereof,[1] a copy of the decree is left at Chambers, and a summons to proceed thereon is taken out and served on the opposite parties, in the usual way.[2] Upon the return of the summons, directions will be given as to the further prosecution of the matter. Evidence, consisting usually of valuations and affidavits by surveyors, must then be adduced to show the best mode of effecting the partition; and the scheme of the partition will be approved, without the expense of a commission.[3] When the proceedings are completed, the Chief Clerk certifies the result as in other cases.[4]

By a partition in Equity, the equitable right only is vested;[5] and, therefore, whether the partition is made at once by the decree, or is directed to be made in Chambers, or under a commission, the decree usually contains a direction that the parties shall execute mutual conveyances to each other of the allotted shares, according to their respect-

[3] 11 Ves. 155, 162, 163.

[4] 2 Bro. C. C. 251.

[5] 11 Ves. 163. In Canning *v.* Canning, 2 Drew. 434; 18 Jur. 640, the new commission was directed to three commissioners; see Seton, 583.

[6] For form of order, see Seton, 583; and for forms of affidavit and motion paper, see Vol. III.

[1] See Howard *v.* Barnwell, 1 N. R. 172, L. JJ.

[2] See *post*, Chap. XXIX., *Proceedings in Chambers*.

[3] 1st Rep Eng. & Irish Com. Ap. 68.

[4] See *post*, Chap. XXIX.; and see Howard *v.* Barnwell, *ubi sup.* For form of certificate, see Vol. III.

[5] Whaley *v.* Dawson, 2 Sch. & Lef. 372; Miller *v.* Warmington, 1 J. & W. 484, 493. Under the statutes of New York, a decree declaring that the "partition shall remain firm and effectual for ever," was held sufficient to vest the title to the allotted parcels in the persons to whom they are severally assigned, without the execution of any releases or conveyances. Younge *v.* Cooper, 3 John. Ch. 295.

ive interests therein.[6] The conveyances should always be directed to be settled by the Judge where infants or married women are interested; but if all the parties are *sui juris*, the conveyances are only directed to be settled by the Judge in case the parties differ about the same.[7] When the conveyance has to be settled by the Judge, the procedure at Chambers is the same as in ordinary cases of settling deeds at Chambers.[8]

Where any decree has been made by the Court for a partition of any lands, the Court may declare that any of the parties to the suit wherein the decree is made are trustees of such lands, or any part thereof, within the meaning of the Trustee Act, 1850; or that the interests of unborn persons who might claim under any party to the suit, or by other ways mentioned in the Act, are the interests of persons who, upon coming into existence, would be trustees within the meaning of the Act; and thereupon the Lord Chancellor, intrusted by the Sign Manual with the care of the persons and estates of lunatics,[9] may, as to any *1162 lunatic or person * of unsound mind, or the Court of Chancery may in other cases, make such orders as to the estates, rights, and interests of such persons, born or unborn, as he or the Court might, under the provisions of the Act, make concerning the estates, rights, and interests of trustees born or unborn.[1] Orders have been made, under these provisions, with respect to the interests of infants, and lunatics, in lands directed to be partitioned;[2] and where the shares of the parties were very minute and complicated, the Court, to save expense, instead of directing a conveyance of the several shares, declared each of the parties to be trustees as to the shares allotted to the others of them, and then vested the whole trust estate in a single new trustee,[3] with directions to convey to the several parties their allotted shares.[4]

One party cannot refuse to execute the conveyance to another on the ground that the remaining party has not executed the conveyance to him.[5]

A decree for a partition generally contains a direction, that, after the partition has been had, such of the title deeds in the possession of the parties as relate solely to any distinct part of the premises which shall be allotted to either of the parties alone, shall be delivered to or retained

[6] It is competent for the Court to direct the manner of the partition, and to decree the making of conveyances, without the necessity of a report and decree of confirmation. Grassmeyer *v.* Beeson, 18 Texas, 753.

[7] See forms of orders, Seton, 571, 572.

[8] *Post*, Chap. XXIX., *Proceedings in Chambers*. For forms of conveyance, see 2 Prideaux's Conv. 443–450; 5 Davidson's Conv. 520.

[9] 13 & 14 Vic. c. 60, § 4. This includes the Lords Justices; see 15 & 16 Vic. c. 87, § 15.

[1] 13 & 14 Vic. c. 30, § 30; and see *post*, Chap. XLV., *Statutory Jurisdiction* (*Trustee Acts*).

[2] Bowra *v.* Wright, 4 De G. & S. 265; 15 Jur. 981; *Re* Bloomar, 2 De G. & J. 88; S. C. *nom.* Singleton *v.* Hopkins, 4 Jur. N. S. 546; *Re* Molineux, 10 W. R. 512, L. JJ.; and *post*, Chap. XLV., *Statutory Jurisdiction* (*Trustee Acts*); Seton, 577. If the share of infants is legally vested in a trustee for them, he can convey without them. Cole *v.* Sewell, 17 Sim. 40.

[3] Under 13 & 14 Vic. c. 60, § 32.

[4] Shepherd *v.* Churchill, 25 Beav. 21.

[5] Orger *v.* Sparke, 9 W. R. 180, V. C. W.; as to the mode of enforcing the execution of the conveyance, see *ante*, p. 1061, and *post*, Chap. XXIX., *Proceedings in Chambers*.

by him, and that the rest shall be deposited in Court for the mutual benefit of the parties, subject to further order; or shall be retained by the party having the custody thereof, he undertaking to abide by any order which the Court may make as to the same, with liberty for any party to apply to the Court for directions concerning the same.[6] In general, the party entitled to the estate of greatest value is entitled to the custody of the deeds; and he may be required to enter into a covenant to produce them, and allow copies of them to be taken.[7] When the parties are equally interested, the plaintiff will have the custody of the deeds.[8]

With respect to the costs of a partition, the general rule of the Court is now understood to be that which was pronounced by the Court, in giving judgment in the case of *Agar* v. *Fairfax:*[9] that as the party came into Equity, instead of going to Law, for his *own *1163 convenience, the rule of law should be adopted, and therefore, no costs should be given until the commission; and that the costs of issuing, executing, and confirming the partition, should be borne by the parties, in proportion to the value of their respective interests; but not the costs of any subsequent proceedings.[1] The costs of an infant,[2] or of a married woman,[3] or lunatic,[4] will be declared to be a charge upon his or her share, including costs before decree;[5] and the order as to a lunatic's costs may be made by a Vice-Chancellor.[6]

Where one of the parties had made a lease of his undivided share, the costs of the lessee, who was a necessary party to the suit for the partition, were thrown exclusively upon the lessor, on the ground that, as such lessee was entitled to his costs, his landlord, who had been the means of bringing him into Court, was the proper person to indemnify him.[7]

[6] Jones *v.* Robinson, 3 De G., M. & G. 910, 912; Seton, 584.

[7] Seton, 577; see the general form of an order as to the title deeds, settled by Lord Hardwicke, Hand. 152; 3 De G., M. & G. 910, n.; and see Jones *v.* Robinson, *ubi sup.*; Elton *v.* Elton, 27 Beav. 632; 6 Jur. N. S. 136; and forms of decrees in Seton, 581, 592.

[8] Elton *v.* Elton, *ubi sup.*

[9] 17 Ves. 533, 558.

[1] See Beames on Costs, 31; see also Calmady *v.* Calmady, 2 Ves. J. 568; Baring *v.* Nash, 1 V. & B. 554; Morris *v.* Timmins, 1 Beav. 411, 418; M'Bride *v.* Malcomson, 2 Dr. & Wall. 700; Seton, 581, 582; Morgan & Davey, 172; see Phelps *v.* Green, 3 John. Ch. 305; Tibbits *v.* Tibbits, 7 Paige, 204; Matter of Hemiup, 3 Paige, 305; Coles *v.* Coles, 2 Beasley, 365. As to the different items of cost, see Coles *v.* Coles, *supra.*

[2] Shepherd *v.* Churchill, 25 Beav. 21; Cox *v.* Cox, 3 K. & J. 554. In recent cases, where it appeared to be for the benefit of the infant, the Court has directed the costs to be raised by a sale of the estate, without a partition. Hubbard *v.* Hubbard, 2 H. & M. 38; Donaldson *v.* Fairfax, *ib.* 40, n. (*a*); [Rickards *v.* Rickards, 15 W. R. 380; Wilkinson *v.* Castle, 16 W. R. 501:] and see Thackeray *v.* Parker, 1 N. R. 567, V. C. W.; Davis *v.* Turvey, 9 Jur. N. S. 954; 11 W. R. 679, M. R.; 32 Beav. 554; Griffies *v.* Griffies, 11 W. R. 943, V. C. K. Where the costs previous to decree have been thus raised, the costs subsequent to the decree will be ordered to come out of the aggregate amount of the purchase-money. Coventry *v.* Coventry, 34 Beav. 572.

[3] Fleming *v.* Armstrong, 5 N. R. 181, M. R.; 34 Beav. 109. In this case, the costs were directed to be raised by a sale of the estate, although there was the usual clause against anticipation.

[4] Singleton *v.* Hopkins, 1 Jur. N. S. 1199; 4 W. R. 107, V. C. S.

[5] Shepherd *v.* Churchill, and Cox *v.* Cox, *ubi sup.*

[6] Singleton *v.* Hopkins, *ubi sup.*

[7] Cornish *v.* Gest, 2 Cox, 27; Beames on Costs, 32; but see Herbert *v.* Hedges, 10 Ir. Eq. 479, cited Morgan & Davey, 174; Williams *v.* Williams, 10 W. R. 609, V. C. K.

It has been decided, that commissioners of partition have no lien on the commission for their charges.[8]

Section II. — *Proceedings under Decrees to settle Boundaries.*

In a suit to ascertain boundaries, the decree generally directs a commission to issue for that purpose.[9] It may, however, direct
*1164 * the question to be tried before the Court itself with or without a jury, or before a Court of Common Law.[1]

A commission to settle boundaries partakes very much of the same nature as a commission of partition: it is nearly in the same form, and is sued out, executed, and returned, and the certificate of the commissioners is objected to, confirmed, or quashed, in the same manner.[2] There is, however, frequently this difference between commissions to ascertain boundaries and commissions of partition, namely, that, in the case of a partition, the thing to be divided is clearly ascertained and described; whereas, in the case of a commission of boundaries, it is often impossible for the commissioners to ascertain them with sufficient certainty to set them out. Where, however, it is through the default of a tenant or copyholder that boundaries are confused, the Court provides for the case of its being impossible to ascertain them, by directing so much of the defendant's own land to be set out, as shall be equal to the quantity originally granted or leased.[3] In such case, the commissioners must proceed accordingly.

It is to be observed that, in a bill by a prebendary against several of his lessees for a commission to ascertain the boundaries of his prebendal lands, which had become intermixed with their own lands, Lord Eldon held that the plaintiff had a right to name as many commissioners as the defendants.[4]

[8] Young *v.* Sutton, 2 V. & B. 365.

[9] Godfrey *v.* Littell, 1 R. & M. 59, 63; Taml. 221; 2 R. & M. 630, 636. As to the jurisdiction, see Speer *v.* Crawter, 2 Mer. 410, 417; Attorney-General *v.* Stephens, 1 K. & J. 724; 1 Jur. N. S. 1039; 6 De G., M. & G. 111; 2 Jur. N. S. 51; Godfrey *v.* Littel, *ubi sup.*; Tulloch *v.* Hartley, 1 Y. & C. C. C. 114; Hicks *v.* Hastings, 3 K. & J. 701; Seton, 590, 591; 2 L. C. Eq. 367 *et seq.*; Story Eq. Jur. § 610 *et seq.*; Strode *v.* Blackburne, 3 Ves. (Sumner's ed.) 227, note. Equity has no jurisdiction, in Virginia, to settle the title or bounds of land between adverse claimants, unless the plaintiff has an equity against the defendant claiming adversely to him; an equity against other persons will not give jurisdiction. Stuart *v.* Coulter, 4 Rand. 74. As to confusion of boundaries, see 1 Story Eq. Jur. 609 *et seq.*, Ch. 9.

In Connecticut, a Court of Equity will not interfere for the mere purpose of settling a disputed boundary between adjoining proprietors. Wolcote *v.* Robbins, 26 Conn. 236. So, in New Jersey, the Court will not entertain a question of boundary between adjoining land-owners. Dickerson *v.* Stoll, 4 Halst. Ch. (N. J.) 294. [So, in Tennessee. Topp *v.* Williams, 7 Humph. 569; Johnson *v.* Britt, 9 Heisk. 756. So, in West Virginia. Hill *v.* Proctor, 10 W. Va. 59.] All parties interested must be parties. Rayley *v.* Best, 1 R. & M. 659. For forms of decrees, see Seton, 588–590, 591.

[1] Godfrey *v.* Littell, *ubi sup.*; 25 & 26 Vic. c. 42, §§ 1, 2; *ante*, p. 1071.

[2] See Braithwaite's Pr. 239; and cases cited below.

[3] Speer *v.* Crawter, 2 Mer. 410, 418; Willis *v.* Parkinson, 2 Mer. 507, 510; Attorney-General *v.* Fullerton, 2 V. & B. 263, 264; Lord Abergavenny *v.* Thomas, 1 West, 649; Duke of Leeds *v.* Earl of Strafford, 4 Ves. 180, 186; Attorney-General *v.* Penruddocke, Seton, 589; [Spike *v.* Harding, 7 Ch. Div. 871].

[4] Willis *v.* Parkinson, 1 Swanst. 9.

The decree, in a suit to settle boundaries, does not order mutual conveyances, as in the case of a partition; but directs that, after the lands have been set out, the defendant is to deliver possession thereof to the plaintiff, and that the plaintiff and his heirs are to hold and enjoy the same against the defendant, or any person or persons claiming under him.[5]

The further consideration of the suit is generally reserved until after the return of the commission, or trial of the question.[6] When, therefore, the commissioners' certificate has been confirmed absolute, the cause must be set down for hearing on further consideration, in the usual manner.[7]

* No certain rule appears to be laid down with reference to the *1165 costs of suits to settle boundaries. Where, however, it does not appear to have been owing to any default, either in the plaintiff or defendant, that the lands have been mixed or confounded, the Court will direct the costs to be borne by the plaintiff and defendant equally: though the interest of one party is more inconsiderable than the interest of the other.[1] The decision of the Court with respect to costs will also be influenced by the relation of the parties; and it is to be recollected, that it has been long settled, that a tenant is bound (among other obligations resulting from that relation) to keep distinct from his own property during the tenancy, and to leave clearly distinct at the end of it, his landlord's property not in any way confounded with his own.[2] If, therefore, it should appear that a tenant has either voluntarily or negligently permitted the boundaries of his own land to get confused with that of his landlord, the Court will, in all probability, compel him to pay the costs of his misconduct or negligence.[3]

Section III. — *Proceedings under Decrees to assign Dower.*

Formerly, the Court would not assist a widow in the assignment of her dower,[4] out of her husband's estate, if there was any doubt as to

[5] Lord Abergavenny *v.* Thomas, Seton, 591. No. 1.

[6] See Godfrey *v.* Littell, Taml. 234; Seton, 588.

[7] See *post*, Chap. XXX., *Further Consideration*. As to bringing the cause to a hearing, after the trial of a question of fact, see *ante*, p. 1146.

[1] Norris *v.* Le Neve, 3 Atk. 82.

[2] Attorney-General *v.* Fullerton, *ubi sup.*

[3] And see further as to costs, Metcalfe *v.* Beckwith, 2 P. Wms. 376; Habergham *v.* Stansfeld, Seton, 591, No. 4, where the costs were directed to be paid ratably. Beames on Costs, 35; Morgan & Davey, 174.

[4] As to dower, and the jurisdiction of the Court in respect thereto, see Sugd. 244 *et seq.*; Seton, 673 *et seq.*; Tudor, L. C. Conv. 55 *et seq.*; Story Eq. Jur. § 624 *et seq.*; Smith's Comp. 188 *et seq.*; 2 L. C. Eq. 402, 403. The result of the various decisions upon this subject is, that Courts of Equity will now entertain a general concurrent jurisdiction with Courts of Law in the assignment of dower in all cases. 1 Story Eq. Jur. § 624, c. 12; see also for a full statement of the law on this subject, *ib.* §§ 625, 632; Herbert *v.* Wren, 7 Cranch, 376; Powell *v.* Monson Manuf. Co., 3 Mason, 347, 459; Swaine *v.* Perine, 5 John. Ch. 482; Greene *v.* Greene, 1 Ham. 535; Grayson *v.* Moncure, 1 Leigh, 449; Kendall *v.* Hovey, 5 Monroe, 284; Stevens *v.* Smith, 4 J. J. Marsh. 64; 4 Kent, 71; London *v.* London, 1 Humph. 1, 12. The claim of dower is considered, in New Jersey, as emphatically, if not exclusively, within the cognizance of the Common Law Courts. Harrison *v.* Eldridge, 2 Halst. 401, 402; Hartshorne *v.* Hartshorne, 1 Green Ch. 349; Wells *v.* Beall, 2 Gill & J. 468; Smith *v.* Eustis, 7 Greenl. 41; Blunt *v.* Gee, 5 Call, 481; Mayburry *v.* Brien, 15 Peters, 21.

her legal right. Where the title to dower was disputed, it referred her claim to the decision of a Court of Law:[5] either by directing an issue, or by ordering the bill to be retained for a certain time, with liberty to the plaintiff to bring a writ of dower, as she might be advised.[6] Now, however, it is presumed that the Court will itself determine the legal right.[7]

*1166 * When the right to dower has been established or admitted, an inquiry will be directed what lands the husband died seised of wherein his widow is entitled to dower; and the dower will then be directed to be assigned.[1]

This may be done, either in Chambers,[2] or by directing a commission to issue.[3] A commission to assign dower is nearly in the same form, and is made out, executed, and returned, in the same manner, as a commission of partition.[4]

It is to be observed that, as in the case of settlement of boundaries, it generally forms part of the decree, that when the dower has been assigned, possession shall be delivered to the plaintiff.[5]

The widow is also entitled to an account of the arrears of her dower,[6] and this, notwithstanding the death of the heir pending the suit: although at Law her right to damages would have been lost by that event.[7] The widow's right to the rents and profits, accrued from the death of her husband, is not limited to the time of filing the bill.[8] It was held, that the Statute of Limitations, 21 Jac. I. c. 16, did not affect proceedings to recover arrears of dower;[9] but the statute, 3 & 4 Will. IV. c. 27, § 41, expressly applies to them.[10]

It may be mentioned here, that interest will not be allowed on arrears of dower.[11]

[5] Ld. Red. 121, 122.

[6] Mundy *v.* Mundy, 2 Ves. J. 122, 128. Read *v.* Read, Ld. Red. 122, n. (*b*); Curtis *v.* Curtis, *ibid.*; 2 Bro. C. C. 620; D'Arcy *v.* Blake, 2 Sch. & Lef. 387, 390; Badgley *v.* Bruce, 4 Paige, 98; Sandford *v.* M'Lean, 3 John. Ch. 117; Drickle *v.* Timrod, 1 Desaus. 109; Wilkin *v.* Wilkin, 1 John. Ch. 111; Phelps *v.* Green, 3 John. Ch. 302; see also Johnson *v.* Johnson, 1 Munf. 554, note; Davison *v.* White, 2 Munf. 527; Ball *v.* Ball, 3 Munf. 279. Since 23 & 24 Vic. c. 126, §§ 26, 27, the proceedings at Law are commenced by writ of summons.

[7] 25 & 26 Vic. c. 42; *ante*, p. 1071.

[1] See form of decree in Meggot *v.* Meggot, Seton, 671, 672.

[2] See forms of decree, Seton, 673; Goodenough *v.* Goodenough, 2 Dick. 795. As to the proceedings at Chambers, see *post*, Chap. XXIX.

[3] Seton, 673, 674, 676; Wild *v.* Wells, 1 Dick. 3; Huddlestone *v.* Huddlestone, 1 Cha. Rep. 38; Lucas *v.* Calcraft, 1 Bro. C. C. 134; 2 Dick. 594; Mundy *v.* Mundy, 2 Ves. J. 125; 4 Bro. C. C. 294. For form, see Vol. III.

[4] *Ante*, pp. 1151–1153.

[5] Meggot *v.* Meggot, Seton, 671, No. 1; Goodenough *v.* Goodenough, *ubi sup.*

[6] See Hazen *v.* Thurber, 4 John. Ch. 604; Newbold *v.* Ridgeway, 1 Harring. 55; Chase's Case, 1 Bland, 206; Keith *v.* Trapier, 1 Bailey Ch. 63; Swaine *v.* Perine, 5 John. Ch. 487, 488; Davis *v.* Logan, 9 Dana, 187. As to her right to rents and profits, against the alienee of her husband, see Sillman *v.* Bowen, 8 Gill & J. 50; Rickard *v.* Talbird, Rice Eq. 159; Gordon *v.* Stevens, 2 Hill Ch. 429; Marshall *v.* Anderson, 1 B. Mon. 199; Kendall *v.* Hovey, 5 Monroe, 284; Russell *v.* Austin, 1 Paige, 192; Whitehead *v.* Bellamy, 2 Hayw. 240; Wood *v.* Lee, 5 Monroe, 57; Golden *v.* Maupin, 2 J. J. Marsh. 240; Johnson *v.* Thomas, 2 Paige, 377; Steiger *v.* Hillen, 5 Gill & J. 121; Tod *v.* Baylor, 4 Leigh, 498.

[7] Curtis *v.* Curtis, 2 Bro. C. C. 620; *contra*, Ld. Red. 122.

[8] Curtis *v.* Curtis, *ubi sup.*; Mundy *v.* Mundy, 2 Ves. J. 122, 128; Oliver *v.* Richardson, 9 Ves. 222. [See Price *v.* Hobbs, 47 Md. 359; Farnsworth *v.* Cole, 42 Wis. 403; Paul *v.* York, 1 Tenn. Ch. 550.]

[9] Oliver *v.* Richardson, *ubi sup.*

[10] *Ante*, pp. 652, 653; Shelford, R. P. Acts, 262.

[11] Lindsay *v.* Gibbon, cited 3 Bro. C. C. 495; Wakefield *v.* Childs, 1 Fonb. 23.

The original decree usually directs an account of rents and profits: whether the assignment of dower is to be made in Chambers,[12] or by commission.[13]

Lord Redesdale observes, that "in the two cases of partition and assignment of dower, as no costs can be given in a Court of *Common Law upon a writ of partition or a writ of dower, no *1167 costs have commonly been given in a Court of Equity upon bills brought for the same purposes."[1] As respects dower, this appears to be the present rule of the Court, in cases where the widow comes into Court for the single purpose of having dower assigned her: the rule, however, is subject to exceptions where previous questions are raised, in litigating which the party is vexatious;[2] therefore where the widow had, without any just pretence, been kept out of her dower, Sir William Grant M. R. awarded her the costs.[3] In *Meggot* v. *Meggot*,[4] also, the Court appears to have awarded the widow her costs, up to the time of the decree: reserving the consideration of the subsequent costs until after the report.[5]

[12] As to the proceedings at Chambers, see *post*, Chap. XXIX.

[13] See forms, Seton, 672, 676.

[1] Ld. Red. 122.

[2] Lucas *v.* Calcraft, 1 Bro. C. C. 134; see also Sir Samuel Romilly's note of S. C. *ib.* ed. Belt. (*n*); Bamford *v.* Bamford, 5 Hare, 203, 205; Stormont *v.* Wickens, 14 W. R. 192, V. C. W.

[3] Worgan *v.* Ryder, 1 V. & B. 20; Beames on Costs, 22 n. (*f*); and see Fry *v.* Noble, 7 De G., M. & G. 687; 2 Jur. N. S. 128; 20 Beav. 598; 1 Jur. N. S. 767; Harris *v.* Harris, 11 W. R. 62, M. R.

[4] Seton, 671, 672.

[5] But see Outhwaite *v.* Outhwaite, referred to in Beames, on Costs, 22 n. (*f*). As to costs in a dower suit, see Morgan & Davey, 151.

*1168 * CHAPTER XXIX.

PROCEEDINGS UNDER DECREES AND ORDERS.

SECTION I. — *Proceedings in the Master's Office.*[1]

Generally.

ACCORDING to the ancient practice of the Court, all references to a Master used to be made to one of the two Masters sitting in Court, as assistants to the Lord Chancellor or Master of the Rolls, when the reference was made;[2] but the modern practice, where there had been no previous reference, was to refer it "to the Master in rotation," and, where there had been a previous reference, "to the Master to whom this cause stands referred."[3]

It may be mentioned, in this place, that after a cause has been referred to a Master, it cannot be withdrawn from that Master without an order of the Court, and that such an order will not be made unless on very special occasions, such as the incapacity of the Master, from illness, to attend to the business, which, to justify such a removal, must be shown to be of a very urgent nature. In one case, it appears, that Lord Eldon directed a cause to be removed on the allegation of counsel, that he found the Master in such a state, from his advanced age
*1169 and infirmity, that it was not * proper to go into the business before him.[1] Sometimes where the Master has died and a succes-

[1] The office of Master in Chancery has been abolished in England, but this section, in reference to the proceedings in the Master's office, has been retained in this edition because the office still exists in many of the United States. The Master's office is a branch of the Court; the Master is an officer of the Court; Simmons *v.* Jacobs, 52 Maine, 153; and, it seems, he has power to control the proceedings of parties before him. Stewart *v.* Turner, 3 Edw. Ch. 458. [But a matter put in issue by the pleadings must be determined by the Court, and cannot be referred to the Master. Morris *v.* Taylor, 8 C. E. Green, 134; Cobb *v.* Jamison, 1 Tenn. Ch. 604.] In reference to a Master's fees and allowance for his services, see Woodruff *v.* Straw, 4 Paige, 407.

[2] Prac. Reg. 363; where a reference is made for the examination of Court Rolls, touching any custom, it should not be to any one Master, but to two at the least. *Ibid.*

[3] The Circuit Courts of the United States may appoint standing Masters in Chancery in their respective districts, both the Judges concurring in the appointment; and they may also appoint a Master *pro hac vice* in any particular case. United States Equity Rule, 82; see State *v.* McIntyre, 53 Maine, 214. It is improper for a Master to perform any official act, as Master, in a cause in which he is solicitor, or partner of the solicitor. Brown *v.* Byrne, Walk. Ch. 453.

When a notice was to appear before A., a Master, and the return was by B., a Master, that the defendant did not appear, it was held to be irregular. Whipple *v.* Brown, Harring. Ch. 436. Where one Master has begun proceedings under an order of reference, they should be completed by him, and the party obtaining the order cannot transfer the proceedings to another Master to be completed. Bishop *v.* Williams, Walk. Ch. 423.

[1] Anon., 9 Ves. 341.

sor has not been appointed, the Court will make an order that the cause, if the matter of the reference requires immediate attention, should be transferred to another Master.[2]

Conduct of the Cause.

As a general rule, the prosecution of a decree devolves upon the plaintiff; he being considered to be, in most cases, the person principally interested in forwarding it. A reference upon an interlocutory order is, for the same reason, usually prosecuted by the party obtaining it, whether plaintiff or defendant.[3]

In the case of concurrent suits, the conduct of the proceedings is usually intrusted to the plaintiff in the first suit in point of time;[4] it will, however, if any sufficient reason appear, be intrusted to any other party. If the Court does not consider the plaintiff or party obtaining the order entitled to the conduct of the proceedings, it will be given, as a general rule, to the defendants or respondents having the greatest interest.[5]

If the party having the conduct of the proceedings is guilty of delay or other misconduct, the Court will commit the conduct of the proceedings to some other of the parties. Thus, where in a creditor's suit, the plaintiff is guilty of delay, the Court will, on the application of any other creditor, make an order giving him the conduct of the cause;[6] and so, if the plaintiff in a legatee's suit neglects to prosecute the proceedings, the conduct of the cause may be intrusted to another legatee.[7]

* In a creditor's suit, an order was made transferring the con- *1170 duct of the proceedings to another creditor, on the ground of

[2] In one case it appears that upon the death of a Master, a general order was made, that all matters referred to him should be transferred to another. Prac. Reg. 165.

[3] Quackenbush *v.* Leonard, 10 Paige, 131; Biddulph *v.* Fitzgerald, Sausse & S. 434; Holley *v.* Glober, 9 Paige, 9. As a general rule, the party obtaining a reference is entitled to the prosecution thereof in the first instance; and where reference is directed at a hearing in which both parties have an interest, it is to be prosecuted by the solicitor of the plaintiff; and in either case, the adverse party has no right to carry the decree to the Master's office until the prosecution of the reference has been committed to him, either upon default of the party originally entitled to the prosecution, or by a provision in the decree directing the reference. Quackenbush *v.* Leonard, *supra;* [Hubbell *v.* Warren, 8 Allen, 177]. In the Circuit Courts of the United States, whenever any reference of any matter is made to a Master to examine and report thereon, the party at whose instance or for whose benefit the reference is made, shall cause the same to be presented to the Master for a hearing on or before the next rule day succeeding the time when the reference was made; if he omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the Master, at the costs of the party procuring the reference. Equity Rule, 74.

Where it is necessary to institute a suit against a person who has had dealings with the person whose estate is being administered, the conduct of it will be given to the personal representative, unless a case of misconduct is made out. Harrison *v.* Richards, L. R. 1 Ch. Ap. 473; 12 Jur. N. S. 871, L. JJ. [The Court will enforce the right to conduct the cause against the other party by injunction Dean *v.* Wilson, 10 Ch. Div. 136.]

[4] Belcher *v.* Belcher, 13 W. R. 913, V C. K.

[5] *Re* Hutchinson, 1 Dr. & Sm. 27, 30; 6 Jur. N. S. 136.

[6] Powell *v.* Wallworth, 2 Mad. 183; see also Sims *v.* Ridge, 3 Mer. 458, 463; Jeudwine *v.* Agate, 5 Russ. 283; Edmunds *v.* Acland, 5 Mad. 31; Fleming *v.* Prior, 5 Mad. 423; Wyatt *v.* Sadler, 5 Sim. 450; Price *v.* North, 2 Y. & C. Exch. 628; Lord Alvanley *v.* Kinnaird, 8 Jur. 114, L. C. For form of order, see Seton, 138, No. 7.

[7] Williams *v.* Chard, 5 De G. & S. 9, 12.

delay; notwithstanding the cause had abated by the death of a defendant.[1]

The party to whom the conduct of the suit is transferred stands in the place of the party who originally carried on the proceedings; and is entitled to inspect and take copies of all the papers in the suit, which may be in possession of the latter or his solicitor.[2]

Of Warrants.

Before we proceed to examine the course of proceedings before a Master in specific cases, it is proper to direct the attention of the reader to certain points relating to the Master's office, which are common to all references. The first of these points which suggests itself, is the method of bringing the parties who are interested in the subject-matter before the Court.

This is done by means of "a warrant," which is a mere memorandum, upon a slip of paper, entitled in the cause, and signed by the Master, appointing a day and hour for all parties concerned to attend him on the matter of the reference;[3] it is generally in this form: —

By virtue of an order of reference, I do appoint to consider the matters thereby to me referred, on next, at of the clock, in the noon, at my Chambers in Southampton Buildings, Chancery Lane, at which time and place all parties concerned are to attend.

S. C. Cox.[4]

Dated the day of 1830.

*1171 *On the attendance by all parties, before the Master, at the

[1] Cook *v.* Bolton, 5 Russ. 282; Brown *v.* Lake, 6 Coll. 620; Johnson *v.* Hammersley, 24 Beav. 498.

[2] Bennett *v.* Baxter, 10 Sim. 417; 4 Jur. 50.

[3] By the United States Equity Rule, 75, upon every reference of a matter to a Master, to examine and report upon, it shall be his duty, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the Master shall be at liberty to proceed *ex parte*, or in his discretion to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the Master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the Court or a Judge thereof, for an order to the Master to speed the proceedings, and to make his report, and to certify to the Court or Judge the reasons for any delay. See Chancery Rules of New Jersey, 2 McCarter (N. J.), 515, 531. In State *v.* McIntyre, 53 Maine, 214, it was decided that, if, after reasonable notice, the Master proceeds in the absence of the defendant, his report cannot be successfully objected to as being *ex parte*. See Moore *v.* Titman, 33 Ill. 358; Whiteside *v.* Pulliam, 25 Ill. 285. The time to prepare for a hearing, after notice given to the parties by a Master in Chancery, unless fixed by some rule or order, is left in the discretion of the Master; but it should be a reasonable notice. Bernie *v.* Vandever, 16 Ark. 616. Notice to appear on the day the case was referred, in a few hours, between 8 and 12 P.M., was held to be so unseasonable that the report should be set aside. Bernie *v.* Vandever, *supra*. In New Jersey the time for notice is fixed by rule at four days at least exclusive before the day assigned for the hearing. Rule 43. [See Mass. Eq. Rule xxxi., and Tenn. Rule of Ch. Practice, Rule 4.]

[4] Bennett's Practice, Appx. 1.

time specified in the warrant, he proceeds to consider the matter referred to him.[1]

Formerly a Master could not proceed with a reference *de die in diem*, without a special order from the Court giving him liberty to do so ;[2] but now, by the 58th Order of 1828, "every Master is at liberty to proceed in all matters *de die in diem* at his discretion."

In such cases, the Master must, on each day, fix the time for the next attendance of the parties.

It is to be observed that the Order above referred to leaves it to the Master's discretion to decide whether he will proceed *de die in diem* or not.

Under the old practice, the attendance of a party upon a warrant was not required of him until the second, and in most cases, not before a third, warrant had been served upon him,[3] but now every warrant for attendance before the Master is to be considered peremptory,[4] and the Master may, upon the non-attendance of the party, proceed in his absence *ex parte*.[5] For this purpose, he must administer an oath to the person who served the warrant, of the same having been duly served, and then proceed on the business of the warrant.[6]

The proceeding *ex parte* is not confined to cases where there is only one party who ought to attend, but makes default; for, by the 53d Order of 1828, it is directed, "That, where some or one but not all the parties do attend the Master at an appointed time, whether the same be fixed by the Master personally, or upon a warrant, then the Master shall be at liberty to proceed *ex parte*, if he thinks it expedient, considering the nature of the case, to do so."

It is also provided, by the 54th Order, "That, where the Master has proceeded *ex parte*, such proceeding shall not in any manner be reviewed, unless the Master, upon a special application made to him for that purpose by the party who was absent, shall be satisfied that he was not guilty of any wilful delay or negligence, and then only upon payment of all costs occasioned by his * non-attendance, such costs *1172 to be certified by the Master at the time, and paid by the party or his solicitor, before he shall be permitted to proceed on the warrant to review."

By Lord Coventry's Orders it is provided that, "If the case be such

[1] By United States Equity Rule, 77, the Master must regulate all the proceedings in every hearing before him, upon every reference of a matter to examine and report thereon. The decretal order is the rule for the guidance of the Master. Simmons *v.* Jacobs, 52 Maine, 147; Remsen *v.* Remsen, 2 John. Ch. 495; Kay *v.* Fowler, 7 Monroe, 593. [*Infra*, 1296, n. 4.]

[2] Purcell *v.* M'Namara, 11 Ves. 362.

[3] 1 Newl. 324.

[4] 59th Order, 1828.

[5] See United States Equity Rule, 75; New Jersey Chancery Rule, 43 ; Dick. Prec. (N. J.), 11. If a Master in Chancery report that he "gave reasonable notice to each and all of the said defendants," of the time and place appointed by him for the hearing of the parties, it is sufficient in the absence of any evidence to the contrary; and if, after such notice, the Master proceeds in the absence of the defendant, his report cannot be objected to as being *ex parte*. State *v.* McIntyre, 53 Maine, 214; see Manhattan Co. *v.* Evertson, 20 Maine, 291; Simmons *v.* Jacobs, 52 Maine, 147, 157, 158.

[6] 1 Newl. 324.

that the Master cannot proceed in the absence of either party or his counsel without just cause absenting, the Master is presently to certify this Court of the default, that the defaulter may be punished by commitment, costs, or otherwise, as the Court shall direct;"[1] and now, by the 55th Order of 1828, it is further provided, "That where a proceeding fails, by reason of the non-attendance of any party or parties, and the Master does not think it expedient to proceed *ex parte*, then the Master is at liberty to certify what amount of costs, if any, he thinks it reasonable to be paid to the party or parties attending, by the absent party or parties, or by his or their solicitor or solicitors personally, as the Master in his discretion shall think fit: and, upon motion, or petition without notice, the Court will make an order for the payment of such costs accordingly."

Parties Entitled to Attend.

The general rule of the Court appears to be, that all parties beneficially interested, either in the estate or in the fund in question, are entitled to attend before the Master on all those proceedings which may affect their interests, or increase or diminish their proportion in the fund: thus all parties entitled to a distributive share of a residue are entitled to attend on those proceedings which tend to increase or diminish the residuary fund.[2] The only exception to this rule appears to be the case of a reference to the Master of the title to an estate purchased under a decree, in which case, in addition to the purchaser's solicitor, the Master will only allow the vendor's solicitor to attend before him on the inquiry.[3]

The rule is also subject to some limitations, where a fund distributable under a will is sufficient; thus, general legatees only are allowed to attend on those proceedings which strictly affect or relate to their legacies, and not on the general proceedings; but if the fund is not sufficient to pay the legatees in full, they are entitled to attend all proceedings which relate to or may affect the fund out of which they are to be paid.[4] Parties entitled only to the personal estate are not entitled to attend those proceedings which affect the real estate alone; and in like manner those interested solely in the real estate are not allowed to attend the proceedings relating exclusively to the personal estate, supposing
*1173 * always that these proceedings have no collateral bearing on each other; for if either fund may be affected by the deficiency of the other; each party may be indirectly interested in both, and is then entitled to attend.

An executor or administrator, as the legal representative of his testator or intestate, is entitled, as representing the creditors, to attend on all proceedings relating to the claims of creditors seeking payment

1 Beames's Ord. 79.
2 2 Smith, 3d ed. 111.
3 *Ib.* 112.
4 *Ibid.*; see also Chillingworth *v.* Chillingworth, cited *ib.* p. 216.

out of the personal estate; but, after there has been a report of the debts, if all the parties interested in the personal estate are before the Court, he is only entitled to attend on those proceedings in which he is personally interested as an accounting party.[1]

Trustees are not allowed (except in proceedings carried on by themselves) to attend before the Master in cases where all the *cestui que trusts* are before the Court; but if there are any parties who are or may become interested, and whose interests are only represented by the trustees, and are not too remote, the trustees will be entitled to attend the proceedings affecting those interests.[2]

Parties having charges on an estate or on a fund, are, if the estate or fund is sufficient, entitled to attend only on the proceedings brought in by themselves; but if there is a deficient fund, each incumbrancer is entitled to attend on the charges of those incumbrancers who claim a priority over him, but not on those who do not claim to be of a prior date to his security.[3] The same rule applies to creditors coming in to prove their debts under a decree.[4]

The above restrictions are adopted for the purpose of protecting the party upon whom, or the funds upon which, the costs of the suit will eventually devolve, from being put to expense, by the unnecessary attendance of parties before the Master; and the application of them is generally regulated by the Master to whose discretion it is left. By the 51st Order of 1828, the Master, strictly speaking, is bound, where it can be done, to point out, at the attendance upon the warrant to consider the course of proceedings under the decree, who the parties are that are entitled to attend him, and, in cases where he may be in a situation to do so, at such attendance, it is very desirable that the terms of the Order should be complied with. It is obvious, however, that in many cases, this would be impracticable; but as the Order does not preclude the discussion of this point at any future stage of the proceeding, and the Master may, at any time, entertain an objection to a party attending before him, on the ground, that his interest does not *entitle him to do so at the risk of throwing the expense of his *1174 attendance upon the fund or the party to be charged with the costs. If the Master, upon an objection being made to the attendance of a party before him, is of opinion that such attendance is inadmissible, he may refuse to mark the attendance of the solicitor of the party in his book, which will have the effect of depriving such solicitor of the costs of such attendance upon the general taxation of the costs.

If the Master should be considered to have come to an improper conclusion in not allowing a party to attend before him, the proper course to obtain the opinion of the Court upon the point would be, to present a petition praying that the party might be permitted to attend the Mas-

[1] 2 Smith, 3d ed. 112.
[2] Davis *v.* Lord Combermere, 14 Sim. 402; 9 Jur. 76.
[3] 2 Smith, 3d ed. 113.
[4] Hare *v.* Rose, 2 Ves. 558.

ter. On one occasion, an application by motion appears to have been made to the Court on the ground that the Master had refused to mark in his book the attendance of a solicitor, and the motion was ordered to stand over, that the Lord Chancellor might see the Master, when the object of the motion appears to have been obtained, and it was not mentioned again.[1]

It is to be noticed, in this place, that the Master has not only the power of restricting the attendance of parties or their solicitors before him, in the manner before stated, but he is also empowered in certain cases, to extend them. Whenever, in any proceeding before a Master, the same solicitor is employed for two or more persons, such Master may, at his discretion, require that any of the said parties shall be represented before him by a distinct solicitor, and may refuse to proceed until such party is so represented.[2]

The rule that all parties interested in the result are entitled to attend before the Master, applies not only to those who are parties, but also to those who are *quasi* parties, by having come in under the decree and established a claim, who, subject to the rules before pointed out,[3] are entitled to notice of all proceedings which affect their interests. We have before seen,[4] that in such cases service upon the solicitor in London, by whom such party appears, is made good service, except in cases requiring personal service.

If any person can show sufficient reason why he should be allowed to attend the proceedings before the Master, he will be permitted to do so, though not a party, or *quasi* party, to the cause or matter.[5] The application for such permission is made by summons:[6] which must be served on the parties to the cause, and be supported by evidence *1175 showing the interest of the applicant in * the matters in question. The order is usually made on terms as to the costs occasioned by such attendance.[1]

The general rule, that all persons having an interest in the result of the proceedings should have notice of the attendance before the Master, extends to cases in which a defendant, after appearance to the *subpœna*, has allowed the bill to be taken against him *pro confesso*, and a decree to be made, for want of an answer. In such cases, as well as in cases where the decree has been made upon the answer of the party, it is necessary to serve him with warrants upon all proceedings in the Master's office, by which his interests are in any way affected.[2]

It is to be remembered that a distinction exists in this respect be-

1 2 T. & V. 215.
2 77th Ord. 1828.
3 *Ante*, p. 1172.
4 44th Ord. 1828.
5 Toosey *v.* Burchell, Jac. 159; Attorney-General *v.* Shore, 1 M. & C. 394; Attorney-General *v.* Prettyman, 8 Beav. 316; *contra*, Attorney-General *v.* St. Cross, 18 Beav. 475.
6 Seton, 46.

1 Toosey *v.* Burchell, 1 Jac. 159; Attorney-General *v.* Shore, 1 M. & C. 394. If the right of parties to be heard by their counsel before a Master is refused them, or if they have not been properly notified of the hearing, the cause will be again referred. Whiteside *v.* Pulliam, 25 Ill. 285.
2 King *v.* Bryant, 3 M. & C. 191; see also Dominicetti *v.* Latti, 2 Dick. 588; *ante*, 1170.

tween decrees *pro confesso* under the statute for want of appearance, and decrees *pro confesso* for want of an answer. In the former, there being no one whom the plaintiff can serve, all the necessary proceedings must necessarily be *ex parte*.[3]

But although a party who has appeared, but has allowed a decree to be taken against him *pro confesso* for want of an answer, is entitled to have notice of the proceedings against him under the decree in the Master's office, he will not be entitled to appear upon such notice before the Master, without previously obtaining an order for that purpose.[4] This order will not be granted except upon terms, and in *Heyn* v. *Heyn*,[5] Lord Eldon refused to permit the defendant to attend the Master upon the accounts directed by the decree, unless upon the terms of his paying all the costs of the suit, including the costs of his contempt up to the time of making the order.

Parties who are entitled to attend upon the Master, are entitled to take copies of all proceedings in writing brought into the Master's office, which in any way affect their interest, and will be allowed the costs of such copies in taxation. Thus, if interrogatories are exhibited for the examination of an executor, or other accounting party, or his examination is left, or if a debtor or creditor account, or charges and discharges arising out of either, or charges or claims of creditors or others, are brought in, all the parties to the suit, liable to be affected by the results of these accounts or claims, are entitled to take copies of them.[6]

The right to take copies of proceedings in the Master's office extends not only to the copies of such matters brought in by the plaintiff, * but to such as are brought in by co-defendants; and, in fact, *1176 the right is solely regulated by the influence of the proceeding upon the estate or fund, and the interest of the party claiming to attend in the result of that proceeding.[1]

Production of Documents.

Almost every decree which directs a reference to the Master, either to make inquiries or to take accounts, contains the following direction: "And for the better (taking the said account and) discovery of the matters aforesaid, the parties are to produce, before the said Master, upon oath, all deeds (or books), papers, and writings, in their custody or power, relating thereto, and are to be examined upon interrogatories as the Master shall direct." [2]

Where by any decree or order of the Court, books, papers, or writ-

[3] Thompson *v.* Trotter, cited 3 M. & C. 183; and see Eltoft *v.* Brown, 2 Hare, 618.

[4] Heyn *v.* Heyn, Jac. 49; [McMicken *v.* Perin, 18 How. 507].

[5] *Ubi supra.*

[6] 2 Smith, 111, 3d ed.

[1] 2 Smith, 112, 3d ed.

[2] Seton, 11; see Hart *v.* Ten Eyck, 2 John. Ch. 513; Russell *v.* McLellan, 3 Wood. & M. 157. Under the United States Equity Rule 77, the Master may require the production of all books, papers, writings, vouchers, and other documents applicable to the matter referred.

ings are directed to be produced before the Master, for the purposes of such decree or order, it shall be *in the discretion of the Master* to determine *what* books, papers, and writings are to be produced;[3] and when and for how long they are to be left at his office, or, in case he shall not deem it necessary that such books, papers, and writings should be left or deposited in his office, then he may give directions for the inspection thereof, by the parties requiring the same, at such time and in such manner as he shall deem expedient.[4]

It is to be observed, that under the above Order, the Master has a right to require, by his warrant, that all such documents as he shall think proper shall be left in his office, and that a refusal to leave them in pursuance of such a warrant, is considered as a disobedience of the original order of the Court directing their production, and may be treated accordingly.[5]

The mode of proceeding to enforce the production and deposit of documents, is by taking out and serving a warrant in the usual form, underwritten to the following effect: "at which time the defendant is to produce before me, and deposit in my office all such deeds, books, and papers as are in his custody or power relating to the matters referred to me." If any particular documents have been mentioned in any answer or examination, or in any schedule or other pro-
*1177 ceeding, they may be referred to in the underwriting * to the warrant;[1] but it is to be observed, that a party can only be ordered to bring in documents specified in any pleading or examination or schedule, or other proceeding, in cases where such pleading, &c., can be read as an admission against such party, and that the Master's certificate of a defendant's default in the production of papers, founded on an admission contained in the answer of another party, will be irregular.[2]

If the party is prepared to bring in such deeds, &c., as may be in his possession, custody, or power, a schedule of them should be made out, and an affidavit that the items contained in such schedule, are the only deeds, &c., in the party's custody or power relating to the matters in question, having been sworn, it is deposited, together with the deeds, &c., in the Master's office, and of this the Master grants a certificate.[3] It is to be observed, that the certificate of the Master, of the

[3] This discretion of the Master is limited by the rules which guide the Court in compelling a discovery and production of documents in other cases. See *post, Interlocutory Applications for the Production of Documents.*

[4] 60th Order, of 1828. This Rule is precisely similar to that heretofore existing in New York. Rule 103 in Chancery.

[5] Shirley *v.* Earl Ferrers, 1 M. & C. 304; see Wells *v.* Glen, New York, in Chancery, Jan. 16, 1839.

[1] Bennett's Prac. 78. A claimant coming in under a decree may obtain an order, on summons, for any party to the suit to produce all documents in his custody, possession, or power, relating to the claimant's case. *Re* M'Veagh *v.* Croall, 1 De G., J. & S. 399; 9 Jur. N. S. 240; Newland *v.* Steer, 11 Jur. N. S. 596; 13 W. R. 1014, V. C. K.; Dent *v.* Dent, L. R. 1 Eq. 186, M. R.; and conversely, the claimant may be ordered to produce all documents in his custody, possession, or power, relating to his claim. *Re* Pine, Pine *v.* Ellis, M. R. in Chambers, 18 Nov., 1863.

[2] Kemp *v.* Wade, 2 Keen, 687.

[3] Bennett, 79.

production of the deeds, &c., is merely confined to the fact of the deeds, &c., mentioned in the affidavit having been produced by the party; it does not go on to certify whether the Master is satisfied with the production, nor is it usual to call upon the Master to make such a certificate.[4] The most convenient course, if there is reason to suppose that the defendant has not made a full disclosure, is to apply for leave to exhibit interrogatories for his examination, supporting the application by an affidavit, stating the papers which he ought to produce, &c.[5]

If the party is not prepared to bring in the documents required, his solicitor should attend, upon the return of the warrant, and apply for time to do so according to the circumstances;[6] or, if he wishes to take the Master's opinion, under the discretionary power above referred to, as to whether all the documents, &c., should be produced, he should attend the warrant for that purpose, when the Master will direct what documents are to be produced, and fix * a time for bring- *1178 ing them in. It seems to be the practice of some Masters, on the return of the warrant, to direct the party, instead of producing the books, to leave an affidavit of what books, papers, &c., he has in his possession, custody, or power, from which the Master will direct the production of such of them as are necessary.[1]

If a party, ordered to produce documents before the Master, requires further time to enable him to do so, and the Master is not disposed to extend it, he may apply to the Court, by motion,[2] and having obtained time, he may apply for and obtain a still further extension of time.[3] He must, however, make such application before he is in contempt; that is, before the period limited by the order *nisi* for the production of the documents has expired, before which time he will not have incurred any contempt, and will not be liable to the costs of the certificate of default or of the order *nisi*.[4]

It seems, also, that the Court will entertain a similar motion, to dispense with the production of the documents, upon giving inspection at the house or counting-house, &c., as in the case of an interlocutory for production.[5]

If upon the return of the warrant for the production of documents, the party neither produces them nor attends the Master to ask for fur-

[4] Cotton *v.* Harvey, 12 Ves. 391. Upon the books, &c., being produced before the Master, those parts which do not relate to the subject of the litigation may be sealed up. And it is contempt of the Court for the adverse party to break open the parts thus sealed up. Dios *v.* Merle, 2 Paige, 294.

[5] *Ib.* 393; *sed quære*, whether the interrogatories may not be exhibited in the Master's office, for the examination of the party, without leave of the Court. If there is reason to suppose that the party has not made a full disclosure, all parties interested in the production or delivery of the books, &c., may examine such party as to the fact whether the order of the Court has been fully and fairly complied with. Hallett *v.* Hallett, 2 Paige, 432. In such cases the Master should allow a reasonable time to inspect the books and papers delivered, and to prepare interrogatories for the examination of the party, if necessary. *Ibid.*

[6] Bennett, 79; and see Stubbs *v.* Sargon, 4 Beav. 90.

[1] 2 Smith, 3d ed. 168.

[2] See Hand. 132.

[3] Hand. 132.

[4] 2 Smith, 132.

[5] Jones *v.* Powell, Seton, 424; *ex relatione* Tinney, see *post*, Ch. XLII., on *Production of Documents*.

ther time, or to take his opinion upon the propriety of limiting the production, under the discretionary power before referred to; or if, having obtained an extension of time from the Master or from the Court, or having attended the Master upon the return of the warrant, and obtained a limited order for production (upon which occasion the Master will, as we have seen, fix the time when such production ought to be made), the party fails to produce the documents within the time limited, the party requiring the production may proceed to enforce it by application to the Court.

For this purpose, he should obtain from the Master a certificate of the default, and upon that being signed,[6] a motion may be made *1179 * that he may produce the documents within four days after service of the order upon the clerk in Court, or that the Sergeant-at-arms may go against him, and bring him to the bar of the Court to answer his contempt; this is called the four-day order.[1]

It may be mentioned here, that the certificate of a Master as to the non-production of documents, cannot be contradicted; and that, where the Master certified that the writings were not delivered in, but the clerk in Court offered to prove that they were delivered in, the Court would not suffer any averment to be made contrary to the certificate.[2]

A contempt incurred by the non-production of documents, pursuant to a Master's warrant under a decree or order, can only be cleared in the same manner as other contempts, *i. e.* by producing the Master's certificate of the party's having deposited the documents required, and moving to discharge the process upon payment of costs.

Where the deeds, &c., are brought into the Master's office, they are usually deposited in a secure box, where all parties wishing to inspect them or make extracts therefrom, are permitted to do so on taking out the usual warrants for that purpose.[3] The Master has, however, under the 60th Order of 1828, above referred to,[4] power to dispense with the deposit of the documents in his office, and to give directions for the inspection of them by the parties requiring the same, at such time and in such manner as he shall deem expedient.

[6] An Order of the Court, dated the 29th October, 1692, Beames's Orders, 202, directs that all reports and certificates shall be filed *within four days after the signing thereof*, and that all proceedings which shall be grounded on any report or certificate not filed as aforesaid, shall be utterly void and of none effect; but, notwithstanding this order, the practice, in cases of certificates of default, appears to be, to apply to the Court for the four-day order, on the day when the certificate bears date (so as to leave no interval within which the party may obey the decree), and to file the certificate afterwards, taking care, however, not to proceed upon the *four-day order*, until after the filing of the certificate. Indeed, the Registrar in fact never delivers out the four-day order, until the certificate has been filed. Harris *v.* De Tastet, 1 S. & S. 263; see also Eyles *v.* Ward, 2 P. Wms. 517; Askew *v.* Peddle, 10 Sim. 182.

[1] Seton on Decrees, 420. In the case of a peer or member of Parliament, the order should be, that he may produce, &c., or that in default, *a sequestration may issue*. The same course of proceeding is proper, in the case of a corporation aggregate, see Seton on Decrees, 428; and, in either case, upon the Master's second certificate of default, the order for the sequestration will be made absolute. *Ibid.* As to exceptions to the Master's certificate, see Jones *v.* Powell, 1 Sim. 387; Chennell *v.* Martin, 4 Sim. 340; Kemp. *v.* Wade, 2 Keen, 287.

[2] Sel. Ca. in Cha. 5; 2 Harr. ed. Newl. 494, n.; see *post*, *Exceptions to the Master's report.*

[3] Bennett, 80.

[4] *Ante*, p. 1176.

It may be observed, that if a party depositing documents in a Master's office, pursuant to a decree or order, should require the use of them, for the purpose of enabling him to put in his examination, he may obtain an order, upon motion or petition, for the delivery of them to him for the purpose.[5]

When the purposes of the production of books, &c., are satisfied, an order may be obtained for the re-delivery of them, either by motion or petition.[6]

* *Examination of Parties.* *1180

We have seen before, that, besides the direction that the parties shall produce before the Master all deeds, &c., the decree usually goes on to order "that the parties shall be examined upon interrogatories, as the Master shall direct."[1] This part of the order is seldom omitted, unless

[5] Hand. 137. "It was also ordered, that the plaintiff should have liberty to inspect the documents whilst they were in the custody of the defendant, at all seasonable times, upon his giving reasonable notice; and when the defendant should have put in his examination, it was further ordered, that he should return the said documents to the Master, in the like state and condition as when they were delivered out." *Ibid.*

[6] Hand. 155, 156.

[1] *Ante*, p. 1176; see Gilmore *v.* Gilmore, 40 Maine, 53; Hart *v.* Ten Eyck, 2 John. Ch. 513; Hollister *v.* Barkley, 11 N. H. 501. By the 81st of the Equity Rules of the United States Courts, the Master is at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *vivâ voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination must be taken down by the Master, or by some other person by his order, and in his presence, if either party requires it, in order that the same may be used by the Court, if necessary. The 105th rule in New York was similar. In Remsen *v.* Remsen, 2 John Ch. 499, it is observed by Chancellor Kent, "though the exhibition of interrogatories, duly settled, be the usual mode of examination appearing in the books, I do not apprehend that it is indispensable. The practice with us, as I have reason to believe, has been more relaxed, and oral examinations have frequently, if not generally, prevailed. This appears to me to be a question merely of convenience, and does not involve any principle of policy or of right." See 1 Hoff. Ch. Pr. 536; Story *v.* Livingston, 13 Peters, 359. A *vivâ voce* examination does not alter the rights of the parties, and therefore there can be no cross-examination by the party's own counsel. His answers are testimony, when responsive, and he may accompany them with an explanation fairly responsive to the interrogatory. Benson *v.* Le Roy, 1 Paige, 122.

In the case of Jackson *v.* Jackson, 2 Green Ch. 103, in New Jersey, the Chancellor said: "The practice of oral examination is universal in the State of New Jersey, as well in relation to parties as witnesses, and I believe the practice of cross-examination by counsel is also universal." But it was held, that the cross-examination must be confined to matters or facts which were the subject of inquiry on the original examination, and which were authorized to be examined into by the decretal order.

In Massachusetts, in proceedings in Equity the evidence is taken in the same manner as in suits at Law, unless the Court for special reason otherwise directs. Genl. Sts. c. 131, § 60. And in this State as in all others, where the parties are by law made witnesses in the cause, of course no special order for their examination can be necessary, but they may be examined as other witnesses. As to the extent to which parties may now be witnesses in England and in Massachusetts, see *ante*, p. 887, and note. In reference to the right of filing interrogatories for the examination of the plaintiff, as in England and New Jersey, or of the plaintiff and defendants, as in Massachusetts, see *ante*, p. 836, note. The statute of New Jersey, allowing parties to be sworn, excepts cases where they sue or are sued in a representative capacity. Under this statute it was held, that if a defendant in a suit dies after the plaintiff has been examined as a witness, and his administrators have been made defendants in his place, this evidence will be admitted at the hearing. The plaintiff was competent at the time when it was taken, and that is the test of admissibility. It cannot be rejected because the defendant was prevented from testifying by his death. Marlatt *v.* Warwick, 3 C. E. Green (N. J.), 108; see Shepherd *v.* McClain, 3 C. E. Green (N. J.), 128; S. C. 4 C. E. Green, 439. For decisions under a similar exception, formerly existing in Massachusetts, see Doody *v.* Pierce, 9 Allen, 141, 144; Hayward *v.* French, 16 Gray; Brady *v.* Brady, 8 Allen, 101. A Master appointed to ascertain certain facts, and state an account under a bill to redeem

where the reference relates to a fact as to which the examination of the parties would not afford evidence, such as the law of another country, &c.[2] Where, however, it is omitted in the decree or order, the Master has no power to examine the parties,[3] but, in such case, if the decree has not been enrolled, the Court will order it to be rectified.[4]

*1181 * The examination of parties under this order is, like the production of documents, in the discretion of the Master, and, in the exercise of this discretion, he may not only refuse to examine a party, but, having examined him, he may re-examine him, *toties quoties*, if he thinks proper, without a new order of the Court.[1]

If the Master declines to examine any party when required (which he usually does by refusing to allow the interrogatories carried in for his examination), the proper way of taking the opinion of the Court upon the propriety of the Master's decision appears to be, by waiting till he has made his report, and then taking an exception to it, on the ground of his refusal to examine the party.[2]

Interrogatories may, it seems, be carried in by any party for the examination of another party; thus, interrogatories may not only be carried in by the plaintiff, for the examination of the defendant, and *vice versâ*, but they may be carried in by one defendant for the examination of a co-defendant.[3] One executor, however, cannot examine his co-executor to prove that money which he had received, and alleges to have been paid over to his co-executor, had been properly applied by him, as, by such examination, the co-executor would discharge himself also; in such cases the Court prefers leaving it to the executor who has paid the

mortgaged premises in Maine, may examine the parties as to the receipt of rents and profits, or the possession of the estate, although one of them may be an administrator. Bailey *v.* Myrick, 52 Maine, 132.

[2] Seton on Decrees, 12.

[3] Prac. Reg. 199; 2 Ch. Rep. 10; see McCrackan *v.* Valentine, 5 Selden (N. Y.), 42. Copeland *v.* Crane, 9 Pick. 93, was a bill in Equity by the administratrix of a deceased partner, against the surviving partner, for an account, and the bill and the answer of the defendant were referred to a Master, "he to take the books and papers of the partnership, examine the same, receive the evidence, hear the parties, audit and state the accounts, and report the facts material for the decision of the cause;" and the Master examined the defendant on oath, without objection on his part. One of the exceptions taken to the Master's report was, that the defendant was examined upon oath or interrogatories before the Master, he having no special authority by the order of reference thus to examine him. The Court, in their decision overruling this exception, remark, "The order is very general, and does not specify the principles upon which the accounts were to be taken by the Master. But neither party objected to the form of the order, or it would have been drawn up, perhaps, with more precision. But this exception cannot be allowed, because it is not founded on any objection made before the Master. Exceptions are always to be confined to objections disallowed or overruled by the Master. Here we understand the defendant submitted to an examination, and it is too late to question the authority of the Master," pp. 77, 78. But by the course of practice now existing in Massachusetts, parties may be examined before a Master, as in the other proceedings in the suit, like other witnesses, without any order, and in the same manner as in suits at Law. See preceding note. By the United States Equity Rule, 77, the Master has full authority to examine the parties in the causes upon oath, touching all matters contained in the reference. See Pingree *v.* Coffin, 12 Gray, 288.

[4] *Ante*, p. 1028.

[1] Cowslade *v.* Cornish, 2 Ves. 270; 1 Dick. 149, S. C.

[2] Chennell *v.* Martin, 4 Sim. 340; also see Simmons *v.* Gutteridge, 13 Ves. 262; and *post*, p. 1182.

[3] Simmons *v.* Gutteridge, 13 Ves. 265; but it seems that a plaintiff cannot examine his co-plaintiff. Edwards *v.* Goodwin, 10 Sim. 123.

money over to the other, to discharge himself by his oath, to allowing one party to examine the other.[4]

These interrogatories are usually, though not necessarily, prepared by counsel; it is not, however, necessary that they should be signed by him, as they must be settled by the Master.[5] As the * ob- *1182 ject of such interrogatories is chiefly to sift the conscience of the party and to obtain admissions from him, they consequently partake more of the nature of the interrogating part of a bill,[1] than of interrogatories for the examination of witnesses, and are not subject to the same restrictions as to leading questions, &c.

Where the object of the examination is to obtain the admission of the party as to facts detailed in a state of facts, they generally follow the state of facts in the same manner, that the interrogating part follows the statements and charges in a bill.

The proper course for bringing before the Court an objection to the interrogatories as settled by the Master, appears to be by excepting to the Master's certificate of having allowed the interrogatories, and not by presenting a petition or making a motion to the Court to vary or suppress them.[2]

With respect to the form of the exceptions, it is to be observed, that, if one general exception is taken to the certificate, because the Master ought not to have allowed all the interrogatories, the party excepting will succeed if he shows the Master was wrong in allowing one; but if the exception is "because the Master ought not to have allowed any of them," then, if one is proper, the general exception fails as to all.[3]

It is to be noticed, that exceptions will lie to the Master's certificate, as well on account of what he strikes out of the interrogatories as of what he allows in them.[4] It seems, however, that if the Master disallows the interrogatories altogether, it is not the practice for him, to certify his disallowance of them, but he proceeds to make a report without examining the party,[5] so that in fact, there is, in that case, no certificate of the Master to which exceptions can be taken; the consequence, therefore, is, that the party, dissatisfied with the Master's opinion disallowing interrogatories altogether, must wait till the Master has made his report, and then take exceptions to the report on the ground of his having refused to examine the party.[6]

It has been before stated, that the Master may examine a party *toties quoties* if he thinks proper.[7] For this purpose the Master is at liberty

[4] Dines *v.* Scott, 1 T. & R. 358.

[5] Purcell *v.* M'Namara, 17 Ves. 435; Jackson *v.* Jackson, 2 Green Ch. 102.

[1] See McDougald *v.* Dougherty, 11 Geo. 570.

[2] Chennell *v.* Martin, 4 Sim. 343; Hughes *v.* Williams, 6 Ves. 459; see Archbishop of York *v.* Stapleton, cited 4 Sim. 345; Strange *v.* Thomas, cited 4 Sim. 346; Paxton *v.* Douglas, 16 Ves. 239; Stanyford *v.* Tudor, 2 Dick 549.

[3] Moore *v.* Langford, 6 Sim. 323; see also Pearson *v.* Knapp, 1 M. & K. 312, and Cotham *v.* West, 1 Beav. 389; Hopkinson *v.* Bagster, 1 Y. & C. 13; see *post*, *Exceptions to the Master's Report*.

[4] Archbishop of York *v.* Stapleton, cited 4 Sim. 345.

[5] Chennell *v.* Martin, 4 Sim. 342.

[6] *Ibid.*; Forbes *v.* Peacock, 12 Sim. 528; *Ex parte* Charter, 2 Cox, 168; Simmons *v.* Gutteridge, 13 Ves. 262.

[7] *Supra*, p. 1181.

to receive new interrogatories, wherever he may consider it necessary to the justice of a case, that he should so do, and this he may do even
*1183 after a motion for the payment of money into * Court, upon an admission in the examination to former interrogatories.[1] And it seems that fresh interrogatories may be received by the Master, without an order of the Court to warrant them.[2]

The party whose examination is required, is bound, after the Master has settled the interrogatories, to prepare his examination forthwith, and if there is any delay on his part, the Master, on a warrant being served, underwritten, "At which time the defendant A. is to bring in his examination to the interrogatories settled by the Master" will fix a day upon being attended by the party or his solicitor, by which such examination is to be brought in.[3] The time allowed for a party to put in his examination is altogether in the discretion of the Master, but a month is the usual time limited, unless under special circumstances.[4]

A party in contempt for not putting in his examination, can only be discharged from his contempt upon the same terms as a party in contempt for not putting in an answer,[5] *i. e.*, upon putting in his examination, and paying or tendering the costs of his contempt. Upon doing this, he may move to be discharged; and it is to be observed, that he is entitled to be so discharged, upon putting in his examination, and that he cannot be detained, till the sufficiency of the examination has been ascertained;[6] the party exhibiting the interrogatories may, however, if the examination should be reported insufficient, proceed upon the old process.[7]

If the party to be examined is desirous of putting in his examination, he should procure a copy of the interrogatories, as settled by the Master, from the Master's office, and should prepare his examination without delay. For that purpose, if it is necessary, that he should have in his possession any documents which he has delivered into the Master's office, he may, as we have seen, obtain an order for the re-delivery of them to him for the purpose of enabling him to prepare his examination.[8]

*1184 * An examination, though generally drawn or settled by counsel, is not necessarily signed by him,[1] there being no order of the

1 Hatch *v.* ——, 19 Ves. 116.

2 Lynn *v.* Buck, 3 Mad. 281; Price *v.* Lytton, 5 Mad. 465; Sidden *v.* Forster, 1 S. & S. 335.

3 Bennett, 72.

4 *Ib.* 73.

5 *Ante*, p. 488 *et seq.*

6 Bonus *v.* Flack, 18 Ves. 287; Chalk *v.* Thompson, 4 Sim. 350.

7 Bonus *v.* Flack, 18 Ves. 287. It is, however, laid down by Lord Eldon, that he cannot do so, if he has accepted the costs of the contempt; this was also the rule of the Court with regard to answers, but has been altered with respect to them by the 24th of the Orders of 1828 (see *ante*, p. 488). The Order, however, merely applies to answers, and it is still doubtful whether the Court will extend the principle of it to examinations.

8 Where a defendant is examined by the plaintiff, in relation to the amount due the plaintiff, on account of certain property sold by the defendant on commission, it is not sufficient for the defendant to refer to his books of account, produced before the Master; but he must give the best answer he can from recollection and information, aided by a recurrence to the books and papers, immediately within his control and possession, accompanied by such explanations responsive to the questions put, as are necessary to prevent improper conclusions being drawn from his answers. Peck *v.* Hamlin, 1 Paige, 247.

1 Bonus *v.* Flack, 18 Ves. 287; see also Yates *v.* Hardy, Jac. 223; Keene *v.* Price, 1 S. & S. 98.

Court requiring that it should be so, as in the case of a pleading. It is entitled in the cause, and is described in the heading, as "The answer and examination of the above-named defendant [or plaintiff], A. B., to interrogatories exhibited on behalf of the above-named plaintiff [or defendant], and allowed by , one of the Masters to this Honorable Court to whom this cause stands referred, pursuant to a decree made on hearing thereof [or to an order], bearing date the day of 18 ."

An examination is in the nature of an answer, and not of a deposition, and is governed by nearly the same rules as answers.[2] It does not, however, commence with any protestation, but proceeds at once to answer the interrogatories *seriatim*, *viz.*, "To the first interrogatory the examinant *saith*," &c., and there is no general traverse at the end. When prepared, the examination must be sworn in the same manner as a written answer.[3]

If the party to be examined is not in a competent state of mind to put in his examination, the usual course is, for the Court to appoint some person to put in his examination for him.[4]

If an examination contains any matter which is scandalous or impertinent, it may be expunged.

Any party who wishes to complain of any matter introduced into any state of facts, affidavit, or other proceeding before the Master, on the ground that it is scandalous or impertinent, shall be at liberty, without any order of reference, by the Court to take out a warrant for the Master to examine such matter; and the Master shall have authority to expunge any such matter as he shall find to be scandalous or impertinent.[5]

In order, therefore, to have matter which is impertinent or scandalous expunged from an examination, the party complaining must take out a warrant, as directed by the above order. It is, however, to be mentioned in this place, that it is not a matter of course to refer an examination for impertinence, after any proceeding has been had upon it.[6] A reference for impertinence ought also, as in the case of an answer, to precede a reference for insufficiency.

When an objection is taken to an examination, on the ground of insufficiency, no exceptions are filed, as in the case of answers, * but on the return of the warrant "to consider the insuffi- *1185 ciency," the party complaining must point out the insufficiency, and, upon hearing the opposite party, the Master decides if such examination is or is not sufficient.[1] If the Master considers the examination insufficient, he gives a certificate to that effect, particularizing the inter-

[2] *Ante*, p. 711 *et seq.* The answers to interrogatories are put in in writing, on advisement of counsel; and under this mode of proceeding there can be no cross-examination. Jackson *v.* Jackson, 2 Green Ch. 102.

[3] *Ante*, pp. 743, 744 *et seq.*

[4] Page *v.* Page, 28th Nov., 1799; 1 Newl 325; Piddock *v.* Brown, 3 P. Wms. 288.

[5] 73d Ord. of 1828.

[6] Johnston *v.* Ure, 2 S. & S. 578.

[1] Bennett, 76.

rogatory or interrogatories, or part of an interrogatory, which he considers not sufficiently answered.[2] If the Master considers the examination sufficient, he must also give a certificate to that effect.[3] In either case, the proper course to be pursued to obtain the opinion of the Court, upon the Master's judgment, is by excepting to the certificate.[4]

It is to be observed, that where the Master certifies the examination sufficient, an exception in general terms, "for that the Master has certified the examination sufficient, whereas he ought to have reported it insufficient," is regular, and that it is not necessary to state in what respect the examination is not sufficient.[5] The Master, in deciding on the sufficiency or insufficiency of any answer or examination, must take into consideration the relevancy or materiality of the statement or question referred to.[6]

In considering the sufficiency or insufficiency of an examination upon exceptions to the Master's certificate, the Court will look at it, to see whether there is any substantial defect; and not with a critical eye, holding insufficient every examination that is not framed with the strict accuracy of special pleading.[7]

An insufficient examination, like an insufficient answer, is considered as a nullity: when, therefore, the examination is found insufficient, either upon the Master's certificate, or by order of the Court, made upon exceptions to it, the same proceedings may be adopted as if no examination had been put in at all;[8] therefore, if no four-day *1186 order for a Sergeant-at-arms, has been obtained, it * may be moved for upon the production of the Master's certificate, or of the order upon exceptions. If a four-day order has been obtained, but has not been made absolute, it may be made absolute, upon the production of the Master's certificate or order, in the same way as it would have been if no examination had been put in.[1] And so, as we have seen, if the order has been made absolute, and the party has been arrested by the Sergeant-at-arms, and discharged upon putting in a further examination; if such further examination is again reported

[2] Bennett. He should in his certificate fix a time within which a further examination is to be put in. Case *v.* Abeel, 1 Paige, 630. Form of certficate, on a reference of an examination for insufficiency:—

Title. "I humbly certify to this Honorable Court, that under an order of reference on the —— day of ——, made in this cause, I have been attended by the solicitors, &c., and have looked into the interrogatories exhibited by the plaintiff, and the examination of the defendant, C. D., thereto; and I find the said examination insufficient.

"In not answering fully to the second interrogatory, that he had set forth a full and true account of all the goods and merchandise referred to therein, and the sales and proceeds thereof, but in answering only, that he had set forth a full account thereof, so far as the plaintiff had any legal right therein, or he, the examinant, was bound to discover the same.

"Whereas, in my opinion, the said examinant was bound to have positively alleged, he had set forth a full account of the same, or to have stated on what grounds he was not legally bound to set forth a part thereof.

"All which, &c., &c." See Sharpe *v.* Sharpe, 3 John. Ch. 407.

[3] See Chalk *v.* Thompson, 4 Sim. 350.

[4] *Ibid.*; and see Purcell *v.* M'Namara, 12 Ves. 166; Chennell *v.* Martin, 4 Sim. 340.

[5] Purcell *v.* M'Namara, *ubi supra.*

[6] 74th Order of 1828.

[7] Per Sir W. Grant, M. R. in Purcell *v.* M'Namara, 12 Ves. 170.

[8] See Jackson *v.* Jackson, 2 Green Ch. 102; 1 Hoff. Ch. Pr. 529, 533; Allfrey *v.* Allfrey, 12 Beav. 620.

[1] Weston *v.* Jay, 1 Mad. 527.

insufficient, the party carrying in the interrogatories may proceed upon the old process.[2]

From what has been above stated, it will be seen, that the same principles which govern the practice, in the case of insufficient answers, will govern the practice in that of insufficient examinations ;[3] and it seems that this will be extended to cases in which a party so far trifles with the Court as to put in a third insufficient examination, and that the Court will, upon such occasions, adopt the same practice of ordering the party to stand committed, and to be examined upon interrogatories before the Master, as to the points wherein his examination is reported insufficient, as in the case of a third insufficient answer to a bill.[4]

It is to be recollected, however, that, except in the case above mentioned of a third insufficient examination, the Master cannot, upon an examination being found insufficient, receive further interrogatories, and compel the party to answer such further interrogatories at the same time that he puts in further examination to the original interrogatories, without an order of the Court, and that such order will not be made by the Court, unless upon special application.

If the Master certifies the examination of a party to be insufficient, the party examining may move, upon the Master's certificate, for the costs of, and occasioned by, the insufficiency of the examination.[5]

Copies of the examination of the party, upon interrogatories, like copies of all other proceedings before a Master, may be taken by all parties to the cause who are interested in it;[6] and any party to the suit may avail himself of an admission, in such examination, to charge the party examined.[7] An examination, however, * like *1187 an answer, can only be made use of as evidence against the party putting it in, and cannot be read as evidence in favor of, or against any other party.[1]

It is to be observed, that a party examining another is not bound to make use of the examination before the Master; if he declines to do so, however, the Master may read it himself.[2] In fact, the examination is taken for the information of the Master, and the Master is at liberty to look at it, whether read by the party examining or not, for the purpose of ascertaining the view taken of the case by the examinant, and of seeing how far his statement is contradicted or borne out by the other evidence before him. Upon the same principle, the Court will allow an examination to be read, upon the hearing of exceptions

[2] *Ante*, p. 1183; see Case *v.* Abeel, 1 Paige, 630; Croskey *v.* European & American Steam Co., 14 W. R. 514, V. C. W.

[3] Weston *v.* Jay, 1 Mad. 527. The proceedings upon the Master's certificate, as to the sufficiency of an examination, are substantially the same as upon a report on exceptions to an answer for insufficiency. Case *v.* Abeel, 1 Paige, 630.

[4] Bennett Ap. 29, c. 3, § 2, Nos. 11, 12.

[5] Hubbard *v.* Hewlett, 2 Mad. 469; Allfrey *v.* Allfrey; 12 Beav. 620; and see *Re* Bainbrigge; 11 Beav. 620; 2 Smith (3d ed.), 148.

[6] Dyott *v.* Anderton, 3 V. & B. 176.

[7] 2 Smith, 135.

[1] *Ibid.*; see also Dines *v.* Scott, T. & R 358. If the evidence of a party is required before the Master, in favor of or against another party, he may be examined as a witness, subject to the usual objections.

[2] Gilbert *v.* Wetherell, 2 S. & S. 259.

from the Master's report, although it has not been made use of by the party exhibiting the interrogatories before the Master.[3]

It may be mentioned here, that, where in an examination put in by two co-executors, it was stated, that their receipts had been joint; but it appeared, by affidavit, that such statement was made through mistake and inadvertence, and that one of the executors had in fact, received nothing, liberty was given to him to put in a supplemental examination to correct the mistake.[4]

The Master is at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *vivâ voce*, or in both modes, as the nature of the case may appear to him to require; the evidence upon such examination being taken down at the time by the Master, or by the Master's clerk in his presence, and preserved in order that the same may be used by the Court if necessary.[5]

It may here be remarked, that now where a person becomes *quasi* a party upon a claim of this nature, the method of enforcing his obedience to the order of the Court is the same as the course of proceeding against a party to the record.[6]

Evidence.

Where the Court directs an inquiry into a fact, it is in the nature of a new issue joined, and what would be evidence in any other case, will be evidence before the Master.[7]

*1188 * The parties in the cause, are, therefore, at liberty, in an inquiry in the Master's office, to make use of all the proceedings which are of record in the cause, whether they be pleadings, such as bills, answers, &c., or in the nature of evidence, such as the depositions of witnesses, or affidavits which have been made use of or filed on former occasions.[1] The pleadings in the cause under the former practice could only be used as admissions by the party on whose behalf they were filed, and could not be made use of as evidence for or against

[3] *Ibid.*

[4] Hewes *v.* Hewes, 4 Sim. 1, as to correcting an answer by supplemental answer; see *ante*, pp. 779, 780.

[5] 72d of the Orders of 1828. The 81st of the Equity Rules of the Courts of the United States is the same.

[6] 15th Order, 1841; *ante*, p. 1061.

[7] Smith *v.* Althus, 11 Ves. 564. Where the claims set up by one of the parties against the other, are resisted on the ground of fraud, and that question is presented to the Court, and judicially determined in favor of such claims, and the case is sent to a Master to find the amount due, he is not authorized to re-examine the question of fraud. Gilmore *v.* Gilmore, 40 Maine, 50; see McCrackan *v.* Valentine, 5 Selden (N. Y.), 42. [See *infra*, 1296, n. 4.]

[1] See Gilmore *v.* Gilmore, 40 Maine, 53. By the 80th Equity Rule of the United States Courts, all affidavits, depositions, and documents which have been previously made, read, or used in the Court, upon any proceedings in any cause or matter, may be used before the Master. It is not error for a Master, at a hearing before him, to admit in evidence a deposition taken on commission out of the Commonwealth, although it does not appear that all the formalities required in depositions taken within the State were observed. The Master may exercise the same discretion the Court could in such a case. Tyng *v.* Thayer, 8 Allen, 391, 397; Stiles *v.* Allen, 5 Allen, 320; Bacon *v.* Rogers, 8 Allen, 146; Genl. Sts. Mass. c. 131, § 37.

any other party:[2] but it seems that under the present practice, the answer of one defendant may be read against his co-defendant.[3]

If the admissions already made in the pleadings are insufficient, the parties may also, as we have seen, obtain further admissions from each other by exhibiting interrogatories under the direction of the Master for their examination, the answers to which interrogatories may be read before the Master as evidence against the parties by whom they are given.

The Master may also allow any parties who are competent for that purpose, to admit any given facts to be true, and it is directed by an old order of the Court, that if, before the Master, either party, by his counsel, clerk, or solicitor, admit a matter of fact, the Master shall take a memorandum thereof, in his book of minutes, or memorandums, and the party admitting shall, in his presence, subscribe such minutes or memorandums; which subscriptions shall be conclusive to the party on whose behalf the same was so subscribed, so as the other side shall not be put to any proof of the matter.[4]

It is to be observed, that the Master ought to take the admissions of such parties only as are competent to make them, and that neither infants nor married women will be bound by admissions to their disadvantage.[5]

*The right to use the proceedings in the cause as evidence *1189 before a Master upon a reference before him, is subject to the same rules and restrictions as govern the admissibility of similar evidence before the Court. Therefore, evidence will not be admissible merely because it appears in the decree to have been taken at the hearing of the cause; for the evidence may be admissible against one defendant, or for one purpose, and not against another defendant, or for another purpose.[1]

It seems, also, that the evidence of witnesses in another cause, between the same parties, may be read before a Master without an order to warrant it,[2] though, as we have seen, such an order is necessary to authorize the reading of such depositions or proceedings before the Court at the hearing.[3] In *Lubiere* v. *Genou*,[4] however, Sir Thomas Clarke, the Master of the Rolls, made an order for the reading of the depositions in a cross-cause, on an account before the Master, directed in the original cause; but it is to be observed, that, in that case, a

[2] Hoare *v.* Johnstone, 2 Keen, 553; Kemp *v.* Wade, 2 Keen, 686, 688; Meyer *v.* Montriore, 9 Beav. 521.

[3] Ashmall *v.* Wood, 3 Jur. N. S. 232, V. C. S.; see *ante*, p. 841 *et seq.* and notes.

[4] Wyatt's P. R. 364. The propriety of adhering to this rule is exemplified by what took place in the East India Company *v.* Keighley, 4 Mad. 16, in which case the discussion before the House of Lords was principally upon the point, whether the Master's report that certain admissions were made before him, could be the subject of exception; as to which, see Lord Eldon's judgment, *ibid.*

[5] As to how far infants are bound by the acts of persons acting for them in a suit, see *ante*, p. 72.

[1] Handford *v.* Handford, 5 Hare, 212; and see Smith *v.* Althus, 11 Ves. 564; Law *v.* Hunter, 1 Russ. 101; Walker *v.* Woodward, 1 Russ. 109.

[2] Anon., 3 Atk. 524; but see Rhodes *v.* Rhodes, L. R. 1 Ch. Ap. 483, L. JJ.

[3] *Ante*, p. 868.

[4] 2 Ves. 579.

difficulty was suggested, arising from the circumstance that the cross-bill had been dismissed.[5]

All affidavits which have been previously made and read in Court upon any proceeding in a cause or matter, may be used before the Master;[6] and all evidence taken at the hearing of any cause may be used in any subsequent proceeding in the same cause.[7]

And here it is necessary to call the practitioner's attention to the fact, that, in strict practice, wherever a reference to a Master is directed by a decree or decretal order, under which it becomes necessary to establish facts by the testimony of living witnesses, such testimony ought to be obtained by examination of the witnesses, and that a Master cannot, in any case, proceed upon an inquiry before him upon affidavit, unless by consent of all parties, as the effect of proceeding upon affidavit is to deprive the other side of the power of cross-examination.[8] For this reason it is, that the Master cannot, strictly speaking, receive affidavits under a decree in which an infant is concerned.[9] And where a reference had been made to the Master, under the decree, of a question of

*1190 * legitimacy, and the Master proceeded upon affidavits obtained from America, Sir J. Leach V. C., on a motion for that purpose, directed the Master not to proceed upon the affidavits, but gave the parties liberty, under the circumstances, to apply to the Court, if by death or otherwise it should become impossible to obtain, under a commission, the evidence of the persons who had made the affidavits.[1]

It is to be noticed that the Master is required at the time appointed for considering the matter of the decree or order, amongst other things, "to point out whether the matter requiring evidence shall be proved by affidavit or by examination of witnesses;"[2] and that, in a recent case, where the Master had not at that time decided to admit affidavits, but afterwards admitted them, although they were objected to, it was held, upon exceptions to the Master's report, that, as the Master had omitted to decide, at the time of considering his decree, whether the proofs should be by affidavit or examination, the practice remained as it was before the issuing of the order, and that the exception must be allowed.[3]

It is to be observed, that, in the case last referred to, the admission of the affidavits had been expressly objected to by the opposite party. It does not appear, however, that a positive assent to reading affidavits is required; the mere circumstance that a party has allowed affidavits

[5] As to reading depositions in cross-suits, see *ante*, p. 868.

[6] 65th Order of 1828; Order, 35, 28.

[7] Order, 5th Feb., 1861, r. 15.

[8] Rowley *v.* Adams, 1 M. & K. 545; and see Willan *v.* Willan, 19 Ves. 590–593. But under the present English practice, if affidavits in the cause are subsequently made use of at Chambers, the witnesses may be cross-examined thereon. Spittle *v.* Hughes, 11 Jur. N. S. 151, V. C. K.; S. C. *nom.* Hughes *v.* Spittal, 13 W. R. 251; and see Jenner *v.* Morris, 10 W. R. 640, V. C. K.

[9] But if the infant's solicitor concurs in the use of affidavits, the infant will be bound; see *ante*, pp. 73, 74.

[1] Tillotson *v.* Hargrave, 3 Mad. 494; see Bellows *v.* Stone, 18 N. H. 465, 480.

[2] 51st of the Orders of 1828.

[3] Gibbs *v.* Payne, 4 Sim. 554. From the report of this case, it appears as if the Court considered that the 51st Order empowered the Master, at the time of considering his report, to determine upon the admission of affidavits, even where there was no consent by the other parties. *Sed quære?*

to be used without objecting to them, will be sufficient to prevent his afterwards raising an objection to the Master's report on the ground that the witnesses ought to have been examined upon interrogatories.[4]

The rule which requires the examination of witnesses upon inquiries before the Master, extends only to decrees or decretal orders, — where the reference is made by motion or petition, in that stage of the cause in which the Court proceeds upon affidavit, the Master may, it is said, do the same ;[5] and so, whenever the matters referred to a Master originate in a summary application, as in petitions in lunacy or bankruptcy, the Master proceeds by affidavit, and the same rule applies to references under petitions authorized by particular statutes where no suits are depending, as * in the case of a reference upon a petition *1191 under the stat. 52 Geo. III. c. 101, which provides a summary remedy by petition in cases of abuses of trusts created for charitable purposes.[1]

It is, however, to be observed, that where references are made to a Master upon an interlocutory motion in the cause, for preliminary inquiries, such as inquiries into titles, or into the amount of principal or interest due upon mortgage, under 7 Geo. II. c. 20, or under the General Orders of the 9th of May, 1839, the Master has the same power to examine witnesses as under a decree,[2] and that he is bound, in such cases, to settle what course he will adopt.[3]

Where, upon an inquiry before the Master, affidavits are received, then no affidavit in reply shall be read except as to new matter, which may be stated in the affidavits in answer ; nor shall any further affidavits be read, unless specially required by the Master ;[4] and the Master shall not receive further evidence as to any matter depending before him, after issuing his warrant on preparing his report.[5]

All persons who are competent to be examined as witnesses in a cause before the hearing, are competent to give evidence before the Master, upon inquiries directed by the decree, subject, however, to this distinction, that witnesses who have been examined in the cause, cannot be examined before the Master, on behalf of the same party, without an application to the Court for leave to examine them,[6] but as to persons

[4] Morgan *v.* Lewis, 1 Newl. 333. Upon reference to a Master to examine the defendant on interrogatories relative to an alleged contempt, and to take such other proof relative to the contempt as shall be produced before him by either party, the Master is not authorized to receive *ex parte* affidavits of witnesses, unless he is specially directed by the order of reference to receive such affidavits as proof. And, as a general rule, the Court will not allow *ex parte* affidavits to be used on such a reference, but will compel the parties to produce and examine the witnesses before the Master, so that they may be cross-examined by the adverse party. Cumming *v.* Waggoner, 7 Paige, 603.

[5] Sonnet *v.* Powell, Seton, 22.

[1] *Ex parte* Greenhouse, 1 Swan. 60.

[2] Order V.

[3] 51st Order of 1828. Woodroffe *v.* Titterton, 8 Sim. 238. *Quære*, whether the 51st Order, 1828, gives the Master power to settle whether he shall proceed by examination or by affidavit in all references to him, whether by decrees, decretal, or interlocutory order, or order under summary proceeding?

[4] 66th Order of 1828.

[5] 67th Order of 1828.

[6] Jenkins *v.* Eldredge, 3 Story, 308; Pearson *v.* Darrington, 32 Ala. 227; Remsen *v.* Remsen, 2 John. Ch. 495.

who were not witnesses, they may be examined without such leave,[7] and that although the same matter was in issue, and might have been, though it was not, proved before the decree.[8]

So, also, a witness, who has been examined on behalf of one party, may be examined by the other side, after decree, without an order;[9] but if he has been cross-examined as to any subject other than that concerning which he was examined in chief, an order will be necessary to enable him to be examined before the Master.[10]

The rule above stated, which requires a previous order of the Court for the examination of a witness before the Master, is founded upon the same reason which requires a special order of the *1192 * Court to authorize a re-examination of a witness before the hearing,[1] *viz.*, the danger of perjury which would be incurred by a witness deposing a second time to the same fact, after having seen where the cause pinches, and how his testimony bore upon it, and the anxiety which the Court therefore feels to prevent improper tampering with witnesses, and inducing them to retract, or contradict, or explain away what they have stated in their former examination upon a second.

For the same reason, also, the Court, although it will generally grant leave for the re-examination before the Master of a witness already examined, will put the party under the terms of having the interrogatories approved and settled by the Master, who, in so doing, will take care that the same witness is not a second time examined to the same facts.[2] It was said by Sir J. Leach M. R. in *Rowley* v. *Adams*,[3] that an order for the examination before the Master, of a witness, who has been previously examined in the cause, is in general, accompanied with a direction, that he shall not be examined to any points with respect to which he has been previously examined; but in *Vaughan* v. *Lloyd*,[4] which has been before referred to, Lord Thurlow refused to insert any such direction in the order, and expressed a doubt whether the order in *Browning* v. *Barton*,[5] in which such a direction had been given was proper. His Lordship, in support of his opinion, said: "Suppose the witness had been examined in the cause on a mere general interrogatory, under which he might have deposed to the point required, but did not, and a more particular interrogatory was exhibited to get at his testimony, I should think the Master would do right in admitting it. This matter is, therefore, to be judged of by the Master, and, if his judgment is erroneous, you may then come here to have it rectified."[6] And this appears

7 Smith *v.* Althus, 11 Ves. 564; Hough *v.* Williams, 3 Bro. C. C. 190.

8 O'Neil *v.* Hamill, 1 Hogan, 183.

9 Melford *v.* Peters, 8 Sim. 630.

10 England *v.* Downs, 6 Beav. 281.

1 Vaughan *v.* Lloyd, 1 Cox, 312.

2 Vaughan *v.* Lloyd, 1 Cox, 312; Whitaker *v.* Wright, 2 Hare, 321.

3 1 M. & K. 545.

4 1 Cox, 312.

5 2 Dick. 508; cited 1 Bro. C. C. 388, *nom.* Browning *v.* Barker, S. C.

6 In Earl *v.* Pickin, 1 R. & M. 547, the Lord Chancellor, instead of directing an issue, sent the case to the Master, directing that the Master should be at liberty to examine witnesses already examined, and to the same points; but the cause was afterwards brought on upon a motion to vary the minutes, by striking out that direction in the decree, and substituting a direction for an issue. This application was supported on the ground that the direction in the decree as to the examination of witnesses, was a violation of the

to be now the practice of the Court. But though the Master may not be positively restricted by the order not to examine the witness as to points upon which he has been before examined, he is nevertheless bound, in settling the interrogatories, to take care that they do not extend to matter embraced in his previous * examination,[1] unless he is *1193 expressly directed to examine as to such matters.

And it seems, in general, that the Court will not, by its order, sanction the Master in examining a witness already examined in the cause, as to matters upon which he has been before examined,[2] unless in cases where the first examination has failed, accidentally, and without fraud, by reason of his having been incompetent, as in *Sandford* v. ——,[3] in which case a witness had given evidence under a release executed by him, which by mere accident, did not cover a very small debt due to him, in respect of which he was interested at the time of his examination, and was, therefore, then incompetent; and the Court made an order for his re-examination before the Master, upon the same point,[4] the interrogatories to be settled by the Master.[5]

The rule restricting the second examination of witnesses to points upon which they have not previously been examined, was further extended by Sir John Leach M. R. in *Rowley* v. *Adams*,[6] who allowed a witness, who had been examined in the cause, and had afterwards made an affidavit in support of a state of facts before the Master, to be examined *vivâ voce* before the Master, upon the subject of his affidavit.

When the reason upon which the rule requiring an order of the Court for the re-examination of a witness before a Master, who has been already examined in the cause, does not exist, the rule need not be observed; thus, when the witness has been examined only to prove exhibits at the hearing, he may be examined on interrogatories before the Master, to prove other exhibits, without a special order.[7]

If a witness who has been examined in the cause is afterwards examined, by the same party, before the Master, without an order, the opposite party may obtain an order to suppress the depositions for irregularity;[8] such order, however, will, if the circumstances justify it, be made without prejudice to any application for the re-examination of the same witness.

In *Greenaway* v. *Adams*,[9] where witnesses had been re-examined before the Master without an order, but upon different points from those upon which they were examined before, an order was made, that the Master might receive the depositions in evidence. It is to be observed, however, that the application for the order was made by the direction

settled principles and practice of the Court, and would be pregnant with consequences most dangerous to justice, and the Lord Chancellor ultimately ordered that the decree should be varied, by directing an issue.

[1] Sandford v. ——, 1 Ves. J. 398.

[2] Earl v. Picken, 1 R. & M. 547.

[3] 1 Ves. J. 398; 3 Bro. C. C 370, S. C.; 2 Dick. 750, S. C.

[4] See also Callow v. Mince, 2 Vern. 472.

[5] 1 Ves. 400.

[6] 1 M. & K. 543.

[7] Courtenay v. Hoskins, 2 Russ. 253.

[8] Smith v. Graham, 2 Swanst. 264.

[9] 13 Ves. 360.

*1194 of the Master, and was not opposed; * and that Lord Eldon directed that the fact should be specially stated, that notice of the application had been given, and no objection made.[1]

When leave has been obtained by one side to re-examine before the Master a witness previously examined in the cause, if the other side is desirous of cross-examining him, and has also previously examined the witness, an order from the Court will be necessary to sanction the cross-examination.[2]

With respect to the power, which one party to the record has to examine another party as a witness before the Master, it is to be observed, that the admissibility of a party, as a witness, depends upon the same rules and principles, as the admissibility of parties to be witnesses before hearing; for information upon this part of the subject, therefore, the reader is referred to a former part of the present work;[3] it may, however, be noticed, that the rule which has been there stated, that a plaintiff cannot be examined by a defendant without his consent, appears to have been departed from, in *Hougham* v. *Sandys*,[4] where the Court gave permission to the defendants to examine one of the plaintiffs as a witness, upon the certificate of the Master, that the examination would be necessary for the better prosecuting the inquiries; but it is to be remarked, that the plaintiffs were mere trustees of a sum of money, and had filed the bill to ascertain the rights of the defendants in the same, and that, consequently, there being no doubt about the liability of the plaintiff to the payment of the money, which was admitted, and the costs of suit being payable out of the fund, the reasons which prevent the examination of a plaintiff, as a witness in ordinary cases, did not, in that case, exist.

In order to authorize the examination of a party, who has not been before examined before a Master under a decree, the same order must be obtained as is necessary to authorize the examination of a party before the hearing.[5]

In *Franklyn* v. *Colquhoun*,[6] Lord Eldon said he had always thought, that a motion for one defendant to examine another, was not a motion of course, after a decree; but in *Van* v. *Corpe*,[7] Sir J. Leach M. R., after having conferred with the Registrar, said, it appeared to be the practice of the Court that such an order might be obtained, as of course, after a decree, saving just exceptions; his Honor's decision was afterwards confirmed by the certificates of

*1195 the Secretaries to the Master of the Rolls, and of the * Registrars and Six Clerks, and has since received the sanction of Lord Langdale M. R. in *Paris* v. *Hughes*.[1]

This rule, however, will not apply where the party has been previously

[1] See Jenkins *v.* Eldredge, 3 Story, 309; 1 Hoff. Ch. Pr. 538, c. 19, § 6.
[2] Whitaker *v.* Wright, 3 Hare, 413.
[3] *Ante*, p. 885 *et seq.*
[4] 2 S. & S. 221.
[5] See Remsen *v.* Remsen, 2 John. Ch. 495.
[6] 16 Ves. 218.
[7] 3 M. & K. 278.
[1] 1 Keen, 1.

examined as a witness, in which case a special application will be necessary, as in other cases, and the Master will be directed to settle the interrogatories for the purpose of precluding the re-examination of the party to matters as to which he has been before examined.[2]

The examination of witnesses before a Master is effected, either by exhibiting interrogatories, or by *vivâ voce* questions, addressed to the witness himself in the Master's presence.[3] The former method is the old practice: the latter was introduced by the Orders of 1828,[4] under one of which, the Master has power, at his discretion, to examine any witness *vivâ voce;* and in such case, the *subpœna* for the attendance of the witness shall, upon a note from the Master, be issued at the Subpœna Office; and the evidence upon such *vivâ voce* examination shall be taken down by the Master or the Master's clerk, in his presence, and preserved in the Master's office, in order that the same may be used by the Court, if necessary;[5] and under another, the Master is at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *vivâ voce*, or in both modes, as the nature of the case may appear to him to require.[6]

When a party wishes to examine a witness before the Master, upon interrogatories, he must have the interrogatories prepared in the same way as interrogatories for the examination of witnesses in the cause.[7] They must be signed by counsel, and when prepared, they must be engrossed upon parchment, and brought into the Master's office; they are not, however, as in the case of interrogatories, for the examination of parties under the directions of the decree, settled by the Master, unless where they are directed to be so settled by the order of the Court, as in the case of witnesses to be examined, who have been before examined in the cause.[8] If they are directed to be settled by the Master, the Master must sign his allowance of them in the same manner as he signs interrogatories for the examination of parties.[9] If they are
* not to be settled by the Master, he merely marks them as *1196
brought into his office.

It seems that the reception of interrogatories for the examination, before the Master, of witnesses who are not parties to the record, or who have not been previously examined in the cause, is not, like the examination of parties, a matter in the discretion of the Master, but that he is bound to receive interrogatories from the parties tendering them, and that the circumstance that the facts, to prove which they are

2 1 Keen, 1; and see Purcell *v.* M'Namara, 17 Ves. 434.

3 See Story *v.* Livingston, 13 Peters, 359; Remsen *v.* Remsen, 2 John. Ch. 501, 502.

4 69th and 72d Orders, 1828.

5 69th of the Orders of 1828: see Herrick *v.* Belknap, 27 Vt. 695. In New Jersey, when, by a decretal order of the Court, any inquiry before a Master is directed to be made in a cause, and the examination of witnesses shall be necessary to obtain the proper information, such examination, if required by either party, shall, at the expense of the party requiring it, be reduced to writing by the Master, in the form of depositions, and returned and filed with the report. Chancery Rule 44.

6 72d of the Orders of 1828.

7 *Ante*, p. 920 *et seq.*

8 3 Bro. C. C. 190.

9 2 Smith, 151.

tendered, were in issue, and might have been proved in the cause, is not a sufficient reason for rejecting them.[1]

If the Master refuse to receive interrogatories for the examination of witnesses, the proper course seems to be to apply to the Court, by motion, that he may be directed to receive them.[2] In *Willan* v. *Willan*,[3] however, the Lord Chancellor ordered the application to stand over, at the same time directing that a petition should be presented, stating the particular circumstances, and the dates.

But, although a Master is bound to permit the examination of any witnesses before him, who have not before been examined, it is to be understood that he is only obliged to do so when the examination is proposed to be taken at a proper period of the investigation before him; he cannot receive them after other witnesses have been examined and publication passed, without a special order of the Court,[4] which will only be made upon surprise,[5] or under the same circumstances as will induce the Court to make such an order after publication has passed before hearing.[6]

It may be observed here, that according to the ordinary course of practice, the party intending to examine witnesses ought, previously to bringing in his interrogatories, to carry into the Master's office a state of facts detailing the circumstances which he intends to prove.[7]

In strictness, the examination of witnesses, after a decree, upon interrogatories, ought to be taken by one of the Examiners of the Court, who formerly examined all such witnesses as the Master thought necessary, unless the Master certified that a commission was requisite.[8] A practice, however, has grown up, which authorizes the examination of witnesses, upon interrogatories, in the Master's office, by the *1197 Master himself.[9] This practice originated * with a custom which appears to have prevailed, of inserting in the decree a direction that the Master should be armed with a commission to examine witnesses, and to direct a commission into the country, if he thought fit.[1] How it came that such a direction was inserted in the decrees of this Court, does not appear; but it seems, that it was not of course, although it was always inserted, if desired.[2]

It is clear that the Master has it in his power to examine the witnesses himself, if he thinks proper to do so, although the practice of inserting such a power in the decree, has been omitted, in this Court,

1 Hough *v.* Williams, 2 Smith, 151.

2 Hough *v.* Williams, 2 Smith, 151; see, however, Forbes *v.* Peacock, 12 Sim. 535.

3 Cooper, 291; 19 Ves. 590, S. C.

4 *Ibid.*

5 *Ibid.*

6 *Ante*, p. 955 *et seq.*

7 See Willan *v.* Willan, 19 Ves. 590; Cooper, 291, S. C.; Trezevant *v.* Frazer, MSS., V. C., 7 Aug., 1833; *post*, 1199, note.

8 Parkinson *v.* Ingram, 3 Ves. 603.

9 When a cause in a divorce suit is referred to a Master, it is irregular to examine a witness before another Master. Cook *v.* Cook, 2 Beasley, Ch. 263.

1 Parkinson *v.* Ingram, 3 Ves. 603; Seton, 12. By the 77th Equity Rule of the United States Courts, the Master may order the examination of witnesses not produced before him to be taken under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the Act of Congress. See Parkinson *v.* Ingram, *supra*.

2 Parkinson *v.* Ingram, 3 Ves. 607; see Beames's Ord. 218, 285.

for above a century.[3] The examination of witnesses upon interrogatories, by the Master himself, appears however, to be of rare occurrence;[4] and when the Master does think it right to adopt this course, he is bound to examine all the witnesses himself, and he must not permit the examination to be taken by his clerk.[5] He must also examine the witnesses upon every item of every interrogatory that is exhibited before him,[6] in the same manner as the Examiner; the depositions should also be kept by him, and are not to be made known to the parties till the conclusion; *i.e.*, the publication.[7]

If the witnesses, or any of them reside above twenty miles from London, they may be examined by commission. Such commission, however, can only be obtained upon the Master's certificate, that it is necessary;[8] but it seems that the Master's certificate is all that is requisite to obtain an order for a commission either abroad or in this country;[9] and if issued without such certificate, it will be irregular.[10] It seems that an exception does not lie to this certificate, but that, if it is improperly granted, a motion may be made to discharge the order for the commission.[11]

After publication of the depositions, upon a reference to a Master, a new witness cannot be examined without a special order to warrant it,[12] which will only be granted upon the same grounds as those upon which the further examination of witnesses after publication is permitted before the hearing.[13]

We have seen, however, that by the 69th of the above Orders, *the Master is now empowered, in his discretion, to examine any witnesses *vivâ voce*.[1] It does not appear to have been positively decided, whether the discretion given to the Master, by this Order, is limited by the rules before laid down with regard to the examination of witnesses who have been before examined; but in *Rowley* v. *Adams*,[2] where the question arose upon the Master's refusal to examine a witness *virâ voce*, who had been previously examined in the cause, the Master of the Rolls seems clearly to have recognized the rule, that a witness who had been examined in the cause cannot be re-examined before the Master, without an order, as applying to a *vivâ voce* examination, as well as to an examination upon interrogatories, and made an order accordingly. And it seems also that where witnesses have been examined under a decree, and publication has passed,

[3] Sandford *v.* Biddulph, 9 Ves. 36.
[4] Handley *v.* Billings, 1 Sim. 511.
[5] Parkinson *v.* Ingram, 3 Ves. 603.
[6] Beames's Ord. 285.
[7] Willan *v.* Willan, 19 Ves. 593.
[8] Parkinson *v.* Ingram, 3 Ves. 603.
[9] Bamford *v.* Bamford, 2 Hare, 642.
[10] Bearcroft *v.* Berkeley, 2 Cox, 108.
[11] Chaffen *v.* Wills, 1 Dick. 377; but see Chennell *v.* Martin, 4 Sim. 342; and *post*, as to exceptions to Master's report.
[12] Willan *v.* Willan, 19 Ves. 594; Winpenny *v.* Courtney, 5 Sim. 554. This extends to the examination of a witness *vivâ voce*. Trotter *v.* Trotter, 5 Sim. 538; Burgess *v.* Wilkinson, 7 R. I. 31, 32.
[13] *Ante*, p. 955 *et seq.*; Burgess *v.* Wilkinson, 7 R. I. 31, 32.
[1] See *ante*, pp. 1194, 1195.
[2] 1 M. & K. 543, *supra*.

the Master is under similar restrictions as to the examination of witnesses *vivâ voce*.[3]

In order to compel the attendance of a witness to be examined *vivâ voce* before the Master, a *subpœna* may be sued out in the same manner as an ordinary *subpœna*, upon a note from the Master.[4] The form of the *subpœna* is pointed out by the Orders of 1845.[5]

A party wishing to examine a witness *vivâ voce*, must take out a warrant for that purpose, underwritten, — "To examine A. B. *vivâ voce*, before the Master," which must be served upon the solicitor for the opposite party.[6] If a *subpœna* is necessary, he must serve one upon the witness, with the usual note fixing the time of his attendance at the return of the warrant; at which time the parties must attend the Master, together with the witness. The party calling the witness examines him, and the other party cross-examines him, and the Master asks such questions as he thinks proper, the questions not being put from written interrogatories.[7]

It may be observed here, that as the examination *vivâ voce*, takes place openly, before the parties, their counsel, or solicitors, the evidence given is fully known, at the time, to the parties interested, and therefore no formal publication of it is necessary.

*1199 * *State of Facts.*[1]

The attention of the reader has been drawn to the necessity there exists for a party, who intends to examine witnesses before a Master under a decree, to carry in a state of facts, detailing the circumstances which he proposes to prove; but as a state of facts is frequently required for other purposes than that of affording a foundation for the examination of witnesses, and is the general form by which the prosecution of every reference to a Master is commenced, it will not be superfluous in this place to devote a few lines to the consideration of its nature, and of the practice arising out of it.

A state of facts, as its name imports, is a statement in writing, made by a party who wishes to prosecute or resist any inquiry before a Master, of the facts and circumstances upon which he relies, either in support of his own cause, or in contradiction or defeasance of that of his ad-

[3] Trotter *v.* Trotter, 5 Sim. 338. The objection in this case was upon two grounds: 1st, because the witness had been examined after publication; and 2d, because, under the 67th Order, the Master could not receive any further evidence. Burgess *v.* Wilkinson, 7 R. I. 31, 32.

[4] 69th Order, 1828. The 78th Equity Rule of the United States Courts provides for the authority of the Master to compel the attendance of witnesses and the mode of proceeding by attachment for contempt, in refusing to attend or to testify.

[5] See *ante*, pp. 906, 907.

[6] 2 Smith, 162, 3d ed.

[7] *Ibid.*

[1] Under the present English practice, in proceedings in the Judge's Chambers, no states of facts, charges, or discharges are brought in; but, when directed, copies, abstracts, or extracts, of or from accounts, deeds, or other documents, and pedigrees and concise statements, must be supplied for the use of the Judge and his Chief Clerks, and, where so directed, copies must be handed over to the other parties; no copies, however, are to be made of deeds or documents where the originals can be brought in, unless the Judge otherwise directs. Ord. XXXV. 26.

versary. It is, in effect, the "pleading" *of the party before the Master*, and is governed by nearly the same rules and principles as pleadings in the Court, although, not being signed, nor, in general, prepared by counsel, they are not always so strictly observed. A state of facts, however, must be pertinent to the matter, and must not, any more than any other proceeding in the cause, contain any scandal; and if it is either scandalous or impertinent, the scandalous or impertinent matter may be expunged, in the manner which will be presently pointed out.[2] A state of facts is intituled in the cause, and contains a detail of the facts and circumstances intended to be relied upon by the party: when the party carrying in the state of facts, makes any claim upon the fund in Court, it is usual to conclude the statement with the particulars of the claim in the manner of a prayer for relief to the bill, as follows: "And the said A. B., therefore, claims, &c.," in such case the proceeding is called "a state of facts and claims." When the object of the party is to charge another with the receipt of money, &c., the state of facts concludes with a charge in the following form: "And the said A. B., therefore, charges, &c.," in such case the proceeding is called "a state of facts and charge." It may be remarked, that a charge is not always preceded by a state of facts, but if the matter appears from any admission in any account, or * examination or pro- *1200 ceeding in the Master's office, and requires no other proof in support of it, it is usual to make "a charge" only.[1]

When a state of facts is prepared, it is carried into the Master's office, and a warrant "on leaving" must be served upon the other parties, who may then apply for and obtain copies from the Master's clerk, and if they have a counter state of facts to leave, they must proceed in the same manner.

It is usual to add to a state of facts, a sort of petition, that the party may be at liberty to add to, alter, or vary the state of facts, as he may be advised; and it is presumed, that such form was originally considered necessary, to enable the party to amend his state of facts, after it has been delivered in. It is, however, now an unnecessary form, as a state of facts may be amended at any time, or a further state of facts carried in, upon leaving which, a warrant, "on leaving" should be taken

[2] Whether a Court of Chancery will reject a state of a case, parts of which are printed in italics, is a question for the discretion of the Court. Cooper *v.* Cooper, 1 Stockt. (N. J.) 655.

[1] In Vermont, every charge, discharge, or statement of facts, brought in before a Master, shall be verified by oath as true, either positively or by information, and belief. Equity Rule, 41, 11 Vt. 699.

Form of State of Facts on a reference to make inquiries: —

"W. G. *v.* D. H. The plaintiff insists that upon the reference in this cause before M. H., one of the Masters of this Court, to ascertain what would have been the net value of the goods in the pleadings mentioned as the proceeds of the ten thousand dollars therein also mentioned, if sold for cash at any time between the twenty-fifth day of May, A. D. 1830, and the twenty-eighth day of June, A. D. 1861, or if sold for approved notes on a credit usual or customary in the city of New York in respect to such goods, that such goods ought to be charged and considered as worth between the dates above-mentioned, if sold in the terms above-mentioned, respectively as follows; and that they ought to be charged with freights, duties, storage, and other necessary and proper charges and expenses as follows, to wit." (*Here set forth an account of the items and values.*)

out and served, as when an original state of facts is left. In the case of *Earl Nelson* v. *Lord Bridport*,[2] Lord Langdale M. R. had occasion to determine, whether it was regular for a party to take in an amended state of facts, after his opponent had completed his examination of witnesses, but before publication had passed; and he came to the conclusion, that such a proceeding was regular, and accordingly he refused a motion seeking either to suppress the amended state of facts, and the commission issued thereon, or to impose terms upon the party who had adopted such a course.

Of Scandal and Impertinence in the Proceedings.

The reader's attention has been already directed to the necessity for excluding scandal and impertinence from examinations and state of facts before a Master, and the same necessity exists with reference to affidavits, and to all other proceedings in the Master's office.[3]

If a party wishes to complain of any matter introduced into any state of facts, affidavit, or other proceeding *before the Master*, on *1201 * the ground that it is scandalous or impertinent, he is at liberty, *without any order of reference by the Court*, to take out a warrant for the Master to examine such matter; and the Master has authority to expunge any such matter as he shall find to be scandalous or impertinent.[1] The proper course of proceeding is for the Master, having been called upon by warrant to look into the state of facts, &c., to ascertain whether there is any impertinent or scandalous matter in it, to make his report to the Court, in the same manner that he did under an order of reference, for the purpose of affording the other side an opportunity of taking the opinion of the Court, by excepting to his report, and then, if he reports that there is scandal or impertinence, and no exceptions are taken, to proceed under another warrant to expunge the scandalous or impertinent matter, in the same manner that he did upon the second order under the old practice.[2] And it seems that this is the construction put upon the 73d Order by the V. C. of England, who, in a case,[3] where the Master was of opinion, that the matter complained of was not impertinent, directed that a certificate should be issued in order that the question might be brought before the Court.

It is to be observed that, under this practice, care must be taken to file the exceptions to the Master's report, immediately upon the report being filed, or at least before the time arrives for attending the warrant to expunge; because, after the expunging has taken place, there is no longer any matter upon the record as to which the Court can form an

2 6 Beav. 293.

3 For the nature of scandal and impertinence, see *ante*, p. 347.

1 Orders of 1828, Rule 73.

2 This is nearly the course of proceeding pointed out by the Orders of 1845, *ante*, pp. 350–354; but the operation of these orders is expressly limited to references of answers, or other pleadings or matters depending *before the Court*.

3 Phipps *v.* Henderson, 10 Sim. 634.

opinion.[4] The 38th Order of 1845, which requires exceptions in writing to be taken and signed by counsel, in cases of scandal or impertinence, applies only to pleadings or other matters depending *before the Court*, and not to matters in the Master's office; it is not, therefore, necessary in proceeding upon scandal or impertinence in matter before the Master, to take exceptions in writing. It is presumed, however, that if the Master certifies that there is no scandal or impertinence in the matter before him, and exceptions are taken to his certificate, it is incumbent upon the party excepting to point out, by his exceptions, in what particular parts the matter is scandalous or impertinent, in the same manner as was formerly done in the cases of exceptions to the Master's report upon reference for impertinence in pleadings and other matters before the Court.[5]

The 42d Order of 1845, which enables the Master, in case of a reference for scandal or impertinence, to direct by whom the costs * are to be paid, applies only to pleadings or other proceedings *1202 *before the Court;* in the case of inquiries as to scandal or impertinence in proceedings in the Master's office, the Master has no power to tax the costs without an order to that effect; it seems, therefore, that after the Master has reported that he has found scandalous or impertinent matter, and has expunged it, the successful party should move for the costs occasioned by the scandal or impertinence.

Allowance Pending Litigation.

Whenever any real or personal property forms the subject of any proceedings, and the Court is satisfied that the same is more than sufficient to answer all the claims thereon which ought to be provided for in such suit, it may, at any time after the commencement of the proceedings, allow to any of the parties interested the whole or part of the annual income of such real property, or a part of such personal property, or a part of the whole of the income thereof, up to such time as the Court shall direct; and may, for that purpose, make such orders as may appear to be necessary or expedient.[1] The application for the allowance is made by summons;[2] and, in general, it will not be granted unless there is some pressing reason for making the allowance, and the Court can see that the parties are clearly entitled.[3] Where the property is personal estate, the executors will also be required to admit assets.[4] Where the object of the suit was to charge a married woman's separate

[4] See Wadman *v.* Birch, 3 Swanst. 230, n.; David *v.* Williams, 1 Sim. 17; Norway *v.* Rowe, 1 Mer. 135.

[5] See Craven *v.* Wright, 2 P. Wms. 181; but see Mackworth *v.* Briggs, 2 Atk. 182.

[1] 15 & 16 Vic. c. 86, §§ 51, 57. For similar orders, under the former practice, see Dando *v.* Dando, 1 Sim. 510; Thomas *v.* Montgomery, 1 R. & M. 729; 2 Sim. 348; Coster *v.* Coster, 1 Keen, 199; Shewell *v.* Shewell, 2 Hare, 154; Digby *v.* Boycott, 4 Hare, 444; Abby *v.* Gilford, 11 Beav. 28; Moffat *v.* Burnie, 16 Beav. 298; see Rockwell *v.* Morgan, 2 Beasley, Ch. 119.

[2] Bentley *v.* Craven, 1 W. R. 362, M. R.

[3] Rowley *v.* Burgess, 2 W. R. 652, V. C. K.

[4] Knight *v.* Knight, 16 Beav. 358.

estate with the value of timber cut by her, she was allowed the whole income: having first given security for the value of the timber.[5]

Inquiries as to Heirs-at-Law, next of Kin, Creditors, &c.

Having directed the reader's attention to the general nature of the proceedings before the Master, and to the powers with which the Master is invested to enable him to perform the duty imposed upon him by the order of reference, it becomes necessary now to point out the course to be pursued in the Master's office, upon the particular reference before him. The objects, however, for which references to a Master may be made, are so numerous and various, that it would be impossible, in a Treatise of this nature, specifically to detail the course of *1203 proceeding which should be adopted * in each; all that can be done, therefore, on the present occasion, is, to direct the practitioner to the practice in the Master's office, upon some of the most usual subjects of reference, from which he will be able, by analogy, to guide his steps upon others which are not of such frequent occurrence.

References to the Master upon decrees or decretal orders, are either: 1. To make inquiries; 2. To take accounts and make computations; or, 3. To perform some special ministerial acts directed by the Court.

Inquiries by the Master are directed either to persons or to facts, though sometimes they are directed to matters of Law; but it is, in general, in those cases only where the Law comes in as a matter of fact, as in the case of an inquiry into the Law of a foreign country, that the Master is ever directed to inquire into the Law, the habit of the Court not being to refer abstract questions of Law to the opinion of the Masters.[1] Sometimes, however, questions of Law are so mixed up with the fact to be ascertained, that it is not possible to decide upon the one without giving an opinion as to the others. In such case, the Master is bound to give his opinion upon the Law, as well as upon the matter of fact referred to him; as in the case of a reference to a Master to inquire whether a good title can be made to land, &c.

The most usual cases in which inquiries as to persons are directed to be made by a Master, are those in which it is necessary to ascertain the heir-at-law or next of kin of a deceased person. The same sort of inquiry is also frequently directed for the purpose of ascertaining the members of a particular class, such as grandchildren, or cousins of a person deceased, or the persons entitled to a share of prize-money.[2] A similar inquiry is also necessary where it is referred to the Master to take an account of the debts of any person, such account involving,

[5] Stacey *v.* Southey, 1 Drew. 400.

[1] Seton, 50; see Prichard *v.* Norris, 10 Hare Ap. 52; Duffield *v.* Denny, 1 W. R. 74, V. C. T.

[2] Good *v.* Blewitt, 19 Ves. 336; and see Brett *v.* Carmichael, 1 W. N. 103; 14 W. R. 507, M. R.

necessarily, an inquiry who the creditors are, as well as into the amount of their claims.[3]

It may be noticed, with reference to inquiries of this nature, that in almost every decree by which they are ordered, it forms a part of the usual directions, "That the Master shall cause advertisements to be published in the London Gazette, and such other public papers as he shall think fit, for next of kin [4] [or for the creditors of the said A. B.], [5] to come in and make out their kindred [or * prove the *1204 debts], and that he shall fix a peremptory day for that purpose, in default of which they are to be excluded the benefit of the decree."

Where such a direction occurs, the first proceeding to be taken is to apply to the Master's office for an advertisement for persons claiming to be heir-at-law, or next of kin, or creditors to come in,[1] which, having been obtained and signed by the Master, is taken to the publisher of the London Gazette for insertion, copies of it having been previously made for insertion in some of the daily morning or evening papers, as the Master shall direct.[2] Where the individual, whose debts or next of kin are to be inquired into, died in the country, it is usual to have the advertisement inserted in one or more of the provincial papers where he died; and should he have died in any of the colonies, the Master usually requires evidence of similar advertisements having been inserted in the Colonial Gazette or other newspapers of the place.[3]

In about a month's time from the insertion of this, a second advertisement is obtained from the Master's office, and inserted in the Gazette and other newspapers as before, which is called a *peremptory* advertisement, limiting the day for the creditors or next of kin, &c., to come in and establish their claims.[4] In the case of advertisements in the East Indies or colonies the first is always peremptory.[5]

This limitation of the day is made in compliance with the usual direction in the decree, which, as we have seen, directs that parties who do not come in and prove their debts, or otherwise establish their claims before it arrives, shall be excluded the benefit of the decree.[6] It seems,

[3] The 45th Order of August, 1841, has established it as a general rule, "That every decree for an account of the personal estate of a testator or intestate, shall contain a direction to the Master to inquire and state to the Court what parts (if any) of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct."

[4] Seton, 72.

[5] *Ib.* 51.

[1] If more than one of these inquiries are directed by the decree, separate advertisements are inserted for each.

[2] Bennett, 49.

[3] Bennett, 50.

[4] *Ibid.*

[5] 2 Smith, 121, 3d ed. Under the present English practice, only one advertisement, which is peremptory, is issued for the purpose of any proceeding in Chambers; unless, for any special reason, it is thought necessary to issue a second advertisement, or further advertisements. Ord. XXXV. 35.

[6] It appears that the direction for exclusions has been extended to legatees. Seton, 65. This, however, is incorrect; and in Anon., 9 Price, 210, Lord Ch. Baron Richards observed, that the reason why creditors are excluded, unless they should come in within a limited time, is, because they could not be known to the Court or ascertained, unless they should appear, and parties interested were not to be delayed by the *laches* of the creditors. The same observation will apply to next of kin, but not to legatees, unless they constitute a class, to ascertain which it is necessary to have recourse to advertisements, in which case there must be a direction for exclusion.

however, that notwithstanding this peremptory direction, no objection can be offered to the reception of a charge or claim, by the Master, provided the same is left before the warrant on preparing the report has been issued.[7] And that, afterwards, although such charge cannot be entertained by the Master, the Court will let in creditors, or *1205 next of kin, at any time while * the fund is in Court.[1] A creditor or other claimant desirous of coming in before the Master to prove his debt or to establish his claim, after a report has been made, must present a petition, stating the reason of his not having come in within the time limited by the advertisement, and praying to be at liberty now to establish his claim;[2] this petition must be supported by the affidavit of the claimant; and must be served on the parties to the cause.[3] The claimant must be able to prove that he has not been guilty of *laches*.[4] If the claimant resides out of the jurisdiction he may be ordered to give security for costs.[5]

As a general rule, the applicant in such cases will be ordered to pay the costs of the application. The other terms and conditions on which he will be allowed to come in will, of course, depend on the circumstances of each particular case. Thus, where the money had been apportioned amongst the creditors (the assets being deficient), and transferred to the Accountant-General, to pay them and the costs of the suit, a creditor, who swore that he was not aware of the decree, was allowed to come in and prove his debt, upon payment of the costs of the application, and the expense incident to the reapportionment of the property amongst the creditors.[6] And where the creditors, who had proved, had been paid their debts, and the residue had been ordered to be apportioned amongst the legatees, and some of them had received the shares due to them on account of their legacies, and the remainder had been carried over to the account of the other legatees, Lord Eldon held, that a creditor who subsequently obtained leave to come in and prove his debt, was not entitled to receive the whole of his debt out of the funds of the other legatees remaining in Court, but only such part of it as should bear the same proportion to the whole, as the legacies given to those legatees bore to the whole amount of the lega-

[7] 2 Smith, 283, 3d ed.; Wilder *v.* Keeler, 3 Paige, 164.

[1] Lashley *v.* Hogg, 11 Ves. 602; Hartwell *v.* Colvin, 16 Beav. 140; Montifiori *v.* Browne, 7 H. L. Cas. 241; 4 Jur. N. S. 1201; and see Knierim *v.* Schmauss, 8 Jur. N. S. 692; 10 W. R. 860, V. C. S.; Pratt *v.* Rathbun, 7 Paige, 271. In practice an order is made limiting a time within which claims shall be presented and proved, in order to facilitate the proceedings, and to promote despatch in the settlement of the estate. But no creditor thereby obtains a vested right to a certain dividend to the exclusion of others. Grinnell *v.* The Merchants' Ins. Co., 1 C. E. Green, 283. [*Ex parte* Naylor, 11 Rich. Eq. 250; Burchard *v.* Phillips, 11 Paige, 70. And persons having a *primâ facie* claim are entitled to be heard at any time before actual distribution. Matter of Howard, 9 Wall. 175; Hurley *v.* Murrell, 2 Tenn. Ch. 620.]

[2] 2 Smith (3d ed.), 286; Seton, 138, 139, Nos. 8, 9. This application has sometimes been made on motion with notice. See Angell *v.* Haddon, 1 Mad. 529; and it has also been entertained on summons. See Halliley *v.* Henderson, 4 Jur. N. S. 202, V. C. S.; Hull *v.* Falconer, 11 Jur. N. S. 151, V. C. K.

[3] Seton, 138, 139, Nos. 8, 9.

[4] Cattell *v.* Simons, 8 Beav. 243; 9 Jur. 418; Hull *v.* Falconer, 11 Jur. N. S. 151, V. C. K.

[5] Drever *v.* Maudesley, 5 Russ. 11.

[6] Angell *v.* Haddon, 1 Mad. 530.

cies given by the will. His Lordship, however, reserved permission to the creditor to apply to the Court, as he might be advised, against such of the legatees as had received payment on account of their respective legacies; and directed that he, and the legatees out of whose funds he was to be paid in part, should be at liberty to apply * to *1206 the Court, according to their respective rights and interests, with regard to the testator's estate remaining outstanding, as and when the same should be gotten in and received.[1]

It is to be observed, that when a decree directs inquiries as to next of kin, creditors, &c., with directions that the Master shall fix a day, &c., after which all persons will be excluded the benefit of the decree, it is not usual for the Master, in his report, to notice any creditors except those who come in under the decree. He merely states the claims which have been proved, taking no notice of the possible claims of others, who, whether entitled or not, did not come in.[2] Where, however, under a decree directing an account of the proceeds of a prize (pronounced upon a bill filed by one partner on behalf of himself and all the others), in which an inquiry was directed as to who were entitled with the plaintiff to the produce, and in what shares, the Master reported, not only the claims brought before him, but the names of persons, who, though they had not come in, were nevertheless considered by him entitled to shares of the fund; Sir W. Grant M. R., on further directions, decreed an account to be taken, not only of what was due to those who had come in, but of what sums had been paid by the defendant, before the suit was instituted, to the other persons who were reported to be entitled to shares, but who had not come in, and of what remained in the hands of the defendant, beyond what had been so paid him; and Lord Eldon appears to have considered that this decree was right, under the special circumstances of the case; but he directed further advertisements to be issued, for the purpose of bringing before the Court the persons who had not come in under the decree.[3]

The distribution of property, under the decree of the Court, amongst persons found by the Master's report to be entitled, does not, however, conclude the rights of persons who have an equal or paramount title to those amongst whom the distribution has taken place;[4] such persons are only precluded from taking the benefit of the decree under which the distribution has been made; and they may, notwithstanding that decree, file another bill against the persons who have taken the

[1] Gillespie *v.* Alexander, 3 Russ. 130, 139; see as to this case, David *v.* Frowd, 1 M. & K. 210; Williams *v.* Gibbes, 17 How. U. S. 255, 256; where, however, in a creditor's suit, leave had been given in Chambers to a creditor to prove her debt, the Court, on the ground of *laches*, refused a motion to stay the payment of a fund in Court till she had established her claim, the fund having been apportioned among the creditors who had proved. Hull *v.* Falconer, 11 Jur. N. S. 151, V. C. K.; see also, for conditions on which the order will be made, Greig *v.* Somerville 1 R. & M. 338; Brown *v.* Lake, 1 De G. & S. 144, 150; Seton, 138, 139, Nos. 8, 9.

[2] Good *v.* Blewitt, 19 Ves. 336.

[3] Good *v.* Blewitt, 19 Ves. 336, 338, 339.

[4] See David *v.* Frowd, 1 M. & K. 200; Gillespie *v.* Alexander, 3 Russ. 130; Sawyer *v.* Birchmore, 1 Keen, 391.

*1207 property under it, to compel them * to refund.[1] Such a suit, however, can only, after a distribution under a decree, be instituted against the parties who have partaken of the distribution. It cannot be instituted against the executor, or administrator, or other person who, having fairly represented every thing to the Court, has acted under its direction in distributing the fund, for the Court will not permit a party who has acted in pursuance of its decree in distributing a fund, to be afterwards charged for what he has done under its directions;[2] and therefore, after a distribution of assets has taken place under a decree ascertaining the rights of legatees (in pursuance of which advertisements have been published for all persons interested to come in and prove their claims before the Master), a bill filed by a legatee against the executor, to render him liable for what has been distributed under the decree, will be dismissed, although it appears that the legatee filing the bill was ignorant of the former decree and proceedings.[3]

Although a party making a distribution under a decree will be protected in what he has done, and the Court will compel parties, claiming a share in the distribution by a new suit, to admit the demand ascertained under its authority in the old suit, to be a just demand, to the extent allowed by the Court in the administration of assets, such parties will not be bound by any account of the assets taken under a decree made in a suit instituted by a single creditor, not on behalf of himself and others.[4] A creditor, therefore, or a legatee, who is entitled to the assets of a deceased debtor or testator, after payment of the debts, &c., may, after a decree in such a suit, to which he was not a party, institute another suit against the personal representative for an account of

*1208 the assets; * and, although in prosecuting the accounts of such suit, such creditor or legatee will be compelled to allow the demands admitted by the Court in the former suit, he will not be bound

[1] In Williams *v.* Gibbes, 17 How. U. S. 239, 255, Nelson J. said: "Now, the principle is well settled in respect to these proceedings in Chancery for the distribution of a common fund among the several parties interested, either on the application of the trustee of the fund, the executor or administrator, legatee, or next of kin, or on the application of any party in interest, that an absent party, who had no notice of the proceedings, and not guilty of wilful *laches* or unreasonable neglect, will not be precluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator; or, in case they have distributed the fund in pursuance of an order of the Court, against the distributees." See Shine *v.* Gough, 1 B. & B. 436; Finley *v.* Bank of U. S., 11 Wheat. 304; Story Eq. Pl. § 106; Wiswall *v.* Sampson, 14 How. U. S. 52, 67.

Where the subject-matter for distribution was the property of an insolvent corporation, it was held, that the fact, that the petitioner, who was a creditor, and showed a reasonable excuse for not presenting his claim within the time limited by the order, was an officer of the corporation, and that the proceedings to establish its solvency were instituted in his name, could not prejudice his right to be let in to prove his claim. Grinnell *v.* The Merchants' Ins. Co., 1 C. E. Green, 283.

[2] Gillespie *v.* Alexander, *ubi supra;* Gaunt *v.* Taylor, 2 Hare, 413; Underwood *v.* Hatton, 5 Beav. 36, 40; Dean *v.* Allen, 20 Beav. 1; Waller *v.* Bassett, 24 Beav. 413, 417; 4 Jur. N. S. 128; Thomas *v.* Griffith, 2 Giff. 504; 2 De G., F. & J. 555; 7 Jur. N. S. 293; Bennett *v.* Lytton, 2 J. & H. 155; Williams *v.* Headland, 4 Giff. 505; 10 Jur. N. S. 384, V. C. S.; Micklethwaite *v.* Winstanley, 13 W. R. 200, L. JJ.

[3] Farrell *v.* Smith, 2 B. & B. 337; see also Pooley *v.* Ray, 1 P. Wms. 355; Brooks *v.* Reynolds, 1 Bro. C. C. 183; 2 Dick. 603, S. C.; and Douglas *v.* Clay, 1 Dick. 393; Kenyon *v.* Worthington, 2 Dick. 668.

[4] Ld. Red. 166, 171.

by any account of the property taken in his absence.[1] This, however, is confined to cases in which the first suit was instituted by a single creditor, for the payment of his own demand alone, and is not applicable to cases in which the original decree was made in a suit instituted by a creditor, on behalf of himself and others, for a general administration of assets.[2]

But although the distribution of property, under a decree of the Court, amongst persons found to be entitled, does not conclude the rights of persons who have an equal or paramount title, yet where, under a decree in a suit against an executor, a debt has been claimed to be due from the estate of the testator, and the claim has been fully investigated and disallowed, the alleged creditor cannot afterwards maintain a suit to enforce the claim against the residuary devisees or legatees.[3] Nor will the Court assist persons who, with full notice of the proceedings in the suit wherein the fund was distributed, have neglected to prosecute their claims.[4]

Where a person, who has not come in under a decree, seeks to compel those who have benefited by the distribution which has taken place under the decree to refund, he cannot proceed against one only for the whole amount of his demand, but he must proceed against them all, in order that they may all be compelled to contribute in proportion to what they have received;[5] and upon this principle the Court acted in *Greig* v. *Somerville*,[6] and in *Gillespie* v. *Alexander*,[7] before referred to,[8] where a partial distribution had taken place under the decree, amongst some of the legatees, and there were left in Court certain funds, which were directed to be appropriated to the legatees who had not been paid, and afterwards a creditor obtained permission to go in before the Master, to prove his debt, which he proved accordingly. Lord Eldon was of opinion that the creditor was only entitled to take out of the fund in Court, which had been appropriated to the payment of the unpaid legatees, such a proportion of his debt as the amount of the legacies unpaid bore to the other legacies which had been paid.[8]

* *Claims.* *1209

A person coming in to claim, under a decree, whether as heir or as next of kin, or creditor, or as an individual belonging to a class, must commence by bringing into the Master's office a state of facts, detailing the particulars of his case and the circumstances under which his claim

[1] Lord Red. 166, 171.
[2] David *v.* Frowd, 1 M. & K. 200.
[3] Per L. J. Turner, in Thomas *v.* Griffith, 2 De G., F. & J. 562; but see Teed *v.* Reese, 5 Jur. N. S. 381; 7 W. R. 394, V. C. S.
[4] Sawyer *v.* Birchmore, 1 Keen, 391, 825; see also Cuttell *v.* Simons, 8 Beav. 243; 9 Jur. 418; Hull *v.* Falconer, 11 Jur. N. S. 151, V. C. K.
[5] David *v.* Frowd, 1 M. & K. 200; and see Todd *v.* Studholme, 3 K. & J. 325, 341, for form of decree, and principles on which the Court acts, as to costs in such cases.
[6] 1 R. & M. 338.
[7] 3 Russ. 130.
[8] See Williams *v.* Gibbes, 17 How. U. S. 255, 256. [So, where there has been a distribution of assets among creditors, and new assets come in. Ashley *v.* Ashley, 1 Ch. Div. 243.]

arises.[1] This state of facts, in the case of a creditor coming in under a decree to prove against his debtor's estate, must be accompanied by an affidavit, from the claimant, that the debt remains due.[2] Such affidavit, however, is not intended as evidence to the Master, in proof of the debt, and must not be used by him as such.[3] "The meaning of the practice is, that a person shall not come here and claim a debt, without giving that assurance that it is due, which arises from his affidavit, which also, if the debt is contested, affords a protection against the conclusion from other evidence that it is due, when the contrary may be within the knowledge of the party himself; but where the debt is contested, no attention is to be given to the affidavit."[4]

It may be mentioned here, that, where an account of debts is directed, the plaintiff, if a creditor, must prove his debt in the proceedings under the decree; although he has established his right to the decree.[5]

The state of facts and charge or claim being left, a warrant "on leaving must be served," followed by the usual warrant "to proceed." If the claim is disputed, it must be investigated before the Master, for which purpose the Master has, as we have seen, the power of examining the claimant, either upon interrogatories or *vivâ voce*, or in both modes, as the nature of the case may require.[6]

The ordinary practice, however, under decrees for the admin-
*1210 istration * of assets, is to examine creditors upon a general set of interrogatories, as they bring in their respective claims; though a particular creditor may be examined on a particular set of interrogatories to meet his case;[1] in either case, it seems that the interrogatories must be settled by the Master.

If it should be found necessary to examine any witness, either for or against the claim, such witness may be examined, either upon interrogatories or by the Master *vivâ voce*, at his discretion, as before pointed out.

[1] Creditors of small sums of 20*l.* or 25*l.* apiece or under, are allowed to join in one charge, but separate affidavits by each creditor, in support of their respective debts, are required. 1 T. & V. 365.

[In Tennessee, in administration suits, the claimant becomes an actual, instead of a *quasi* party, by petition and answer. Reid *v.* Huff, 9 Humph. 345.]

[2] Burroughs *v.* Elton, 11 Ves. 33; Fladong *v.* Winter, 19 Ves. 199; Morris *v.* Mowatt, 4 Paige, 142. A claimant is entitled to the production of all documents in the possession or power of any of the parties in the suit, relating to his claim; and, conversely, the parties are entitled to the like production of documents in his possession. *Re* M'Veagh, M'Veagh *v.* Croall, 1 De G., J. & S. 399, 406; 9 Jur. N. S. 240; Newland *v.* Steer, 11 Jur. N. S. 596, V. C. K.; *Re* Pine, Pine *v.* Ellis, M. R. in Chambers, 18 Nov., 1863. If the claim has been supported by documents suspected to have been forged, the claimant may be ordered to leave them with the Chief Clerk, for examination by an expert. Leave will, however, be given to the claimant's solicitor to be present at the examination. Groves *v.* Groves, Kay Ap. 19; see Boyd *v.* Petrie, L. R. 5 Eq. 290.

[3] Burroughs *v.* Elton, 11 Ves. 33.

[4] Per Lord Eldon, in Fladong *v.* Winter, *ubi supra.*

[5] Seton, 129; Owens *v.* Dickenson, C. & P. 48, 56; Woodgate *v.* Field, 2 Hare, 211, 213; Whitaker *v.* Wright, 2 Hare, 310, 314; Graves *v.* Wright, 2 Dr. & War. 77, 79; Field *v.* Titmuss, 1 Sim. N. S. 218; Nichols *v.* Nichols, 10 W. R. 598, V. C. S.; Newman *v.* Norris, 1 Dick. 259.

[6] *Ante*, p. 1187; 81st of the United States Equity Rules. Upon a reference to ascertain the right to surplus moneys upon a mortgage sale, the Master may examine the claimants upon oath, touching their respective claims. Hulbert *v.* McKay, 8 Paige, 652; Whitaker *v.* Wright, 2 Hare, 310.

[1] 1 Newl. 333; 1 T. & V. 366.

It seems, however, that in supporting charges in the Master's office, the strict rules of evidence are, by mutual understanding, frequently dispensed with, and that bonds, deeds, notes, and other securities, are almost invariably proved by affidavit, recourse being had to the examination of witnesses in very contested cases only, or where fraud is suspected.[2]

In the case of *Rundell* v. *Lord Rivers*,[3] a question arose concerning the practice in the Master's office in the proof of bond debts, under a decree in a creditor's suit, and from a certificate of the Masters delivered to the Lord Chancellor upon that occasion it appears, that it is not the practice that the affidavit of debt should state the consideration for which the bond was given, as in the case of simple contract debts, but it is sufficient if the affidavit states that the deceased was indebted in so much money upon the bond. Moreover, if the bond be not twenty years old, the execution of it must be proved in the regular way, and where a case of suspicion is raised as to the consideration, an inquiry is then made into the validity of the bond.

It may be observed here, that where a person, not a party to the suit, carries in a claim before the Master, under the decree, the party representing the estate out of which the claim is made, has a right to the benefit of any defence which he could have made, if a bill had been filed by the claimant in Equity, or an action had been brought at Law to establish such claim. Therefore, as we have seen, an executor may, in the Master's office, set up the Statute of Limitations as a bar to a claim by a creditor under the decree, provided such claim was within the operation of the statute before the decree was pronounced.[4] So also, if it is objected that * a person is not a creditor for a *1211 valuable consideration, that question may be entered into in the Master's office, and afterwards come before the Court upon exceptions.[1]

With reference to the effect of the Statute of Limitations, in barring a claim brought in by a creditor under a decree, it may be mentioned that in *Sterndale* v. *Hankinson*,[2] it was determined that where a bill is

[2] 2 Smith, 301.

[3] 1 Ph. 88.

[4] *Ante*, pp. 643, 644. It seems, also, that the statute may be set up in the Master's office, as well by another creditor or legatee, as by the personal representative. *Ibid.*; Shewen *v.* Vanderhost, 1 R. & M. 347; but *quære*, whether it can be set up by the Master? *Ibid.*

A creditor who comes in under, and takes the benefit of, a decree, is entitled to contest the validity of the claim of any other creditor. Shewen *v.* Vanderhost, 1 R. & M. 347; Owens *v.* Dickenson, C. & P. 48, 56; Woodgate *v.* Field, 2 Hare, 211, 213; Whitaker *v.* Wright, 2 Hare, 310, 314; Field *v.* Titmuss, 1 Sim. N. S. 218, 223; Graves *v.* Wright, 2 Dr. & War. 77, 79; Nichols *v.* Nichols, 10 W. R. 598, V. C. S. [So may the heir to protect the realty. *Ante*, 643, n. 10.] He will not, however, in a creditor's suit, be permitted to set up the Statute of Limitations against the plaintiff whose claim is the foundation of the decree. Fuller *v.* Redman (No. 2), 26 Beav. 614; and see Briggs *v.* Wilson, 5 De G., M. & G. 12; Adams *v.* Waller, 1 W. N. 200; 14 W. R. 789, V. C. W. In a residuary legatees' suit, a claim may be opposed by a residuary legatee, although not objected to by the executor. Moodie *v.* Bannister, 4 Drew. 432. It seems the Court is not bound to take the objection. Alston *v.* Trollope, L. R. 2 Eq. 205, M. R.

[1] Per Lord Hardwicke, in Peacock *v.* Monk, 1 Ves. 127-131.

[2] 1 Sim. 393. [See Hubbard *v.* Epps, 1 Tenn. Leg. Rep. 320, where the statute is held to apply.]

filed, by a creditor, on behalf of himself and all others, every creditor has an inchoate interest in the suit from the moment the bill is filed, and, from that moment, time does not run against him; so that a simple contract creditor, coming in under a decree made in such a suit, was admitted to prove, although there had been a lapse of more than six years between the filing of the bill and the decree. Since the above case, however, the statute 3 & 4 Will. IV. c. 27, § 40, has been passed, which operates as a positive bar to all actions, suits, or other proceedings, for the recovery of any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at Law or in Equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same; and it has been held that a petition for leave to go in under a decree, to prove a debt before a Master, is a proceeding within the meaning of the above section.[3] The effect of the above alteration in the law, therefore, is to prevent all debts being proved before the Master, under a decree, after the period limited by the above section, in cases where they operate as charges upon land or rents.

Where the Master is satisfied that the claim is properly made out, he marks the state of facts as "allowed," and it will then form an item in his report,[4] and the opinion of the Court upon the propriety of the Master's determination may be taken by excepting to the report allowing the claim.

Where the Master has admitted the claims of a creditor he becomes *quasi* a party to the suit; it is not, however, necessary to bring him before the Court by supplemental bill. Where the Master finds that persons are next of kin who are not parties to the record, the strict practice is, to make them parties, by filing a supplemental bill *1212 against them. It seems, however, that this may be * dispensed with, where there is already one person on the record who is next of kin, provided the others are willing to attend, as if they were on the record; this, however, cannot be done where the claim on behalf of the next of kin is not raised on the record, and none of the next of kin, are *in that character* parties to the suit.[1] A creditor or next of kin, or other claimant, if the Master disallows his claim or he has any other ground for dissatisfaction with his decision, may except to so much of the report as relates to his claim;[2] and it is to be observed that, in a creditor's suit, if the Master disallows the claim of the plaintiff, and exceptions are taken to the report, the Court will not, pending the exceptions, take the conduct of the cause from the plaintiff.[3]

It is to be noticed, that the method of objecting to the Master's re-

[3] Berrington *v.* Evans, 1 Y. & Col. Ex. 434; O'Kelly *v.* Bodkin, 2 Ir. Eq. 361; Watson *v.* Bird, 15 Sim. 523; 11 Jur. 198; Forster *v.* M'Kenzie, 17 Beav. 414.

[4] Bennett, 54.

[1] Waite *v.* Semple, 1 S. & S. 219.

[2] 1 T. & V. 366; and see Gregg *v.* Taylor, 4 Russ. 279; Thomas *v.* Griffith, 2 De G., F. & J. 555; 7 Jur. N. S. 293.

[3] Jeudwine *v.* Agate, 5 Russ. 283.

port upon a claim, by exceptions to the report, applies to those cases only in which the Master has taken the claim into consideration and disallowed it; — where the Master refuses to entertain the claim at all, either from a doubt as to his power to investigate it under the decree, or for any reason, the proper course appears to be, to apply to the Court by motion or petition. Thus, where, under the usual decree for an account on a bill by creditors, the Master refused to proceed upon a claim by the surviving partners of the testator, in respect of the balance of certain dealings between the testator, in his individual capacity, and the partnership firm, from a doubt whether he had the power to examine into such claim under the decree, the Court entertained a motion, to refer it to the Master to take the account.[4]

A creditor who has come in and established his debt before the Master under a decree or order in a suit, is entitled to the costs of so establishing his debt; and the sum to be allowed for such costs shall be fixed by the Master without taxation, at the time the Master allows the debt of such creditors, unless the Master shall think that such costs ought to be taxed in the regular mode, in which case the same shall be so taxed by the Master, or he shall request the Taxing Master in rotation, or the Taxing Master to whom any taxation in the same cause, or matter, may have been previously referred, to assist him in taxing the same, and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established.[5] The costs of a creditor who is plaintiff are not added to his debt; but form part of his costs in the cause.[6]

*Where persons coming in under a decree establish their *1213 claims, and are permitted to mix in the cause as if they had been parties, they will be allowed their costs;[1] not the costs incurred out of doors in collecting information, nor the costs of private inquiry, but the costs of proceedings in the suit.[2] And where legacies were sought to be raised out of real estate, and an inquiry was directed as to the heir-at-law, who was served with notice of the decree and came in and proved his pedigree, the costs of making out and proving the same were allowed him out of the estate.[3]

If any person brings in a claim which is unsuccessful, he may be ordered to pay the costs occasioned thereby. For this purpose a summons that he may be ordered to pay such costs is taken out and served

[4] See Paynter *v.* Houston, 3 Mer. 297.

[5] 47th Order, Aug., 1841; see 6th Order, 11th April, 1842; and 12th Order, Oct., 1842; and still later Order XL. r. 24.

[6] See Flintoff *v.* Haynes, 4 Hare, 309.

[1] Waite *v.* Waite, 6 Mad. 110; Bennett *v.* Wood, 7 Sim. 522; Bakewell *v.* Tagart, 3 Y. & C. Ex. 173; Hutchinson *v.* Freeman, 4 M. & C. 490; Shuttleworth *v.* Howarth, 4 M. & C. 492; C. & P. 228; Swift *v.* Swift, 1 De G., F. & J. 160; Morgan & Davey, 124; *Re* Taylor, Daubney *v.* Lake, L. R. 1 Eq. 495, M. R.; Hubbard *v.* Latham, 1 W. N. 105; 14 W. R. 553, V. C. K.; Wragg *v.* Morley, 14 W. R. 949, V. C. W.; see also Watkins *v.* Maule, Jac. 107; Abell *v.* Schreech, 10 Ves. 355, overruling Maxwell *v.* Wettenhall, 2 P. Wms. 27; Orwell *v.* Lord Hinchinbrooke, 10 Ves. 356, n.; and Skeene *v.* Pepper, *ib.* n; and see Harvey *v.* Harvey, 6 Mad. 91; Richards *v.* The Morris Canal, &c. Co., 3 Green Ch. 428, 431.

[2] Shuttleworth *v.* Howarth, C. & P. 228, 232, 233.

[3] Swift *v.* Swift, 1 De G., F. & J. 160.

upon the claimant;[4] and the order therein may be enforced by *subpœna*, and process of contempt.

If the estate is insufficient, after payment of the costs of the suit, to pay the creditors their principal and interest, and costs of proof in full, any dividend ordered to be paid to them is computed upon the total amount thereof, including the costs.[5]

It may be mentioned here, that under the former practice where suits were instituted, by creditors, or next of kin, or other persons of a class, on behalf of themselves and others of the same class, it was usual for the decree to direct, that persons coming in to prove their debts, or to establish their claims, should contribute to the expense of the suit. Under a decree of this nature, the plaintiff was bound to claim the contribution from the party coming in, as soon as he had established his right before the Master; if he omitted to do so then, he was considered to have waived it; and, therefore, where a plaintiff's solicitor refused to attend at the Accountant-General's office, with the Master's report, in order that the other creditors might obtain their debts, unless they would pay him their proportion of the extra costs of the suit, Sir J. Leach V. C. held, that the plaintiff, by failing to pursue the decree, and to call for a contribution, had waived all claims to it, and directed the solicitor to attend the Accountant-General, with the report, *1214 upon the application of every creditor, on being paid * the usual fee.[1] It seems that, in practice, the direction for contribution was seldom, if ever, acted upon,[2] which, as far as relates to creditors, was thus accounted for by Lord Eldon: "As the fund brought into Court, in a creditor's suit, is, in part at least, the fund of all the creditors, and as the taxed costs are paid amongst those who are entitled to it, the plaintiffs and their solicitor receive, in effect, the contribution, to which the form of the suit and of the decree gives them a right, without going through a formal process for that purpose."[3] The direction as to contribution is now omitted from the decree.[4]

Where in a creditor's suit, the creditors, who had signed an undertaking to contribute their proportion of the costs, had been paid in full, they were, on the assets subsequently proving deficient to pay the costs, ordered on the petition of the plaintiff to contribute to the payment of his costs, and for that purpose to repay proportional parts of what they had received.[5]

[4] Hatch *v.* Searles, 2 Sm. & G. 147; Yeomans *v.* Haynes, 24 Beav. 127; Colyer *v.* Colyer, 10 W. R. 748, V. C. K.; see also Morgan *v.* Elstob, 4 Hare, 477; Scurrah *v.* Scurrah, 2 W. R. 53, M. R.; Bentley *v.* Bentley, 1 N. R. 390, V. C. W.; Morgan & Davey, 28.

[5] Morshead *v.* Reynolds, 21 Beav. 638.

[1] Shortley *v.* Selby, 5 Mad. 447; and see Dunning *v.* Hards, 2 Phil. 294; Lechmere *v.* Brazier, 1 Russ. 72.

[2] See Bluett *v.* Jessop, Jac. 243; Lechmere *v.* Brazier, 1 Russ. 76.

[3] Lechmere *v.* Brazier, 1 Russ. 80. [See, as to contribution of creditor, who comes in under a decree, to the costs, Mason *v.* Codwise, 6 Johns. Ch. 277. And, as to the liability of the fund recovered to costs and counsel's fees, see *Ex parte* Plitt, 2 Wall. J. 453, 480; Rains *v.* Rainey, 11 Humph. 261; Whitsett *v.* City Building and Loan Association, 3 Tenn. Ch. 526.]

[4] Seton, 134.

[5] Thompson *v.* Cooper, 2 Coll. 87.

Inquiries as to Legacies and Annuities.

Where the Master is ordered to take an account of the legacies or annuities given by a will, no advertisement for such legatees and annuitants to come in need be issued, where their names appear by the will. If, however, legacies are given to a class, and its members cannot be conclusively shown by evidence, or where it is unknown whether a legatee is living, or, though proved to be dead, who is his personal representative, or where an inquiry is directed as to incumbrances, created by legatees or next of kin, upon their legacies or shares of residue, advertisements, calling upon such legatees or next of kin, or the persons claiming under them, to come in and prove their claims, are often directed to be issued.

A list of the legacies or annuities, in the form of a state of facts of legacies, &c., and a copy of the will, are generally required by the Master, upon which the usual warrant "on leaving," "to proceed," must be obtained and served.[6] If any of the legatees have been paid, it is necessary that their receipts, and the legacy duty receipts for each legacy, should be produced, to authorize the Master to report that such had been paid; and the same observation will apply to annuities.[7]

* *Inquiries as to Facts.* *1215

The cases in which the Master may be directed to make inquiries into facts are so numerous and various in their nature, that it is impossible to point out the rules by which each inquiry is to be pursued in the Master's office.[1] And all that can be done, on the present occasion, is to remind the practitioner of what has been before stated, *viz.*, that the state of facts ought to be brought in by the party supporting the affirmative, though a negative state of facts has been permitted.[2] Where another party affirms the fact to be different from the fact as alleged by the party carrying in the state of facts, the party so affirming must bring in a counter state of facts. A counter state of facts, however, is not necessary where one party merely negatives the facts as alleged by the other.

Inquiries as to Titles, in Suits for Specific Performance.

It has been already stated, that the habit of the Court is, not to refer abstract questions of Law to a Master, and that, except in cases where the matter of Law comes in question as matter of fact, as in the case

6 Bennett, 50.

7 *Ibid.*

1 The Court in an Equity suit has no power under the Practice Act of California, without the consent of parties, to order a reference [to a Master or referee] for the trial of any issue of fact, except one which requires the examination of an account. Williams *v.* Benton, 24 Cal. 424. [*Ante*, 1168, n. 1.]

2 See *ante*, 1196, 1199 note; Willan *v.* Willan, 19 Ves. 590; S. C. Cooper, 291; Trezevant *v.* Frazer, MSS., V. C. 7th Aug., 1833.

of inquiries into the Law of foreign countries, a reference as to the Law of a case is never made. Still, however, there are many cases in which questions of Law are so strongly involved in the facts into which the Master is directed to inquire, that the Master cannot report upon the fact without also expressing an opinion upon the Law as it affects the matter before him. The most ordinary instance of this occurs where a reference is made to a Master to inquire into the title of a party to property in question in the cause.[3]

References of this nature are principally made in suits for the specific performance of contracts or agreements for the sale or purchase of estates;[4] and, as they are in the nature of a preliminary inquiry, they may be made either by decree or by order upon motion.[5] Inquiries into titles are, however, not confined to suits for specific performance, but may occur incidentally in suits having other objects; as, where a
*1216 bill is filed, by creditors or persons * claiming under trusts, to have trust estates sold, and a sale having taken place under the decree, the purchaser procures an order to refer it to the Master to inquire into the vendor's title.[1]

We have seen that, in a suit for specific performance, the Court will not, in general, permit the question whether a good title can be made or not, to be argued before it in the first instance; but will direct an inquiry on the subject.[2]

An inquiry as to title, in a suit of this description, may be directed before or after answer, on motion, by consent; and, after answer, on motion adversely, if it appears clearly from the answer that the title is the only question in dispute.[3] An order so made is in its nature decretal;[4] consequently, after such an order, the plaintiff cannot dismiss his bill as of course; nor the defendant procure the bill to be dismissed for want of prosecution.[5]

When an inquiry is directed as to a title, it is not necessary to carry in a state of facts, but the Master proceeds upon the abstract.[6] If a decree or order has been obtained by the vendor, he must take his abstract to the Master's office, at the same time that he leaves the order or decree. If the decree or order has been obtained by the vendee, and an abstract has been already delivered, he must, in like manner, carry the abstract so delivered into the office. If no abstract has been delivered, an application may, if necessary, be made to the Court by motion, that the vendor's solicitor may deliver an abstract of the title to the

[3] See Woodson *v.* Smith, 1 Head (Tenn.), 276.

[4] Frost *v.* Brunson, 6 Yerger, 36; M'Comb *v.* Wright, 4 John. Ch. 319; see Jackson *v.* Lingan, 3 Leigh, 161; Enraght *v.* Fitzgerald, 1 Con. & Law. 181. But if it manifestly appears from the bill and answer, that no title can be made, the reference will not be ordered. Frost *v.* Brunson, 6 Yerger, 36. If the Master reports in favor of the title, a reference is made to him to approve of the conveyance. *Ibid.*

[5] *Ante*, 1201; see Winterbottom *v.* Ingham, 9 Sim. 654.

[1] See *post*, *Sales of Estates*.

[2] *Ante*, pp. 987–990.

[3] Bennett *v.* Rees, 1 Keen, 405; Seton, 595; Ord. XX., *ante*, p. 991.

[4] Biscoe *v.* Brett, 2 V. & B. 377.

[5] Biscoe *v.* Brett, 2 V. & B. 377; Collins *v.* Greaves, 5 Hare, 596; *ante*, pp. 805, 810.

[6] Bennett, 153.

vendee's solicitor.[7] When the abstract is left in the Master's office, the usual warrant "on leaving," and afterwards "to proceed," must be taken out and served.[8]

When the abstract is brought in, the solicitor of the vendee should carefully compare the abstract with the title-deeds, for which purpose, if necessary, the production of such of them as are in the custody or power of the vendee, or of any other parties to the cause, may be compelled, in the manner already pointed out.[9] The Master, however, always proceeds upon the abstract only, upon which alone he makes his determination, unless the vendee insists upon the production of the title-deeds, the Master *as well as the Court, always *1217 taking it for granted that, whenever the vendee omits to call for the production of the title-deeds, he is satisfied that the abstract is correct. Upon this ground, an exception to a Master's report upon a title to copyholds, because no surrender had been produced before him, was overruled.[1]

On litigated questions of title, written objections to the abstract are brought into the Master's office by the party objecting, and the Master is either attended by counsel on both sides, or the written opinions of counsel upon the abstract, already given, are produced to him, according to circumstances.[2]

In cases of difficulty, the Master seldom takes upon himself to decide intricate questions of title. He usually directs the abstract to be laid before one of the conveyancing counsel of the Court, upon whose opinion he exercises his own judgment in reporting to the Court. In such cases, the original abstract, with instructions, in writing, by the Master's clerk, "to advise on the title, by the direction of the Master," with a copy of the order of reference, and the objections taken by the purchaser, with the vendor's answers thereto, are taken by the solicitor, and laid before the conveyancer, and when he has given his opinion thereon, the abstract must be returned to the Master's office, by the solicitor who left it.[3]

In the prosecution of the order for reference, the Master, in his discretion, may examine the parties upon interrogatories,[4] receive evidence upon affidavit, or by the examination of witnesses before him, either upon written interrogatories or *viva voce*.[5] He may also call for such deeds and other muniments as are necessary to the elucidation of the title.

[7] 1 T. & V. 417.

[8] 1 T. & V. 417. It is to be recollected that in cases of sales under the decree of the Court, the Master will only allow the vendor's solicitor to attend before him upon the investigation of the title. *Ante*, p. 1172.

[9] *Ante*, p. 1176. The seller is bound to produce the title-deeds mentioned in the abstract, in order that the abstract may be examined with them, although they are not in his possession, and the purchaser is not entitled to the custody of them. But if they are in the possession of a third person, the purchaser's solicitor, it seems, must send to the place where the deeds are, in order to examine them with the abstract, and the seller must pay the expense of the journey. 1 Sugden V. & P. 449.

[1] Poole *v.* Shergold, 1 Cox, 160.

[2] Bennett, 154.

[3] 1 T. & V. 418; see Flower *v.* Walker, 1 Russ. 408; 15 & 16 Vic. c. 80, § 40.

[4] See *ante*, p. 1180.

[5] *Ante*, p. 1180.

If the Master is satisfied with the title, as shown by the vendor, he reports accordingly. If he is not satisfied with the title, he must state the points in which the title is defective.[6] The mere circumstance that since the contract, a suit has been instituted by other parties, and is pending, in which part of the lands are claimed adversely to the vendor, is not a sufficient ground for reporting against a title;[7] the nature of the adverse claim should, however, be examined on the inquiry.

Where a necessary party to the title is neither in Law nor in Equity, under the control of the vendor, but has an independent interest, unless a legal or equitable obligation on the part of the stranger to join *1218 in the sale is shown before the Master, the report * ought to be against the title; but where the necessary party to the title is under the legal or equitable control of the vendor, the report should be in favor of the title.[1]

A purchaser cannot, upon a report of a defective title, insist upon being discharged, if the title is capable of being made good within a reasonable time; and, therefore, when it appears, by the report, that the vendor, on getting in a term, or getting in administration, &c., will have a title, the Court will not discharge the purchaser, but will put the vendor upon terms to complete his title speedily.[2] It will not, however, do so when it appears that the vendee will have a long time to wait; and in *Whittaker* v. *Whittaker*,[3] where Sir Robert Mackreth wished very much to be discharged from his purchase, Lord Kenyon would not hold that the vendee was to be bound during the six years, while all Mr. Wilkinson's affairs were winding up.[4]

If the Master reports in favor of a title, and any new fact afterwards appears, by which the title is affected, the Court will refer the title back to the Master, upon application by motion, even after the Master's report has been confirmed.[5] So, if the Master reports in favor of a title, but, upon hearing exceptions, the Court thinks the evidence not sufficient to support the Master's finding, it will, upon application of the vendor, refer it back to the Master, to review his report, in order to give the vendor an opportunity of producing further evidence.[6] And even after the exceptions have been heard, and the Master's report has been overruled; yet, the seller may, upon an early application, obtain a reference back, in order to show that the title is valid, upon another ground, not

[6] Green *v.* Monks, 2 Moll. 325. For information as to what may be considered as good title, see 1 Sugd. V. & P. 329.

[7] Osbaldeston *v.* Askew, 1 Russ. 219.

[1] Esdaile *v.* Stephenson, 6 Mad. 366; Sugd. V. & P. 350; Bennett, 152.

[2] Coffin *v.* Cooper, 14 Ves. 205; Moulton *v.* Edmonds, 6 Jur. N. S. 305, L. C.; but see Lechmere *v.* Brazier, 2 J. & W. 289, in which Lord Eldon said he would not extend the rule which the Court had adopted, of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it had not already been applied.

[A Court of Equity will allow a reasonable time to perfect the title. Baker *v.* Shy 9 Heisk. 85.]

[3] 4 Bro. C. C. 31; see 10 Ves. 599.

[4] Per Lord Eldon, in Coffin *v.* Cooper, *ubi supra*. A Court of Equity, in the exercise of its discretion, will not compel a purchaser to accept a title depending upon an illegal or invalid sale, while it remains open to review, although the judgment unreversed might be conclusive upon the party's rights. Young *v.* Rathbone, 1 C. E Green, 224.

[5] Jeudwine *v.* Alcock, 1 Mad. 597.

[6] Andrew *v.* Andrew, 3 Sim. 390; Portman *v.* Mill, 1 R. & M. 696; Curling *v.* Flight, 2 Phil. 613.

before taken ;[7] and, in general, — where the Master has, by expressing an opinion in favor of the title, prevented the vendor from showing, that if his opinion had been otherwise, still the title was good, — the course of the Court appears to be, to send it back to the Master to review his report, the party moving paying the costs of the motion.[8]

So, where it appears, at the hearing of exceptions to a report, against a title, that the seller can clear up the objections, the *Court has sometimes sent the title back to the Master, to review *1219 his report ;[1] and it has frequently occurred, even at the hearing of the exceptions to the Master's report, that, if the vendor can satisfy the Court that he can make a good title by clearing up the objections reported by the Master, the Court will make a decree in his favor, without a reference back.[2] Thus, where the Master reported that a good title could be made, except as to so much of the estate as a widow was entitled to in respect of her dower : she refusing to join in the conveyance to a purchaser, Sir John Leach V. C. said, that if, at the hearing on further direction, the vendor should be prepared to cure the objection which was reported by the Master, he would be in time to do so ; but he required an affidavit that the widow was ready to release ;[3] and in *Esdaile* v. *Stephenson*,[4] Lord Eldon and Sir John Leach V. C. agreed, that if a title upon a new fact can be made between the report and the further directions, the Court will enforce the contract ; as if, in the above case, the jointress had agreed to join when the cause came on for further directions. In such a case, the Court will expect counsel to appear, and undertake that she will concur.[5]

It appears, however, that the Court would not allow a vendor to lie by, before the Master, and then, upon further directions, attempt to make a title.[6]

If exceptions are taken to the report, that a good title can be made, and are overruled, other objections to the title cannot be made ; but if exceptions are allowed, and a new abstract of title is delivered, further objections may, of course, be brought in.[7] Thus, in a case where the vendor of a leasehold estate produced the leasehold title, which the Master thought sufficient, and reported accordingly, but the Court held that the lessor's title ought to have been produced, and sent it back to the Master, to review his report ; the vendor having liberty given him to produce the freehold title, it was considered that the purchaser was

[7] Egerton *v.* Jones, 1 R. & M. 694; Portman *v.* Mill, *ib.* 697; and see Dawes *v.* Betts, 12 Jur. 412, V. C. W.

[8] 1 Sugd. V. & P. 349, 354; Dawes *v.* Betts, 12 Jur. 412, V. C. W.

[1] 1 Sugd. V. & P. 350.

[2] *Ante*, pp. 989, 990.

[3] Paton *v.* Rogers, 6 Mad. 256; and see Sidebottom *v.* Barrington, 4 Beav. 110.

[4] 6 Mad. 366.

[5] Sugden V. & P. 350; see in Dawes *v.* Betts, 12 Jur. 412, V. C. W. "This points out the necessity, in such cases, of setting down the cause upon further directions, at the same time with the exceptions. In Esdaile *v.* Stephenson, as the exceptions only were before the Court, they were ordered to stand over with liberty to set down the cause for further directions, and then the exceptions and further directions to come on together. *Ibid.*

[6] Sugd. V. & P. 350.

[7] Brooke *v.* ——, 4 Mad. 212; Sugd. V. & P. 350.

at liberty to enter into objections to the leasehold title, which were not taken upon the former discussions before the Master; and upon the objections being afterwards taken, the bill was dismissed.[8]

It has been before stated,[9] that the Court has adopted the practice, at the same time that it refers it to the Master to inquire into *1220 * the vendor's title, to direct him, in case he shall be of opinion that a good title can be made, to inquire, and state to the Court, when it was first shown that it could be made.

A title will be considered to be complete whenever it appears that, upon certain acts being done by persons whom the vendor has the means of compelling to concur, the legal estate will be in the purchaser.[1]

It may be observed, also, that when the abstract shows the legal estate to be outstanding, and that the persons in whom it is vested would necessarily be trustees for the vendor, it will not be a complete abstract unless it shows who the persons are in whom the legal estate is vested.[2]

Where the bill has been filed by the vendor against the purchaser, and the title is found to be good, the further order usually directs, in effect, that an account be taken of what is due to the plaintiff for purchase-money, interest, and costs of suit;[3] and that upon his executing a conveyance of the estate to the defendant, or his nominee, such conveyance to be settled by the Master in case the parties differ, and delivering up the title deeds, the defendant pay to the plaintiff the amount so due to him.[4] A certified copy of the order is left with the Master, and a summons to proceed thereon is taken out and served; upon the return of which, evidence of the amount due will be directed to be brought in; and where the costs are to be included in the account, the proceeding will be adjourned until after the taxation; but where the costs are not to be included, a day will be named to proceed with the account; if the parties differ as to the form of the conveyance, the draft will be directed to be brought in and settled, as hereafter explained.[5] On the proceedings before the Master being brought to a conclusion the Master will make his report of the result; which will be completed in the ordinary way. The usual form of order, in these cases, does not specify the time at which the conveyance is to be delivered to the purchaser, and the purchase-money paid; though they should be simultaneous acts.[6] If, therefore, any difficulty arises in this respect, the plaintiff should obtain an order, on motion or summons,[7] with notice, appointing a time

[8] Fildes *v.* Hooker, 1 Sugden V. & P. 219, n.; 2 Mer. 424, S. C.; 3 Mad. 193, S. C.

[9] *Ante*, p. 990.

[1] Per Lord Eldon, in Lord Braybrooke *v.* Inskip, 8 Ves. 436, as explained in Lewin *v.* Guest, 1 Russ. 325, 329; and see Esdaile *v.* Stephenson, 6 Mad. 366, *ante*, p. 1219; Jumpson *v.* Pitchers, 1 Coll. 13.

[2] Wynne *v.* Griffith, 1 Russ. 283; but see Avarne *v.* Brown, 14 Sim. 303.

[3] See Seton, 612–620; Sugd. V. & P. 849, 870.

[4] See Seton, 607, 615–618; Margravine of Anspach *v.* Noel, 1 Mad. 310, 317; Sugd. V. & P. 831, 833, 837.

[5] *Post*, 1262.

[6] Margravine of Anspach *v.* Noel, 1 Mad. 316.

[7] Seton, 615.

and place for the purpose ; [8] and if the defendant makes default thereat, the order may be enforced against him.[9]

Where the suit is by the purchaser against the vendor, the *further order, after the title is approved, is similar in form to *1221 the order in the converse case above stated ; except that the direction to pay precedes that to convey ; [1] and the account is taken, costs taxed, conveyance settled, and report made, in like manner.

Method of Taking Accounts.[2]

According to the practice of the Court, as it existed previously to the Orders of 1828, the usual course of proceeding under decrees to take accounts in the Master's office, was for the plaintiff, in the first instance (where it was necessary), to examine the accounting party upon interrogatories, and then, from the defendant's examination, and from his answer, and the schedules, thereto, or from the other evidence or papers in the cause, to prepare a charge against him ; *i. e.*, a statement of the several items which the plaintiff claimed to be entitled, upon proof, to charge the defendant in the account.[3] This charge was left with the Master, and the different items in it were investigated in the Master's office. When the charge was gone through, the defendant brought in his discharge, containing a statement of payments and disbursements made by him, and other matters, by which he claimed to discharge himself from the debt attempted to be made out against

[8] Urmstone *v.* Singleton, Seton, 615 ; Morley *v.* Clavering, 30 Beav. 108 ; *ante*, pp. 1043, 1044.

[9] For mode of enforcing orders, see *ante*, p. 1042 *et seq.* Where, after a decree for specific performance, the defendant, the purchaser, made default, the contract was, on the application of the vendor, ordered to be rescinded, and all further proceedings in the suit stayed. Sweet *v.* Meredith, 4 Giff. 207 ; 9 Jur. N. S. 569; and see Folingo *v.* Martin, 16 Beav. 586; Simpson *v.* Terry, 34 Beav. 423; Clark *v.* Willis, 1 W. N. 162, M. R. [If the plaintiff is unwilling to rescind, he may obtain a declaration that he has a lien on the property for unpaid purchase-money and costs, and an order for the sale of the property for the purpose of paying them. Walker *v.* Ware, &c. R. Co., 35 Beav. 52; Bishop of Winchester *v.* Mid-Hants R. Co., L. R. 5 Eq. 17 ; Wing *v.* Tottenham, &c. R. Co., L. R. 3 Ch. App. 740. And see, for the stage of the suit at which the declaration of lien may be made, Attorney-General *v.* Sittingbourne, &c. R. Co., 35 Beav. 268; Munns *v.* Isle of Wight R. Co., L. R. 5 Eq. 653.]

[1] See Seton, 608, No. 3 ; 612.

[2] Orders of reference to a Master should specify the principles on which the accounts are to be taken, or the inquiry to proceed, so far as the Court shall have decided thereon, and the examination before the Master should be limited to such matters within the order as the principles of the decree or order may render necessary. Remsen *v.* Remsen, 2 John. Ch. 495; Kay *v.* Fowler, 7 Monroe, 593; Stonington Savings Bank *v.* Davis, 2 McCarter (N. J.), 30 ; Gordon *v.* Hobart, 2 Story, 260 ; Harris *v.* Fly, 7 Paige, 421 ; Torrey *v.* Shaw, 3 Edw. Ch. 356; Simmons *v.* Jacobs, 52 Maine, 147, 153; Updike *v.* Doyle, 7 R. I. 446, 458; see Rishton *v.* Grissell, L. R. 5 Eq. 326; Blackford *v.* Davis, L. R. 4 Ch. Ap. 304; Field *v.* Holland, 6 Cranch, 8, 25, 26; Dubourg *v.* United States, 7 Peters, 625. The Court will give special directions to the Master as to the manner of taking the account, and the principles by which he should be governed in taking it. The decree must direct to what matters the account shall extend, and in decreeing a general account, special directions will be rendered proper and necessary by the particular circumstances of the case. Hudson *v.* Trenton Locomotive and Machine Manuf. Co., 1 C. E. Green (N. J.), 475 ; Izard *v.* Bodine, 1 Stockt. 311 ; see *ante*, [857, n. 1 ;] 1004 note. The order of reference must be founded on the pleadings and proofs and cannot be made more extensive than the allegations and proofs of the parties. Consequa *v.* Fanning, 3 John. Ch. 587, 595; Gordon *v.* Hobart, 2 Story, 260, [Wycoff *v.* Combs, 1 Stew. Eq. 40].

[3] 1 Newl. 329.

*1222 him by the charge.[4] The Orders of 1828, however, * simplified the practice, for by the 61st of them it is directed, "That all parties accounting before the Master, shall bring in their accounts in the form of debtor and creditor, and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the Master shall direct."[1]

The effect of this Order is to render it unnecessary to proceed, in the first instance, by examining the accounting party upon interrogatories.

The account is generally annexed by way of schedule to an affidavit verifying its contents, and if the party does not bring it in within a time to be fixed by the Master, he may be proceeded against, in the same manner as a party not putting in his examination.[2]

The 62d Order goes on to direct "that all such accounts, when passed, and settled by the Master, shall be entered in a book to be kept for that purpose, in the Master's office, as is now the practice with respect to Receiver's accounts, and with proper indexes, in order to be referred to as occasion may require."

It has been held, that when accounts entered into this book, as prescribed by the above orders, are afterwards copied into schedules,

[4] *Ibid.*; see Crone *v.* O'Dell, 2 Hogan, 144. The Master ought, in the first instance, to ascertain from the parties, or their counsel, by suitable acknowledgments, what matters or items are agreed to or admitted; and then as a general rule, and for the sake of precision, the disputed items claimed by either party ought to be reduced to writing by the parties, respectively, by way of charges and discharges, and the requisite proofs ought then to be taken on written interrogatories prepared by the parties, and approved by the Master, or by *vivâ voce* examination, as the parties shall deem most expedient, or the Master shall think proper to direct, in the given case. The testimony may be taken in the presence of the parties or their counsel, except when by a special order of the Court it is to be taken secretly; and it ought to be reduced to writing, in cases where the Master shall deem it advisable, by him, or under his direction, as well where a party as where a witness is examined. Remsen *v.* Remsen, 2 John. Ch. 501, 502; see Story *v.* Livingston, 13 Peters, 359; Kirkman *v.* Vanlier, 7 Ala. 217.

[1] This Order is adopted in the 79th Equity Rule of the United States Courts. So in the 41st Equity Rule in Vermont, 11 Vt. 699. In Hollister *v.* Barkley, 11 N. H. 506, after stating that there are two modes of practice in taking accounts before a Master, one in the form of debtor and creditor account, rendered by the accounting party, and verified by his affidavit; the other by examining such party upon interrogatories; and that these two modes are sometimes combined in taking accounts, the Court add, "As we have adopted no rule in this respect, either of these modes may be resorted to; but the better practice probably is, to require the parties to bring in debtor and creditor accounts, and to examine them on written interrogatories, the Master taking down the answers." Bellows *v.* Stone, 18 N. H. 480; see Reed *v.* Jones, 8 Wis. 421. The parties should not put in their general books of account. Reed *v.* Jones, *supra*. Turner *v.* Hughes, 1 Busbee Eq. (N. C.) 116. [For neither the Court nor the clerk can be expected to examine such books, consisting, as they often do, of numerous immense folios. Norwood *v.* Norwood, 2 Bland, 481, in note; Budeke *v.* Ratterman, 2 Tenn. Ch. 459; *infra*, 1250, n. 2.] And it is not good cause of exception to a Master's report, that he admitted as evidence summary statements of partnership accounts between the parties, as prepared from the partnership books by a person who made them up as the agent of the parties, and in their presence, at the time of the dissolution of the firm. Turner *v.* Hughes, *supra*; see *post*, 1249, note.

[2] *Ante*, p. 1167. Where a party is required to bring in his account before the Master, under the above rule, he must bring in his whole account and for the whole period for which he is accountable. It must also be verified by the usual affidavit, that the account, including both debits and credits, is correct; and that the party accounting does not know of any error or omission therein, to the prejudice of any of the other parties. Story *v.* Brown, 4 Paige, 112; Bellows *v.* Stone, 18 N. H. 480. Where the plaintiff is an accounting party, he is treated as a defendant, so far as taking his account is concerned.

annexed to the Master's report, such schedules are only to be charged at the rate of 6*d.* per folio, like Receiver's accounts.[3]

*On the account being left, the usual warrant on leaving, *1223 &c., must be served, and if, upon taking a copy of the account, the party calling for the account is not satisfied with it, he may exhibit interrogatories for the examination of the accounting party, under the direction of the Master.

The account having been taken in, and the party, if necessary, examined, a charge must then be carried in by the party conducting the inquiry.[1] This charge[2] is usually a transcript of so much of the debtor and creditor account as sets forth the receipts, to which may be added any additional items with which it is intended to charge the accounting party.

It is to be observed here, that although the 61st Order directs the parties accounting before a Master, to bring in their accounts in the manner there prescribed, it is not always necessary to call upon them to do so. If sufficient appears from the admissions of the party to be charged, either in his answer or in the schedule to it, or in any proceeding in the cause, to enable the account against him to be properly made out, the party conducting the proceeding may immediately bring in his charge, without calling for any account under the 61st Order.

The charge being left, warrants "*on* leaving" and "to proceed on the charge" are taken out, and served on the solicitors of all persons interested in the account.[3] On the return of the warrant, the charge is compared with the debtor and creditor account, or with the answer or examination, or the schedules annexed to them, put in by the accounting party, and if the charge is found to accord with them, it is allowed without further evidence. If the charge includes sums not admitted in the account to have been received, they must be substantiated, either by evidence or by admissions in the examination of the party charged, or in his answer, or the schedules thereto.[4] The charge being established, is marked by the Master "allowed."[5]

It may be mentioned here, that a party conducting an account before the Master is not limited to one charge. If, after his charge is allowed, he discovers other items, with which the accounting party is chargeable, he may either amend his charge, or carry in a further charge, and this he may do as often as may be necessary.[6] In *Napier* v. *Staples*,[7] in Ireland, under a decree for an account, the plaintiff had examined the defendant on three successive sets of interrogatories, and had filed a charge, which he amended three times, and had then sued out a commission and examined witnesses. He afterwards filed a further charge, and after various delays, *applied to the Master of the *1224

[3] Attorney-General *v.* Lubbock, 1 M. & C. 264.
[1] 2 Smith, 115.
[2] As to the nature of a charge, see *ante*, p. 1199.
[3] See *ante*, p. 1149.
[4] See 2 Smith, 116.
[5] Bennett, 84.
[6] See Copeland *v.* Crane, 9 Pick. 73.
[7] 1 Moll. 928.

Rolls for liberty to file a sixth, which was refused; but upon appeal, the Lord Chancellor, Sir A. Hart, gave him leave to file it, observing: "I am not aware that there exists any rule, such as has been assumed, that in taking the account, a uniform series of proceeding is to be followed, — a charge, discharge, and examination, and the subject is then dropped." . . . "It is not the course in England, to comprise every thing in the first charge; on the contrary, in the majority of cases, the plaintiff, after he has brought in his charge, looks to the examination of the defendant to furnish him with further items; the Court always taking care, and this is the true principle, to indemnify the opposite party, and to guard against vexatious irregularity, by making the party pay all the costs incurred through his irregularity or delay." His Lordship afterwards said: "I do not lay any stress upon the point, whether the plaintiff knew of the existence of this item or not; I think that is not material. Equity would not deserve the name, if it acted on a form to shut out a just claimant, because he came late, whether his doing so was optional or involuntary. But the same equal justice that admits the plaintiff's further charge, gives the defendant a further opportunity to discharge himself, and the order must be so. The defendant must have an opportunity of explaining his case, by evidence, and his denial of the receipt of this sum, by affidavit, will have very great weight in determining it." [1]

It may be stated here, that it is the constant practice of the Court, in decrees against a mortgagee, or against an executor to account, to direct it without *future* words; and yet, if the person decreed to account receive any thing subsequent to the decree, it may be inquired into before the Master, and the defendants, in such case, must bring the sums so received to account; [2] the consequence of this rule is, that in decrees of this nature, the practice generally is, where the matter has been long pending in the Master's office, since the first charge against the accounting party was brought in, to examine again, upon interrogatories, just before the Master is prepared to make his report; *1225 and then, if it appears that *he has received any thing subsequent to his last examination, to carry in a further charge; so as to bring down the account to the time when the Master's report is made.

[1] 1 Moll. 231.

[2] Bulstrode *v.* Bradley, 3 Atk. 582; see also Bell *v.* Read, *ib.* 592. The account remains open down to the time of the report. Holabird *v.* Burr, 17 Conn 563, 564; Smith *v.* Brush, 11 Conn. 366; Robinson *v.* Bland, 2 Burr. 1086. And in Massachusetts, on a bill in Equity to redeem, the account of the mortgagee is to be made up of the amount due at the time of the decree for redemption. Adams *v.* Brown, 7 Cush. 223, 224; Mann *v.* Richardson, 21 Pick. 355; Stewart *v.* Clark, 11 Met. 384; *ante*, 999, note.

Where the mortgagee has received rents between the report and time for payment, though default was made, there must be a further order for account and new day for payment. See Alden *v.* Foster, 5 Beav. 592; Ellis *v.* Griffiths, 7 Beav. 83; Buchannan *v.* Greenway, 12 Beav. 355; Garlick *v.* Jackson, 4 Beav. 154. But it is otherwise where the mortgagee merely receives rents after default on the day fixed for payment. Constable *v.* Hawick, 1 Seaton on Dec. (3d Eng. ed.) 394. [Accounts ordered in Chancery are usually brought down to the date of hearing. Rubber Co. *v.* Goodyear, 9 Wall. 788.]

Any party who is dissatisfied with the account may enter into evidence to show that the accounting party has received more than he has admitted by his account; but, in such case, he must give notice thereof to the accounting party; stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner.[1] He may also cross-examine the accounting party upon his account; but he must give him notice of the parts to which the cross-examination will be directed.[2] The accounting party may be ordered to produce all documents in his custody, possession, or power, at the cross-examination, although there is an existing order for their production elsewhere.[3]

When the ordinary administration accounts have been directed, and a particular part of the estate cannot be traced, an application to charge the personal representative with it cannot be entertained, unless it can be proved that it was received by him: such an application being in the nature of a charge of wilful default.[4]

If any question arises as to the principle on which the accounts should be taken, an application may, it seems, be made by motion for the directions of the Court on the subject;[5] or the opinion of the Judge thereon may be obtained, according to the present English practice, on an adjournment to him in Chambers. If necessary, the Court or Judge may obtain the assistance of accountants, merchants, or other scientific persons: and act on their certificate.[6]

When the charge has been allowed, the accounting party must carry in his "discharge."[7] If he does not do so within a reasonable time after the charge has been allowed, the party conducting the account must take out and serve upon him a warrant, underwritten "at which time the said A. B. is to bring in his discharge," &c. This warrant is peremptory, and if it is not obeyed, or the accounting party does not appear and crave further time, the Master may proceed, if otherwise in a situation to do so, to make a report, without the discharge, charging the defendant with the whole amount of the charge as allowed.[8]

This discharge is usually a transcript from the payments he has * made, as stated either in his debtor and creditor account, or *1226 in his answer or examination, or the schedules attached to them, and a warrant on leaving and to proceed should be taken out upon it and served in the usual manner. A discharge, as well as any other matter before the Master, may be the subject of an examination for impertinence.[1] The accounting party is bound to use all due diligence in

[1] Ord. XXXV. 34.

[2] Wormsley *v.* Sturt, 22 Beav. 398; *Re* Lord, Lord *v.* Lord, L. R. 2 Eq. 605, 12 Jur. N. S. 698, M. R.

[3] Wormsley *v.* Sturt, 22 Beav. 398. As to the examination of an accounting party on interrogatories, see *ante*, 1223 *et seq.*

[4] Shuttleworth *v.* Bristow, 12 W. R. 40, V. C. K.; see Whittle *v.* Henning, 2 Beav. 396; Hutton *v.* Rossiter, 7 De G., M. & G. 9.

[5] Robertson *v.* Norris, 1 Giff. 428.

[6] 15 & 16 Vic. c. 80, § 42.

[7] And so if a plaintiff carries in a further charge, or an amended charge, the defendant must have an opportunity of carrying a further discharge, and of explaining his case by evidence. See Napier *v.* Staples, 1 Moll. 928.

[8] 2 Smith, 121.

[1] Price *v.* Shaw, 2 Cox, 184.

obtaining and attending warrants to vouch his discharge; or the party interested in the account may take out warrants to compel his attendance for that purpose;[2] and if, upon the return of such warrants, the party does not attend and proceed, or account, to the Master's satisfaction, for his not proceeding, the Master will disallow the discharge, or such part of it as the party has omitted to support. The Master, however, will, if he sees the party anxious, and that he does his best to support his discharge, afford him every indulgence,[3] and in *Ridifer* v. *O'Brien*,[4] where an executor was unable to produce sufficient evidence before the Master in support of his discharge, the Master, in his report, stated the payments insisted upon in the discharge, and that he had not allowed them, as no sufficient evidence had been produced before him to warrant that allowance, *but that he had received them as a claim*, and an exception to his report was overruled.

The account is vouched, by the production of the proper vouchers, such as receipts, &c.,[5] which documents, when produced, are marked either by the Master or his clerk, with the initials of his name, as a token of his inspection or allowance of them. It seems that the vouchers will be admitted as evidence of the payment of the sums therein specified, and credit given to the accounting party in the account, unless the other side shows some reasonable ground for impeaching the vouchers;[6] but that, if any party objects, the affidavit or oral evidence of the person who received the money is required; and if this cannot be had, then proof must be given of his signature to the voucher.[7]

The necessity for producing the proper vouchers in support of the discharge, is not removed by the circumstance of the defendant's answer, in which the items are sworn to, not having been replied to; although, in other cases, an answer which has not been replied to, is to be taken as true. The Master must, nevertheless, require the vouchers to be produced.[8]

*1227 * It may be mentioned here, that the ordinary course of proceeding upon discharges in the Master's office, is by affidavit; and though, in strictness, in cases where infants are concerned, all evidence should be upon examination by interrogatories, yet still, as we have seen, if the solicitor for the infant acquiesces in the reception of

[2] Bennett, 85.

[3] 2 Smith, 121.

[4] 3 Mad. 43.

[5] As to proof by entries made by a party in his books of account, confirmed by his oath, according to the practice of many of the States, see 1 Greenl. Ev. §§ 118, 119, and notes; 1 U. S. Dig. 51 *et seq.*, *Accounts*, § 5, pl. 112, &c.; Callender *v.* Colgrove, 17 Conn. 1.

[6] Earl of Lonsdale *v.* Wordsworth, 28th May, 1789; cited Bennett, 85. [Vouchers are *primâ facie* evidence of disbursements, provided they show for what, or on what account the payment was made, but additional proof may be required on reasonable impeachment, or doubt on the part of the Master. Halsted *v.* Tyng, 2 Stew. Eq. 86.]

[7] Bingham *v.* Lady Clanmorris, 2 Moll. 20. In accounting before the Master, the oath of the party should not be received to support charges, which, from their nature, admit of full proof. Harding *v.* Handy, 11 Wheat. 103.

[8] Davenport *v.* Davenport, 1 Sim. 512; see Doody *v.* Pierce, 9 Allen, 141; Copeland *v.* Crane, 9 Pick. 73. If the bill requires the defendant to state an account between the parties, the account so stated is responsive to the bill. Bellows *v.* Stone, 18 N. H. 465.

affidavits, the infant will be bound by it. In a case in Ireland, before Sir A. Hart L. C.,[1] where an infant was interested, an order appears to have been made by his Lordship to restrain the defendant, who was an executor, from issuing a commission to examine witnesses in aid of his account, and he was ordered to verify, by affidavit, the several vouchers on which he sought credit.

All vouchers produced before a Master must be stamped with the proper stamp applicable to the instrument, otherwise they will be rejected.

Should any item occur, which cannot, at the moment be satisfactorily explained, or the voucher for it produced, it is marked as a *queried* item, for further inquiry: and should there be any such item remaining when the others are disposed of, a warrant is obtained and served by the plaintiff's solicitor, and underwritten, "to proceed on the queried items in the defendant's discharge;" on the attendance upon which, such explanation as may be given, and the evidence adduced, in support of the queried item, is discussed and read.[2] If the accounting party does not attend and support the queried items, or crave further time, the whole of such items may be disallowed by the Master, or he may direct a further warrant to be taken out to give the party an opportunity of setting himself right before he proceeds to disallow the payment.[3]

Although, strictly speaking, every payment insisted upon in the discharge, where it amounts to forty shillings and upwards, must be established by a proper voucher, sums under forty shillings may be substantiated by the oath of the accounting party, provided that in his account he mentions to whom, for what, and when the amounts were paid.[4] This rule appears to have been adopted from analogy to the rule at Law in accounts; and as it is not sufficient * at Law that the *1228 party should swear to his belief only that the money has

[1] Young *v.* Reynolds, 2 Moll. 21, n.

[2] Bennett, 85.

[3] 2 Smith, 132, 3d ed.

[4] Anon., 1 Vern. 283; Marshfield *v.* Weston, 2 Vern. 176; Bingham *v.* Lady Clanmorris, 1 Moll. 20; Everard *v.* Warren, 2 Cha. Ca. 249; but although a defendant in account shall be discharged by his oath of sums under 40*s.*, a party shall not, by way of charge, charge another party so. *Ibid.*; see also Marshfield *v.* Weston, 2 Vern. 176. In Whicherley *v.* Whicherley, 1 Vern. 470, the Court having been informed that the course of the Court was, that an accountant was to be allowed, on his own oath, all sums not exceeding 40*s.* each, so as the whole sum was not above 100*l.*, declared the rule seemed very unreasonable, and would consider how to rectify it. In Remsen *v.* Remsen, 2 John. Ch. 501, it is remarked by Chancellor Kent, "It is understood to be the settled course of the Court, that upon the defendant accounting before the Master, he is to be allowed, on his own oath being credible and uncontradicted, sums not exceeding forty shillings each; but then he must mention to whom paid, for what, and when, and he must swear positively to the fact, and not as to belief only, and the whole of the items so established must not exceed a hundred pounds; and the defendant cannot, by way of charge, charge another person in this way. The forty shillings sterling was the sum established in the early history of the Court, and perhaps twenty dollars would not now be deemed an unreasonable substitute." The Revised Statutes of New York have fixed the sum at twenty dollars for such cases in the settlement of the accounts of executors and administrators. But such allowances are not in the whole to exceed five hundred dollars, for payments in behalf of any one estate. 2 Rev. Stat. 92, § 55. It has been decided in Maine, at Law, that the books of a party, accompanied by his oath, are not sufficient proof of a charge of twenty-six dollars in money; the sum of forty shillings, or six dollars and sixty-seven cents is the extent that Courts have permitted to be proved in this way. Dunn *v.* Whitney, 1 Fairf. 9. So held also in Massachusetts. Union Bank *v.* Knapp, 3 Pick. 109; Burns *v.* Fay, 14 Pick. 8; Bailey *v.* Blanchard, 12 Pick.

been paid, but he must swear to the fact; so, in accounts under decrees in Equity, it is not sufficient to swear that he believes he paid the money, but he must peremptorily swear to the fact.[1]

But although it is the general rule that every item in a discharge, of forty shillings and upwards, must be supported by a proper voucher, there are cases in which a party has been allowed to discharge himself by other means than the ordinary vouchers; thus, where the evidence produced to charge an accounting party, consists of entries in books kept by the party himself, the party has a right to make use of entries in the same book in support of his discharge.[2] And so, if a paper is produced by one of the parties from which he takes his evidence to charge the accounting party, the same paper may be read by the other party, by way of discharge;[3] thus where an account furnished by a party before any suit instituted, is produced to charge him with the items on the debit side, he is entitled to resort to the credit side in support of his discharge.[4]

This rule is adopted, in Equity, from analogy to the rule at Law, which provides, — "that if to prove a debt, it be sworn that the defendant confessed it, but withal said at the same time that he paid it, his confession shall be valid as to the payment, as well as that he owed it."[5]

*1229 *Upon this principle, it is held, that where a man, by his answer or examination, admits that he has received certain sums, which sums he has paid, &c., *the discharge following in the same sentence*, that will be sufficient to discharge him.[1] It must be observed, however, that it is necessary, in order to entitle the party, charged by his own answer, to read such answer in support of his discharge, that the statement of the payment should be in the same sentence with the admission of the receipt. If it occurs in another part of the answer it cannot be made use of;[2] and it has been held that a party charging

166; see Cogswell *v.* Dolliver, 2 Mass. 217; Prince *v.* Smith, 4 Mass. 455; Craven *v.* Shair, 2 Halst. 345; Ducoign *v.* Shreppel, 1 Yeates, 347; Case *v.* Potter, 8 John. 211. [An accounting party, being credible and uncontradicted, may discharge himself, but not charge the opposite party, before the Master, on his own oath with sums not exceeding twenty dollars each, nor in the aggregate $500, but he must swear positively to the fact, not merely to his belief, and must mention to whom paid, for what, and when. Goodner *v.* Browning, 9 Humph. 783; Brown *v.* Brown, Thomp. Cas. 42.]

[1] Robinson *v.* Cumming, 2 Atk. 409, 410. But an executor or administrator may support his discharge by swearing to his belief that sums under 40*s.* were paid by his testator or intestate himself.

[2] Darston *v.* Earl of Oxford, 1 Eq. Ca. Ab. 10, pl. 9; see *post*, 1249, 1250; but see Reeve *v.* Whitmore, 11 Jur. N. S. 722, V. C. K.; 2 Dr. & Sm. 446.

[3] Carter *v.* Lord Colrain, Barnardist. 126, acknowledged to be correct, 2 B. & B. 386; see Method. Epis. Church *v.* Jacques, 3 John. Ch. 81.

[4] Boardman *v.* Jackson, 2 B. & B. 382; Morehouse *v.* Jackson, 13 Jur. 420, V. C. K. B.; Coward *v.* Coward, *ib.* n. In Jones *v.* Jones, 4 Hen. & M. 447, it was held by Chancellor Taylor, that the general rule of law is, that where you take an account of one of the parties as evidence against him, you must admit it to be evidence for him; but this is only so far as the account would itself be evidence if proved by other means. See Waggoner *v.* Gray, 2 Hen. & M. 603; Freeland *v.* Cocke, 3 Munf. 352. This last rule is said, however, not to be applicable to an executor's account, nor to any case where there is a trust or confidence. Robertson *v.* Archer, 5 Rand. 319; see n. 6, p. 1229, n. (7).

[5] Trials per Pais, Vol. 2, 363.

[1] Ridgeway *v.* Darwin, 7 Ves. 404.

[2] Robinson *v.* Scotney, 19 Ves. 582. [More recent decisions are governed by the sounder rule of being controlled by the sense, instead of the contiguity or grammatical structure of the sentences. Passages connected in

himself in a schedule to his answer, cannot discharge himself by another schedule to the same answer, stating his disbursements;[3] *a fortiori*, he is precluded from discharging himself in this way, by affidavit.[4] And it seems that it is not only necessary that the discharge should be by the same sentence with the charge, but it must form, as it were, one and the same transaction.[5] In *Thompson* v. *Lambe*,[6] Lord Eldon said, "I am clearly of opinion, that a person charged by his answer cannot, by his answer, discharge himself; nor even by his examination, unless it is in this way: if the answer or examination states that upon a particular day, he received a sum of money, and paid it over, that may discharge him; but if he says that upon a particular day he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in his discharge; for it is a different transaction." Upon the same principle it has been held, that a party charged with one sum of money, cannot discharge himself by distinct independent items on the other side of the account.[7]

*It seems also, that, where the account is of long standing, *1230

meaning may be read together from distinct parts of the answer. Rude *v.* Whitechurch, 3 Sim. 562. And, on the other hand, if the matter in avoidance has been skilfully interwoven into the sentences containing responsive admissions, the complainant will be entitled to have the matter of avoidance considered as struck out. McCoy *v.* Rhodes, 11 How. 131; Baker *v.* Williamson, 4 Penn. St. 467; Beech *v.* Haynes, 1 Tenn. Ch. 571.]

[3] Boardman *v.* Jackson, 2 B. & B. 382.

[4] Ridgeway *v.* Darwin, 7 Ves. 404.

[5] Freeman *v.* Tatham, 5 Hare, 329, 340; 10 Jur. 685; and see East *v.* East, 5 Hare, 343; see Hart *v.* Ten Eyck, 2 John. Ch. 89.

[6] 7 Ves. 588.

[7] Robinson *v.* Scotney, *ubi supra*; see Freeland *v.* Cocke, 3 Munf. 352; Jones *v.* Jones, 4 Hen. & M. 447; Waggoner *v.* Gray, 2 Hen. & M. 603. The authorities on this point were very thoroughly sifted by Chancellor Kent in the case of Hart *v.* Ten Eyck, 2 John. Ch. at pages 87–98. That was a case in which administrators were called upon to account. The Chancellor there arrives at the conclusion in reference to this matter, that where the answer is put in issue, what is confessed and admitted need not be proved; but where the defendant admits a fact, and insists on a distinct fact by way of avoidance, he must prove the fact so insisted on in defence. [This conclusion was approved by the Supreme Court of the United States in Clements *v.* Moore, 6 Wall. 315, and by the Supreme Court of Tennessee in Napier *v.* Elam, 6 Yerg. 113. And see Beech *v.* Haynes, 1 Tenn. Ch. 569.] In the case of Talbot *v.* Rutledge, cited and stated at length in Blount *v.* Burrow, 4 Bro. C. C. (Perkins's ed.) 74, 75, Lord Chancellor Hardwicke is said to have remarked, "In this Court (of Chancery) if a man is to be charged by a book, or other writing, he shall also be discharged, if the entries are made for that purpose therein; and so have been many cases relating to goldsmiths' and merchants' accounts. But what is sworn by a man's answer or examination, admits of a different consideration; as, if a man admits, by his answer, that he received several sums at particular times, and in the same answer swears that he paid away those sums at other times in discharge, he must prove his discharge, otherwise it would be to allow a man to swear for himself, and to be his own witness." [See Adams *v.* Adams, 22 Vt. 67.] Chancellor Kent cites this case of Talbot *v.* Rutledge, with approbation, in Hart *v.* Ten Eyck, 2 John. Ch. 89, 90, so far as it refers to the answer of a party. In the case of Talbot *v.* Rutledge, the defendant was examined on oath, on taking an account before the Master, and he acknowledged the receipt of some moneys, but stated that he had disbursed them at other times, on account of the concern. The Master on his proof charged him with the receipt, and put him upon proof of the discharge, and Lord Hardwicke confirmed the report. In another case decided by Lord Hardwicke (Kirkpatrick *v.* Love, Amb. 589), it appeared that the plaintiffs had dealings with the defendant, in the way of merchandise, and on a decree for an account, both parties were to be examined. On taking the account, the plaintiffs admitted the receipt of some goods, and in the same sentence said, they had paid the defendant for them, and the question was whether they were bound to prove the payment. Lord Hardwicke held not, as they charged and discharged themselves *in the same sentence*; but that it would have been otherwise, if the discharge or voidance had been in a different sentence. In reference to these two decisions, Chancellor Kent remarks, "If these two decisions are correctly reported, I cannot undertake to reconcile them; but neither of them applies to the point how far the *answer* will of itself sup-

the Court will sometimes permit the accounting party to discharge himself upon oath, of all such matters as he cannot prove by vouchers by reason of their loss. This was done in *Peyton* v. *Green*,[1] where, in regard that the account in question was of twenty years' standing, it was ordered that the defendant should prove his account by his own oath, so far as he could not prove it by books or cancelled bonds; and in *Holtscom* v. *Rivers*,[2] a similar direction was given, where the account was of fourteen years' standing only.

It appears, also, that if executors or trustees have been led to divest themselves of the fund, by paying it over to their co-trustees or co-executors, the Court will, on a proper case, permit the executor or trustee so paying it over, to discharge himself by his own oath, and that it will do this in preference to permitting one co-executor or trustee to exhibit interrogatories for the examination of the others.[3]

*1231 * But although, in the instances above stated, and in many others, the Court has declared upon the hearing of the cause, that in the circumstances under which the bill has been filed it would apply a different rule of proof from that which is ordinarily applied; it is only when such declaration forms part of the order of the Court directing the account, or upon an order made under special circumstances, that the Master will be authorized to allow a party to discharge

port a matter set up by way of avoidance or discharge. It appears to me that there is a clear distinction as to proof, between the *answer* of the defendant and his examination as a *witness*. At any rate, the question how far the matter set up in the answer can avail the defendant, without proof, is decidedly and rationally settled." Hart *v.* Ten Eyck, 2 John. Ch. 88. This point was also considered in Fisler *v.* Porch, 2 Stockt. 243, 248, 249; Hutchinson *v.* Tindall, 2 Green Ch. 357; see Beckworth *v.* Butler, 1 Wash. 224; Paynes *v.* Coles, 1 Munf. 373; Neal *v.* Robinson, 8 Humph. 435; Allender *v.* Vestry of Trinity Church, 3 Gill, 166; but see Woodcock *v.* Bennet, 1 Cowen, 742–748, and note to page 744, in which it is stated that the decision of Chancellor Kent, in Hart *v.* Ten Eyck, 2 John. Ch. 87–94, was reversed on the point relating to the effect of an answer as stated above. In the same note is Mr. Emmet's able argument in favor of the appellants from the Chancellor's decision. In Woodcock *v.* Bennet, in error, 1 Cowen, 711, it was held, that where an answer to a bill filed is responsive to the bill, and within the discovery sought, it is legal evidence in all cases; and this, whether it is a denial of some fact alleged by the plaintiff, or sets up a fact by way of avoidance merely; see Forsyth *v.* Clark, 3 Wend. 643; Stafford *v.* Bryan, 1 Paige, 239. [This distinction has also been made in Tennessee. Alexander *v.* Williams, 10 Yerg. 109; Walter *v.* McNabb, 1 Heisk. 703; Hopkins *v.* Spurlock, 2 Heisk. 152. But the charges of the bill may be so limited as to prevent the defendant from having the benefit of matters in avoidance. Beech *v.* Haynes, 1 Tenn. Ch. 569.] See the doctrine, as to the effect of allegations in an answer not responsive to the bill, stated, and the authorities cited, *ante*, 843–846, in note. See also Thompson *v.* Lambe, 7 Sumner's Ves. 587, Perkins's note (*b*). In reference to the difference in effect between the answer of the defendant and his examination as a *witness*, above suggested, see Hollister *v.* Barkley, 11 N. H. 501, 509, 510, where it is held that the statements of a party under oath upon the taking of an account, cannot have the character or effect of matter in an answer responsive to the bill, except, perhaps, so far as they are answers to the interrogatories of the other party, or explanations of such answers. See Bellows *v.* Stone, 18 N. H. 465, 472–479. In Higbee *v.* Bacon, 8 Pick. 484, it was held, that if an administrator, in answer to interrogatories in the Probate Court, touching his account, makes an admission tending to charge himself with estate omitted in his account, and at the same time states a fact in his discharge, unsupported by proof, such statement must be rejected as irrelevant.

[1] 1 Cha. Rep. 146; 1 Eq. Ca. Ab. 11.

[2] 1 Cha. Ca. 127; see also Turner *v.* Correy, 5 Beav. 515; Millar *v.* Craig, 6 Beav. 433; Kirkman *v.* Booth, 11 Beav. 273; Allfrey *v.* Allfrey, 1 M'N. & G. 87; 10 Beav. 353, 355; Caton *v.* Ridout, 15 Jur. 308.

[3] Dines *v.* Scott, 1 T. & R. 358.

himself by his own oath, from the sums proved to have come to his hands.[1]

There are many cases in which the Court decreeing an account, directs it to be taken with the admission of certain documents or testimonies not having the character of legal evidence; thus, if parties have been permitted, for a long series of years, to deal with property as their own, considering themselves under no obligation to keep accounts as if there was any adverse interest, having no reason to believe the property belonged to another; though it would not follow, that, being unable to give an accurate account, they should keep the property, yet the account would be directed, not according to strict course, but in such a manner as, under all the circumstances, would be fit.[2] It is to be observed, however, that it is not for the Master to decide, in such cases, as to the propriety of departing from the ordinary course of proceeding: — he cannot do so without the order of the Court, and that an order of the Court to this effect will not always be made until the difficulty of proceeding in the usual mode has become apparent upon an attempt to pursue it in the Master's office; thus, in *Lupton* v. *White*,[3] the Court refused to make such an order prospectively, but gave liberty to either party, if the Master in taking the account should find difficulty as to receiving any evidence, to apply to the Court for directions upon that particular point.

It may be mentioned here, that the Court will not allow any thing in the account, under the name of general expenses, but the party must name the particulars.[4] So, also, where a party discharges himself, upon his oath, of sums under 40*s*., he must, in his affidavit, mention unto whom paid and for what and when.[5]

*In almost every decree directing accounts to be taken by *1232

[1] *Ibid.*; and see Maddeford *v.* Austwick, 11 Sim. 209. Before the Statute of Massachusetts making parties witnesses, an executor, though bound to make oath to the truth and correctness of his accounts, and to answer such specific interrogatories as may be put to him touching the same, could not be admitted upon his own motion, as a competent witness generally to his accounts and their items, except to support small charges, not exceeding forty shillings, according to the usage in Probate Courts. Bailey *v.* Blanchard, 12 Pick. 166.

[2] See Lupton *v.* White, 15 Ves. 433–443; Gordon *v.* Lewis, 2 Sumner, 143, 148, *post*, 1241.

[3] 15 Ves. 433.

[4] Anon., 1 Eq. Ca. Ab. 11. The allowance of a sum in gross, in an administration account, without items or explanations, is improper. Swan *v.* Wheeler, 4 Day, 137; see Field *v.* Hitchcock, 14 Pick. 405. The items on the credit side of an account, in the Orphans' Court of New Jersey, may be expressed in general terms. Liddell *v.* M'Vicker, 6 Halst. 44.

[5] Anon., 1 Vern. 283, *ante*, 1227, 1228, note. Under the present practice in England, the Court is expressly authorized, in any case where any account is required to be taken to give such special directions (if any) as it may think fit with respect to the mode in which the account should be taken or vouched; either by the decree or order directing such account, or by any subsequent order or orders; upon its appearing to the Court that the circumstances of the case are such as to require such special directions; and particularly the Court may, in cases where it shall think fit to do so, direct that, in taking the account, the books of account, in which the accounts required to be taken have been kept, or any of them, shall be taken as *primâ facie* evidence of the truth of the matters therein contained; with liberty to the parties interested to take such objections thereto as they may be advised. 15 & 16 Vic. c. 86, § 54; see Ewart *v.* Williams, 7 De G., M. & G. 68; 1 Jur. N. S. 409, 3 Drew. 21. The above provisions do not authorize any substantial variation of a decree previously made. Nelson *v.* Booth, 3 De G. & J. 119; 5 Jur. N. S. 28; see Ogden *v.* Battams, 1 Jur. N. S. 791, V. C. W.; Sleight *v.* Lawson, 3 K. & J.

the Master, there is inserted a declaration that "the Master is to make unto the parties all just allowances."[1] Under this direction, the Master is authorized to allow the parties such disbursements as may appear to have been fairly and properly made by them. It is to be observed, that it is not the ordinary course for the Court, in matters of this nature, to say, in the first instance, what is a just allowance; but that it generally leaves the determination as to what is to be considered a just allowance to the Master, and that the Court is not called upon to decide it except upon exceptions to the report.[2] In *Cook* v. *Collingridge*,[3] however, Lord Eldon, under the special circumstances of the case, made it part of the order that, as to such part of the allowance as should be claimed and objected to before the Master, he was to state his reasons for allowing or disallowing the same.[4]

With respect to what, by the practice of the Court, may be considered as just allowances, that must depend very much upon *1233 the * circumstances of each case;[1] it is, however, a settled rule that whatever a trustee or personal representative has expended in the fair execution of his trust, may be allowed him in passing his accounts; thus, where the decree, in a suit by residuary legatees, directed an account to be taken of the personal estate of a testator, *and of his debts and funeral expenses*, and the personal estate was ordered to be applied in payment of the debts and funeral expenses in a course of administration, and the Master allowed payments in discharge of legacies, it was held, that the payment of legacies, in such an account, was the subject of a just allowance, as the plaintiff could be entitled to nothing until the legacies were paid.[2] So where a trustee, in the fair

202. In general, such special directions should be given only where, from the loss of vouchers or any other cause, the accounts cannot be taken in the ordinary way; and should not be given where the ordinary evidence can be had, or merely to save expense. Lodge *v.* Pritchard, 3 De G., M. & G. 906; Ewart *v.* Williams, *ubi supra;* Morgan *v.* Higgins, 1 Giff. 270, 283; see Coleman *v.* Mellersh, 2 M'N. & G. 309. Special directions as to the manner of taking accounts, and receiving books of account, as *primâ facie* evidence, should not, in general, be given at the hearing; but by the Judge, in the course of the proceedings under the reference. See Attorney-General *v.* Attwood, 9 Hare Ap. 56 n., Seton, 99; Ogden *v.* Battams, 1 Jur. N. S. 291, V. C. W.; Sleight *v.* Lawson, 3 K. & J. 292; Ewart *v.* Williams, 3 Drew. 21; Stewart *v.* Pollard, Seton, 105, 106.

[1] Seton on Decrees, 42. But, under the present practice in England, in taking any account directed by a decree or order, all just allowances will be made, without any direction for that purpose in the decree or order. Ord. XXIII. 16; Blackford *v.* Davis, L. R. 4 Cha. Ap. 307.

[2] Brown *v.* Detestet, Jac. 284–294; see Peyton *v.* Smith, 2 Dev. & Bat. 325; Wright *v.* Wright, 2 M'Cord Ch. 195; Adams *v.* Brown, 7 Cush. 220; Reed *v.* Reed, 10 Pick. 398; Boston Iron Co. *v.* King, 2 Cush. 405, 406; Sparhawk *v.* Wills, 5 Gray, 423; Howe *v.* Russell, 36 Maine, 115; Ashmead *v.* Colby, 26 Conn. 289, 312, 313. Instances are not wanting where the decree ordering the account to be taken has directed the allowance of particular items. See Smith *v.* Wilkinson, 2 Newl. Ch. Pr. 335; Consequa *v.* Fanning, 3 John. Ch. 590. But the more modern cases would seem to exclude these directions as to what items of the accounts should or should not be allowed. Still the Court must, it should seem, settle the construction and effect of agreements between the parties, by which their mutual dealings were regulated, and by which, consequently, the account must be controlled. Hudson *v.* Trenton Locomotive & Machine Manuf. Co., 1 C. E. Green, 475, 477; Sharp *v.* Morrow, 6 Monroe, 300.

[3] Jac. 607.

[4] *Ib.* 625.

[1] See Blackford *v.* Davis, L. R. 4 Ch. Ap. 304, 307, 308.

[2] Nightingale *v.* Lawson, 1 Cox, 23.

execution of his trust, has expended money by reasonably and properly taking opinions and procuring directions necessary to the due execution of his trust, he is entitled, not only to his costs, but to his charges and expenses, under the head of just allowances;[3] and he may also be allowed the costs of litigation conducted by him strictly as trustee: and although such costs may not have been allowed him in the suit in which they were incurred:[4] he will not, however, be allowed the costs of unsuccessful litigation which he has imprudently commenced.[5] The next friend of an infant is also entitled to his charges and expenses: for as the infant himself cannot incur charges and expenses, if they cannot be claimed as just allowances, and the next friend is to be at the whole expense of the infant beyond his costs, persons will deliberate before they accept the office.[6]

The expenses of a sale may also be allowed, under the head of just allowances:[7] and a widow, who was trustee for her son, of the real estate, whereof she was dowable, was allowed, in accounting for the rents and profits, to retain so much thereof as she was entitled to for her dower, under the head of just allowances.[8]

But although an executor or trustee is of course entitled, under the head of just allowances, to have all the reasonable expenses he may have incurred in the conduct of the trust, he is not entitled to any compensation for personal trouble and loss of time.[9] This * rule *1234

[3] Fearns *v.* Young, 10 Ves. 184; Attorney-General *v.* Mayor of Norwich, 2 M. & C. 406, 424; 1 Jur. 398; Allen *v.* Robbins, 7 R. I. 33, 40; see Wham *v.* Love, Rice Eq. 51; The Bank *v.* Trapier, 2 Hill Ch. 26; Pettibone *v.* Stevens, 15 Conn. 19.

[4] Graham *v.* Wickham, 11 Jur. N. S. 168; 2 De G., J. & S. 497.

[5] Chambers *v.* Smith, 2 Coll. 742; 11 Jur. 359, L. C.; S. C. *nom.* Smith *v.* Chambers, 2 Phil. 221. [But the question as to whether the executor is to be allowed the costs of litigation with a stranger is not determined in that suit, and will be settled in the administration suit. Graham *v.* Wickham, 2 De G., J. & S. 497.]

[6] Fearns *v.* Young, 10 Ves. 184. [See Yourie *v.* Nelson, 1 Tenn. Ch. 614.]

[7] Crump *v.* Baker, 18 Ves. 285.

[8] Graham *v.* Graham, 1 Ves. 262.

[9] Robinson *v.* Pett, 3 P. Wms. 249; Scattergood *v.* Harrison, Mos. 128; Brocksopp *v.* Barnes, 5 Mad. 90; Marshall *v.* Holloway, 2 Swanst. 432, 453; see McWorter *v.* Benson, 1 Hopk. 28; Manning *v.* Manning, 1 John Ch. 547; Green *v.* Winter, *ib.* 27. But compensation is in general provided for executors and trustees in the United States. Carrol *v.* Connel, 2 J. J. Marsh. 205; Wright *v.* Wright, 2 M'Cord Ch. 195; Taliaferro *v.* Minor, 2 Call, 190; Triplett *v.* Jameson, 2 Munf. 242; Cavendish *v.* Fleming, 3 Munf. 198; Webb *v.* Webb, 6 Monroe, 166; Gist *v.* Gist, 2 M'Cord Ch. 474; M'Anslan *v.* Green, Cam. & Nor. 33; Wood *v.* Lee, 5 Monroe, 65; Nimmo *v.* Commonwealth, 4 Hen. & M. 57; Miller *v.* Beverleys, 4 Hen. & M. 415, 420; Logan *v.* Troutman, 3 A. K. Marsh. 66; Walker's Estate, 9 Serg. & R. 223; M'Pherson *v.* Israel, 5 Gill & J. 60; Lee *v.* Lee, 6 Gill & J. 316; Jennison *v.* Hapgood, 10 Pick. 77; Gibson *v.* Crehore, 5 Pick. 161; Wilson *v.* Wilson, 3 Binney, 557. And so in the United States the accounts of executors, administrators, and trustees are generally disposed of in the Courts of Probate. But the remedy in those Courts may not always be complete, and a resort to Chancery may become necessary. Thus in French *v.* Winsor, 36 Vt. 412, 418, it was said by Poland C. J., "All accounting between trustees and their *cestui que trusts* was always a proper head of original Equity jurisdiction; and, except that, by statute, jurisdiction of this particular species of trust is given to the Courts of Probate, it would properly come within ordinary Chancery jurisdiction; and if, by reason of the limited power of the Probate Court, or its peculiar mode of proceeding, it cannot give relief, resort may then be had to the more ample power and jurisdiction of a Court of Equity." In this case an administrator, after paying the debts of the estate, paid to the guardian of a minor who was the sole heir, more than the true balance in his hands, but did not settle his account in the Probate Court. The amount overpaid was fixed by agreement with the heir after he became of age. The Court held, that, even if the administrator had settled in the Probate Court, and it had there been found that he had overpaid, and that a balance was due

applies especially where an executor has an express legacy for his pains; nor will it alter the case, that the executor has renounced and yet is assisting to the executorship; even though it appears that he has deserved something, and benefited the trust to the prejudice of his own affairs.[1] And, even where an executor had acted as a commission agent for a testator in his lifetime, under a power of attorney, and was held entitled on an account to the usual commission on his agency, prior to the death of the testator, he was not allowed to charge commission on the business transacted subsequently to his death.[2] The same rule has been extended to solicitors and attorneys, who, in the character of executors and trustees, are not, unless authorized by the instrument creating the trust,[3] allowed any professional charge, or remuneration for loss of time or other emoluments, but only such charges and expenses, actually paid by them out of pocket, as the Master may find to have been properly incurred and paid;[4] and, in the taxation of costs, the Master will, without any special order, disallow all other costs claimed by them.[5] A solicitor will, however, be allowed his costs where he acts as the *1235 solicitor for other parties in the cause; * and where he acts both as solicitor for himself and for other parties, his costs of suit will only be disallowed to the extent to which they have been increased by his being a party.[1] Where the solicitor is a member of a firm, costs out of pocket only will be allowed, although the business is transacted by his partner;[2] unless the latter is acting for his own exclusive benefit.[3]

Although an executor or trustee, who acts himself as solicitor in the affairs of his trust, cannot be allowed any thing for his professional assistance beyond what he has actually paid out of pocket, an executor or trustee who requires the assistance of a solicitor, in the execution of his trust, will be allowed the amount of what he has *properly* paid to

to him, clearly the Probate Court could give him no aid to recover it; but that he might have a decree in Chancery against the heir for the amount so overpaid, the claim being really against the heir, though in form against the estate.

[1] Robinson *v.* Pett, *ubi supra.*

[2] Sheriff *v.* Axe, 4 Russ. 33; and see Matthison *v.* Clarke, 3 Drew. 3; Douglass *v.* Archbutt, 2 De G. & J. 148; Crosskill *v.* Bower, 32 Beav. 86.

[3] *Re* Sherwood, 3 Beav. 338; Moore *v.* Frowd, 3 M. & C. 45; see Harbin *v.* Darby, 28 Beav. 325.

[4] Moore *v.* Frowd, 3 M. & C. 45; see also New *v.* Jones, 9 Blythewood's Convey. by Jarman, p. 338; S. C. 1 M'N. & G. 668, n. (*d*); Frazer *v.* Palmer, 4 Y. & C. Ex. 515; *Re* Sherwood, *ubi supra;* Bainbrigge *v.* Blair, 8 Beav. 588; 9 Jur. 765; Stanes *v.* Parker, 9 Beav. 385; 10 Jur. 603; Broughton *v.* Broughton, 5 De G., M. & G. 160; 1 Jur. N. S. 965; 2 Sm. & G. 422; Lincoln *v.* Windsor, 9 Hare, 158; Pollard *v.* Doyle, 1 Dr. & S. 319. As to costs of a solicitor mortgagee, see Sclater, *v.* Cottam, 3 Jur. N. S. 630.

[5] York *v.* Brown, 1 Coll. 260; 8 Jur. 567; Cradock *v.* Piper, 1 M'N. & G. 664; and see Price *v.* M'Beth, 10 Jur. N. S. 579; 12 W. R. 818, V. C. S. [Professional charges by a solicitor acting in a fiduciary capacity were disallowed in Mayer *v.* Galluchat, 6 Rich. Eq. 1; Matter of Bank of Niagara, 6 Paige 213; but were allowed in Fulton *v.* Davidson, 3 Heisk. 615; Wendell *v.* French, 19 N. H. 210; Carmichael *v.* Wilson, 2 Moll. 537. See, however, what Lord Cottenham says of this latter case in Cradock *v.* Piper, 1 M'N. & G. 678. See also Thompson *v.* Childress, 1 Tenn. Ch. 369, 374.]

[1] Cradock *v.* Piper, *ubi supra;* Clack *v.* Carlon, 7 Jur. N. S. 441; 9 W. R. 568, V. C. W.; Pierce *v.* Beattie, 9 Jur. N. S. 119; 11 W. R. 979, V. C. K.; but see Lincoln *v.* Windsor, and Broughton *v.* Broughton, *ubi supra.*

[2] Collins *v.* Casey, 2 Beav. 128; Christophers *v.* White, 10 Beav. 523.

[3] Clack *v.* Carlon, *ubi supra.*

such solicitor, in respect of his bill of costs;[4] he will not, however, be allowed, without question, whatever sum he thinks proper to pay to his solicitor, but the practice in cases of this description is, for the Master to hand the solicitor's bill over to the proper officer to be taxed and moderated, without proceeding to a regular taxation.[5]

Where it is necessary to the due execution of their office, that trustees, &c., should employ accountants,[6] agents, or receivers, under them, they are entitled to be allowed the costs of such agents or receivers.[7] Thus, where a testator died possessed of several houses let at weekly rents, the Court held the trustees justified in paying a person to collect such rents; even though the testator had, by his will, given his trustees small annuities for their trouble.[8]

It seems that according to the course of the Courts in India, and the usage there, an executor is entitled to a commission of five per cent for collecting the estate of the testator; the Court here, therefore, will make the same allowance to an Indian executor passing * his *1236 accounts in this country.[1] It seems, also, that the executor will be entitled to such commission, although he has a legacy given him by the will, provided it is not expressly given to him in the character of executor;[2] and that he will be allowed to charge it on all the assets of the testator collected by him in India, including the assets which he retains in respect of his own legacy, and the moneys belonging to the testator which were in the hands of a commercial house in which the executor was, and the testator had been, a partner.[3]

It may be noticed here, that where a substantive claim, for a specific allowance (as for commission upon receipts in India) has been made by the answer, and no special direction has been founded upon it in the decree, the Master will not be justified in making such an allowance under the head of just allowances:[4] the proper inference to be drawn from the fact of the claim, made by the answer, not being noticed in

[4] See Pusey *v.* Clemson, 9 Serg. & R. 209; Bryson *v.* Nichols, 2 Hill Ch. 121; Branham *v.* Commonwealth, 7 J. J. Marsh. 190; Crofton *v.* Ilsley, 6 Greenl. 48; Sterrett's Appeal, 2 Pennsyl. 419; Liddell *v.* M'Vickar, 6 Halst. 44.

[5] Johnson *v.* Telford, 3 Russ. 477; see Liddell *v.* M'Vickar, 6 Halst. 44. An executor or administrator ought to be credited in his administration account for fees paid to counsel, although those fees were more than the law allowed. Lindsay *v.* Homerton, 2 Hen. & Munf. 9. Where the services of counsel are required, some discretion must be allowed the trustee as to the amount of compensation; but the mere fact that a trustee has paid fees to an attorney or counsel will not, of itself, be a warrant for the allowance, especially where it is obvious that there could be no occasion for their services. Green, Chancellor, in Holcombe *v.* Holcombe, 13 N. J. Ch. 415, 416.

[6] Henderson *v.* M'Iver, 3 Mad. 475.

[7] Vanderheyden *v.* Vanderheyden, 2 Paige, 287. Where an administrator employed an agent to collect money for the estate under his care, no resort being had to legal process, and the agent being neither a public officer nor an attorney, it was held, that the compensation for such agent was not a charge upon the estate. Gwynn *v.* Dorsey, 4 Gill & J. 453.

[8] Wilkinson *v.* Wilkinson, 2 S. & S. 237; but see Weiss *v.* Dill, 3 M. & K. 26, where it was held, that an executor will not be allowed to charge for an agent, except under very special circumstances, and that a Master's report, reducing the executor's charge, for the employment of such agent, from five per cent to 2½ per cent was correct.

[1] Chetham *v.* Lord Audley, 4 Ves. 72; Poole *v.* Larkins, *ibid.*; Cockerell *v.* Barber, 1 Sim. 23; Campbell *v.* Campbell, 13 Sim. 168; 2 Y. & C. C. C. 607; Matthews *v.* Bagshaw, 14 Beav. 123, 126, n.

[2] Cockerell *v.* Barber, *ubi supra*.

[3] *Ibid.*

[4] E. I. Company *v.* Keighly, 4 Mad. 38.

the decree being, either that the Court did not think it proper to be allowed, or that the party making it had abandoned it.

It seems, moreover, that claims cannot be allowed to a defendant, under the head of just allowances, unless they are immediately connected with the transactions in respect of which the account is decreed.[5] Thus, in a suit against a steward and land agent, where the decree directed an account to be taken of rents, profits, and timber money received by the defendant on the plaintiff's account, and also directed the Master to make to the parties all just allowances, it was held, that the Master could not under the head of just allowances, permit the defendant to set off the amount of certain bills of costs due from the plaintiff to him as a solicitor.[6]

Accounts in Suits for Redemption of Mortgaged Premises.[7]

[A mortgagee in possession of mortgaged premises is said to be the steward or bailiff of the mortgagor, without a salary, and as such *1237 *accountable upon a suit brought for the redemption of the premises.[1] He is, as such, accountable to the mortgagor or his assignee.[2]]

The form of decree generally made in such a case, so far as

[5] See Blackford *v.* Davis, L. R. 4 Ch. Ap. 304. Under a direction to allow each party all expenses necessary to the due use and preservation of the common property, it was held proper to allow the cost of a lock, the erection of which was required by law as the condition of maintaining a dam previously built, although the lock was more expensive than the law required, the proof showing that such a lock was desirable, if any was built. Reed *v.* Jones, 16 Wis. 40.

[6] Joliffe *v.* Hector, 12 Sim. 398. Expenses and services, which have been rendered necessary through the fault of the administrator, will not be allowed for in the settlement of his account. See Brackett *v.* Tillotson, 4 N. H. 208; Moore *v.* Zabriskie, 3 C. E. Green, 51. But an unfaithful administration will not deprive an executor of his right to compensation for services, so far as they have been beneficial to the estate. Jennison *v.* Hapgood, 10 Pick. 77; Moore *v.* Zabriskie, 3 C. E. Green, 51. [But see Trimble *v.* Dodd, 2 Tenn. Ch. 500.]

[7] A mortgagee in possession is bound to account for all rents, issues, and profits received by him, and for all waste and destruction of the premises, and must deduct the allowance for these matters from the amount due on his mortgage. But such allowance can only be claimed, either on a bill to foreclose, or bill to redeem, against a mortgagee in possession, and in possession as mortgagee. He cannot be called to account, in such suits, for trespasses committed by him; nor, if he is in possession as tenant of the mortgagor, under a lease from him, which a mortgagee may take as well as a stranger, can the mortgagor claim an allowance for rent due on the lease, or waste committed as tenant. Onderdonk *v.* Gray, 4 C. E. Green, 65; White *v.* Williams, 2 Green Ch. 376. Where the mortgagee is proceeding in Equity to foreclose, the mortgagor may file a cross-bill praying for an account, and to be allowed to redeem on paying the balance due. Onderdonk *v.* Gray, *ubi supra.*

[1] Cholmondeley *v.* Clinton, 2 J. & W. 179. In a suit for redemption of mortgaged premises, it is provided by statute in Massachusetts, that "if the mortgagee or any person under him has had possession of the premises, he shall account for the rents and profits, and shall be allowed for all sums expended in reasonable repairs and improvements, all sums paid for lawful taxes and assessments, and all other necessary expenses in the care and management of the premises. If on such account there is a balance due from him, it shall be considered as so much paid towards the debt due on the mortgage. If there is a balance due him, it shall be added to the debt, and be paid or tendered as such." Genl. Sts. c. 140, § 15. The mortgagee cannot be allowed for payments for any purposes not strictly embraced within the provisions of the statute: Strong *v.* Blanchard, 4 Allen, 538; and the burden of proof is on him to establish them: Strong *v.* Blanchard, *ubi supra.*

[2] Ruckman *v.* Astor, 9 Paige, 517, or to a subsequent mortgagee, Moore *v.* Degraw, 1 Halst. Ch. (N. J.) 346, for the rents and profits, Brown *v.* Simons, 44 N. H. 477, 478. The case may be sent to a Master to take an account of payments made upon the mortgage debt, although the mortgagee has never been in possession of the premises, and has received no rents and profits. Doody *v.* Pierce, 9 Allen, 141, 144.

A first mortgagee, who has merely taken formal possession for the purpose of foreclo-

it concerns the Master, is, "that it be referred to, &c., to take an account of what is due to the defendant for principal and interest on the mortgage in the pleadings mentioned, and that the said Master do also take an account of the rents and profits of the said mortgaged premises received by the defendant, or by any other person or persons by his order, or for his use, since the ——— day of ———, or which without his wilful default,[3] might have been *received *1238 thereout. And what shall be coming on the said account of rents and profits to be deducted out of what shall be found due to the defendant for principal and interest. And in case the said Master shall find the said defendant has been in possession and held the said premises, as owner thereof, then the said Master is to set a rent thereon, and take the account accordingly. And in taking the said account he is to make the parties all just allowances, and particularly for all necessary repairs and lasting improvements, which have been made by the defendant on the said mortgaged premises since the, &c."[1]

The party applying to redeem should bring in a charge stating the

sure, and has allowed the mortgagor to remain in possession, and to take the rents and profits, does not render himself liable to account with the second mortgagee for the rents and profits, although in making such entry he has the purpose to prevent the creditors of the mortgagor from attaching the crops growing on the mortgaged premises. Charles *v.* Dunbar, 4 Met. 498; Bailey *v.* Myrick, 52 Maine, 132; Demarest *v.* Berry, 1 C. E. Green, 481; see Myer's Appeal, 42 Penn. St. 518.

But if the mortgagee in possession permits the mortgagor to take the profits of the mortgaged premises, the mortgagee will be charged, in favor of subsequent incumbrancers, with all the profits he might have received. So if the mortgagee refuses to enter, but suffers the mortgagor to take the profits and to protect his possession by means of the mortgage. Demarest *v.* Berry, 1 C. E. Green, 481; Coppring *v.* Cooke, 1 Vern. 270; Bentham *v.* Haincourt, Prec. in Ch. 30; Chapman *v.* Farmer, 1 Vern. 267; Dux Bucks *v.* Gayer, 1 Vern. 257. The principle upon which the Court acts is, that if the mortgagee be in possession, or act *malâ fide* in regard to subsequent incumbrancers, he will be charged, not only with all profits received, but with all which, without fraud or wilful default, he might have received from the mortgaged premises. Demarest *v.* Berry, *ubi supra;* Loftus *v.* Swift, 2 Sch. & Lef. 655; Harvey *v.* Tebbutt, J. & W. 203; Berrey *v.* Small, J. & W. 630. [A mortgagee may take possession of part of mortgaged property, as, for example, the land, not the timber; or the right of hunting and shooting, and be charged accordingly. Simmons *v.* Shirley, 6 Ch. Div. 173.]

[3] Sometimes, instead of the words "without his wilful default," the words "with ordinary care and diligence" are inserted. See Burnet *v.* Claghry, 1 January, 182, Hoff. Mast. in Chan. (ed. 1824), 242; see also Seton's Forms, 106, 107; 4 Kent, 166.

[1] Hoff. Mast. in Chan. 241; Seton, Forms, 106, 109; Vanderhaise *v.* Hugues, 2 Beasley, 410. In estimating the amount for which conditional judgment shall be entered, under the Statute of Massachusetts (Rev. Sts. c. 107, § 5; Genl. Sts. c. 140, § 5), upon a writ of entry to foreclose a mortgage, distinct debts cannot be set off. The question is, "How much is due to the plaintiff on the mortgage?" not, What would be due between the parties upon a settlement of all mutual demands between them. Bird *v.* Gill, 12 Gray, 60.

In New Jersey, the proceedings to foreclose a mortgage are said to be *in rem*, and not against the person of the debtor. The principles of set-off do not apply. Nothing can be set up by way of satisfaction of the mortgage, in whole or in part, except payment. There must either have been a direct payment of part of the debt, or an agreement that the sum proposed to be set off should be received and credited as payment. Dolman *v.* Cook, 1 McCarter, 56; White *v.* Williams, 2 Green Ch. 376; [Dudley *v.* Bergen, 8 C. E. Green, 397. See] Troup *v.* Haight, 1 Hopk. 239.

But in New Hampshire, the defendant in a writ of entry upon a mortgage may make any defence which he could properly make in an action upon the note secured by the mortgage. Hence, he may file a set-off to the plaintiff's demand which is secured by the mortgage, and in that way reduce the amount which the Court shall adjudge due upon the mortgage debt; or, if the set-off be large enough, may defeat the plaintiff's action altogether. The set-off must, however, be against the party to whom the money which is secured by the mortgage is payable, and to enforce the payment of which the suit is brought. Northy *v.* Northy, 44 N. H. 141;

rents and profits received, or what he claims on the ground of a wilful default or gross negligence in not receiving what the party, if in the occupation of the premises, should be charged with as a fair rent, and any charge upon the ground of waste or spoliation, with any other item properly to be brought against the defendant under the decree. This is to be proceeded upon in the usual manner; and when the charge is settled, the defendant's discharge should be brought in, containing a statement of the amount due upon the bond or note and mortgage, expenditures in repairs and in improvements or their value, and all other allowances claimed by him.[2]

As to the rents and profits. The mortgagee is bound to make all reasonable efforts to rent the premises.[3] By taking possession he imposes upon himself the duty of an ordinarily provident owner, and he is bound *1239 to obtain what such an owner would, with * reasonable diligence, have received.[1] As any person may be a mortgagee, so any person may, in the exercise of his right on default of the mortgagor to pay his debt, find it necessary to occupy the position of a mortgagee in possession, and to account for his care and management of the mortgaged premises. Hence he should, as a general rule, be held chargeable only with the rents actually received by him, or with those which he might have received by the exercise of ordinary care and diligence, as it is sometimes expressed, or without wilful default or gross negligence, as it is at other times expressed.[2] Actual fraud is not necessary to charge a mortgagee in possession; it is sufficient, if there is plain, obvious, and gross negligence, by not making use of facts within his knowledge; as, for instance, he will be chargeable with an amount of rent for which the premises were held by a sufficient tenant turned out by him, or which would have been given by a sufficient tenant, whom he has refused to accept.[3]

But the mortgagee is not bound to engage in adventures and speculations for the benefit of the mortgagor, and he is not to be affected by

see also Chapman *v.* Robertson, 6 Paige, 627; Holden *v.* Gilbert, 7 Paige, 208; Knapp *v.* Burnham, 11 Paige, 330; Rawson *v.* Copland, 3 Barb. Ch. 166; Raguet *v.* Roll, 7 Ham. 76; Adair *v.* Adair, 5 Mich. 204; Thayer *v.* Mann, 19 Pick. 535; Vinton *v.* King, 4 Allen, 562.

[2] Hoff. Mast. in Chan. 242, 243.

[3] Per Dewey J., in Sparhawk *v.* Wills, 5 Gray, 429.

[1] Williams *v.* Price, 1 S. & S. 581; 4 Kent, 166; Miller *v.* Lincoln, 6 Gray, 556; Hughes *v.* Williams, 12 Vesey, 493; 3 Powell on Mort. 949 *a*, note; Benham *v.* Rowe, 2 Cal. 387; Shaeffer *v.* Chambers, 2 Halst. Ch. (N. J.) 548. The mortgagee is trustee for the mortgagor only to a very limited extent. King *v.* Stat. Mut. Fire Ins. Co., 7 Cush. 7, 8; Clarke *v.* Sibley, 13 Met. 213; Russell *v.* Southard, 12 How. U. S. 154, 155; see Brown *v.* Simons, 44 N. H. 477, 478.

[2] Sparhawk *v.* Wills, 5 Gray, 429, 430; Miller *v.* Lincoln, 6 Gray, 556; Anon., 1 Vern. 45; Hughes *v.* Williams, 12 Ves. 493; Rowe *v.* Wood, 2 Jac. & W. 556; Anthony *v.* Rogers, 20 Miss. 281; Jewett *v.* Cunard, 3 Wood. & M. 277; Strong *v.* Blanchard, 4 Allen, 538; Richardson *v.* Wallis, 5 Allen, 78; Demarest *v.* Berry, 1 C. E. Green, 481; [Gerrish *v.* Black, 104 Mass. 400; Simmons *v.* Shirley, 6 Ch. Div. 173; Madison Avenue Baptist Church *v.* Oliver Street Baptist Church, 73 N. Y. 82; Lockhart *v.* Gee, 3 Tenn. Ch. 334; Dawson *v.* Drake, 3 Stew. Eq. 601. He is also chargeable, if he sell, with the proceeds of sale received, or which without his wilful default might have been received. Mayer *v.* Murray, 8 Ch. Div. 424.] In a bill to redeem real estate mortgaged, the mortgagee may properly be called upon to account for what he has received, or ought to have received of the proceeds of personal property mortgaged to him to secure the same demands, deducting all reasonable and necessary expenses incurred in and about it. Stone *v.* Bartlett, 46 Maine, 438.

[3] Anon., 1 Vern. 45; Hughes *v.* Williams, 12 Ves. 494, 495; Beare *v.* Prior, 6 Beav. 183; see Shaeffer *v.* Chambers, 2 Halst. Ch. 557.

the inquiry, whether some person would not have given more, if the fact was not communicated to him.[4]

He is, however, accountable for the rent during the time he suffers a notoriously insolvent tenant to occupy the premises,[5] deducting the time reasonably necessary to expel him by legal means and to obtain a responsible tenant.[6] But he is not responsible for rent due from a tenant, who absconds, if he has not been guilty of negligence.[7]

If the mortgagee himself occupies the estate, he is liable to account for the fair rent of the premises;[8] without regard to what he may in fact have realized as profits from the use of them.[9]

*But he will not be charged for rents and profits which have *1240 arisen exclusively from his own expenditures in improvements, which are not allowed for to him in the account.[1] If, however, he has been allowed for the improvements, or they are not made by himself, there is no reason why he should not be charged with the improved rents arising therefrom.[2]

If the premises are subject to a lease, and the mortgagee enters and claims the rents, he will be charged with the same at the rate reserved in the lease.[3] So it has been held that, if the mortgagor makes proof, that the estate was let at a certain price while in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the contrary is shown by the mortgagee.[4]

If there be wilful default or gross neglect, as to the making of repairs, by which the property is depreciated in value, the mortgagee, who is in possession, is trustee to the mortgagor to that extent, that he ought to be made responsible for the deterioration during the time of his possession.[5] But he is not bound to leave the estate in the situation in which he found it, if the lapse of time will account for the injury. He ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature, decaying by ruin.[6] A diminution in value of the rents is not sufficient evidence

[4] Hughes *v.* Williams, 12 Ves. 496.

[5] Miller *v.* Lincoln, 6 Gray, 556; Coote Mort. 561; Hagthorp *v.* Hook, 1 Gill & J. 270; Neale *v.* Hagthorp, 3 Bland, 590; 1 Coote, 427, 428; Brown *v.* Simons, 44 N. H. 477, 478.

[6] Miller *v.* Lincoln, 6 Gray, 556.

[7] Saunders *v.* Frost, 5 Pick. 259.

[8] Trimleston *v.* Hamill, 1 B. & P. 385; Maroney *v.* O'Dea, 1 B. & B. 118; Moore *v.* Degraw, 1 Halst. Ch. (N. J.) 346; Gordon *v.* Lewis, 2 Sumner, 143; Trulock *v.* Robey, 15 Sim. 265; Holabird *v.* Burr, 17 Conn. 556; Kellogg *v.* Rockwell, 19 Conn. 446; Tucker *v.* Buffum, 16 Pick. 46; Pierce *v.* Faunce, 53 Maine, 351, 354; Currier *v.* Webster, 45 N. H. 226, 235.

[9] Sanders *v.* Wilson, 34 Vt. 318.

[1] Moore *v.* Cable, 1 John. Ch. 385; Bell *v.* Mayor of New York, 10 Paige, 49; Hidden *v.* Jordan, 28 Cal. 301.

[2] Montgomery *v.* Chadwick, 7 Clarke (Iowa), 114; see Givens *v.* M'Calmont, 4 Watts, 460; Merriam *v.* Barton, 14 Vt. 501; Story *v.* Shultz, 1 Hill Ch. 464; Morrison *v.* M'Leod, 2 Ired. Eq. 108; Hidden *v.* Jordan, 28 Cal. 301.

[3] Trimleston *v.* Hamill, 1 B. & B. 385.

[4] Blacklock *v.* Barnes, Sel. Cas. in Chan. 53; Hoff. Mast. in Chan. 248.

[5] Dexter *v.* Arnold, 2 Sumner, 126 and note; see Witherington *v.* Banks, Sel. Cas. in Chan. 31, per Baron Price; Thorne *v.* Newman, Finch, 38; Hoff. Mast. in Chan. 249. Waste must be charged in the bill, and specifically referred to the Master. Gordon *v.* Hobart, 2 Story, 243, 260, 261.

[6] Russell *v.* Smithies, 1 Anst. 96; Dexter *v.* Arnold, 2 Sumner, 126 and note; Hoff. Mast. in Chan. 245, 246. As to his liability when he pulls down buildings, see Soudon *v.* Hooper, 6 Beav. 250. In Dexter *v.* Arnold, Mr. Justice Story said: "It is also the default of the mortgagor himself, if he does not take care to have suitable repairs made, to preserve his property."

of a want of proper repairs.[7] If the clearing of land by the mortgagee is shown to be an injury to the estate, he will be charged for the waste; but if it is not an injury, he will not be charged for waste.[8]

*1241 * If a mortgagee continues to occupy the mortgaged premises, or to receive the rents and profits thereof, after his debt has been satisfied,[1] he will be accountable for an occupation rent in the first case, and for the rents and profits received in the latter case, with interest thereon.[2] As soon as he is paid, the mortgagee is regarded in Equity as a mere trustee, holding the legal estate for the benefit of the mortgagor, and he will be charged with interest on the balances retained in his hands from the time he was overpaid.[3] Where the mortgagee has kept no regular accounts, and it cannot be accurately ascertained from him what rents and profits he has received, the Master must exercise a sound discretion, and upon the whole evidence determine the amount with which he should be charged, as that which he might have received, and must be presumed to have received.[4] If the Master can form no satisfactory estimate of the rents and profits actually received by the mortgagee, resort may be had to a fair occupation rent.[5]

If the mortgagee insures his interest at his own expense, and recovers for a loss, he is not bound to account to the mortgagor for any part of the amount recovered, nor to apply it in payment of his debt which is secured by the mortgage.[6]

[7] Russell *v.* Smithies, 1 Anst. 96; Hoff. Mast. in Chan. 246.

[8] Givens *v.* M'Calmont, 4 Watts, 464; see Moore *v.* Cable, 1 John. Ch. 385; Pierce *v.* Faunce, 53 Maine, 351, 354. Where a mortgagee in possession recovers against a trespasser, for cutting timber on the mortgaged premises, the remedy of the mortgagor is against the mortgagee for the timber cut and carried away, as for profits received by him. Guthrie *v.* Kahle, 46 Penn. St. 331.

[1] If a mortgagor of land performs labor for the mortgagee under an agreement that his wages shall be applied upon the mortgage and earns more than enough to satisfy the same, the debt nevertheless remains undischarged until the actual application of the wages thereupon; and if such application has not been made, and the condition of the mortgage has been broken, the mortgagor may maintain a bill to redeem. Doody *v.* Pierce, 9 Allen, 141.

[2] Gordon *v.* Lewis, 2 Sumner, 143, 147, 148; Wilson *v.* Metcalf, 1 Russ. 535; Quarrell *v.* Beckford, 1 Mad. 269; Powell on Mort. 948 *a*, note; Archdeacon *v.* Bowes, 13 Price, 369; S. C. 1 M'Clel. 165. And if a balance be due from the mortgagee, interest upon it will be allowed, although he had not been in possession. Smith *v.* Pilkinton, 1 De G., F. & J. 136; see Davis *v.* May, Coop. 238. If, however, there are sufficient equitable circumstances in favor of the mortgagee, as if he retained the rents under a mistake, supposing the rights of the mortgagor extinguished, he would not be liable for interest, until after notice of the adverse claim. Gordon *v.* Lewis, 2 Sumner, 143, 148.

[3] Quarrell *v.* Beckford, 1 Mad. Ch. R. 278; Smith *v.* Pilkinton, 1 De G., F. & J. 120; Upham *v.* Brooks, 2 Wood. & M. 413; Conard *v.* The Atlantic Ins. Co., 1 Peters, 441; Bronson *v.* Kinzie, 1 How. U. S. 318; Waltham Bank *v.* Waltham, 10 Met. 337, 338. A Court of Equity, having jurisdiction of a suit for the redemption of mortgaged land, upon payment of the mortgaged debt, may *in such suit*, require that any overpayments made to the mortgagee upon such debt, shall be repaid, without resort to an action at Law. Farwell *v.* Sturdivant, 37 Maine, 308.

[4] Dexter *v.* Arnold, 2 Sumner, 108, 129, 130; Miller *v.* Whittier, 36 Maine, 577. As to the effect of negligence in keeping accounts by a mortgagee or trustee, so that it is impossible to ascertain what is due, see Codrington *v.* Parker, 16 Vesey, 469; Quarrell *v.* Beckford, 13 Ves. 377; S. C. 14 Ves. 177; Lupton *v.* White, 15 Ves. 440; *ante*, p. 1231.

[5] Gordon *v.* Lewis, 2 Sumner, 143; see Trulock *v.* Robey, 15 Sim. 265.

[6] King *v.* State Mut. Fire Ins. Co., 7 Cush. 1; Ætna Ins. Co. *v.* Tyler, 16 Wend. 385; Carpenter *v.* Providence Ins. Co., 16 Peters, 495; White *v.* Brown, 2 Cush. 412; Russell *v.* Southard, 12 How. U. S. 139. Where a mortgagee has paid a claim upon which he was surety for the mortgagor, and which the mortgage was given to secure, he may be allowed for the whole sum so paid, in accounting with the mortgagor, although he has afterwards received contribution of a portion thereof from a co-surety. Strong *v.* Blanchard, 4 Allen, 538.

** As to Repairs and Lasting Improvements, and other Allowances to the Mortgagee.* *1242

The mortgagee is bound to make reasonable and necessary repairs;[1] and where he is guilty of wilful default or gross neglect as to repairs, he is properly responsible for the loss and damage caused thereby. But what are reasonable and necessary repairs, and what will be waste in the management of the estate, must depend upon the particular circumstances of the case.[2] If a house is very old and dilapidated, the mortgagee is not bound to go to extraordinary expenses to put it into full repair, if those expenses will be greatly disproportionate to the value of the estate, or to his own interest therein. Certainly it cannot be pretended that he is bound to make new advances on the estate.[3] In *Godfrey* v. *Watson*,[4] Lord Hardwicke said, that a mortgagee in possession is not obliged to lay out money further than to keep the estate in necessary repair. But it is quite a different question, whether if a mortgagee lays out money in proper permanent repairs for the benefit of the estate, he may not be allowed to claim an allowance therefor." The mortgagee will not be allowed any advantage out of the mortgaged estate beyond principal and interest.[5] But he will be allowed all sums expended by him, in reasonable and necessary repairs and lasting improvements, or other acts for the preservation of the estate mortgaged; and he may add this to the principal of his debt and it will carry interest.[6] He may, if he sees fit, replace old buildings gone to decay with new ones, for similar uses and purposes, and charge the expense to the estate in rendering his account.[7]

The mortgagee will not be allowed for expenses incurred in making additions to the estate, or in new or ornamental improvements, which are neither necessary to the upholding of the estate, nor contribute any thing to its permanent value.[8] The mortgagee should be allowed for no more of the expenditures for improvements *than those *1243 which are beneficial to the estate,[1] except under special circum-

[1] Godfrey *v.* Watson, 3 Atk. 517; Dexter *v.* Arnold, 2 Sumner, 125; Shaeffer *v.* Chambers, 2 Halst. Ch. (N. J.) 557.

[2] Dexter *v.* Arnold, 2 Sumner, 125, 126; Givens *v.* M'Calmont, 4 Watts, 434, 460, 462.

[3] Dexter *v.* Arnold, 2 Sumner, 125, 126; Gordon *v.* Lewis, 2 Sumner, 143; Russell *v.* Smithies, 1 Anst. 96; McCamber *v.* Gilman, 15 Ill. 381.

[4] 3 Atk. 518.

[5] Gubbins *v.* Creed, 2 Sch. & Lef. 218; Story J. in Gordon *v.* Lewis, 2 Sumner, 155; Walton *v.* Withington, 9 Miss. 549.

[6] Powell on Mort. 89; Hoff. Mast. in Chan. 246; Campbell *v.* Macomb, 4 John. Ch. 534; Pierce *v.* Faunce, 53 Maine, 351, 354; Sandon *v.* Hooper, 6 Beav. 246; Ruby *v.* Abyssinian Society, 16 Maine, 306.

[7] Marshall *v.* Cave, reported Powell on Mort. 957 *a*.

[8] Reed *v.* Reed, 10 Pick. 400; Russell *v.* Blake, 2 Pick. 505; Lowndes *v.* Chisholm, 2 M'Cord Ch. 455; Hagthorp *v.* Hook, 1 Gill & J. 270; Hopkins *v.* Stephenson, 1 J. J. Marsh. 341; Quinn *v.* Brittain, 1 Hoff. Ch. 353; Clark *v.* Smith, Saxton Ch. (N. J.) 121; Dougherty *v.* M'Colgan, 6 Gill & J. 275; Bell *v.* Mayor of New York, 10 Paige, 49.

[1] Reed *v.* Reed, 10 Pick. 400; Gordon *v.* Lewis, 2 Sumner, 143, 149, 150; Moore *v.* Cable, 1 John. Ch. 387; McCarron *v.* Cassidy, 18 Ark. 34. In this last case it was held that a mortgagee in possession, having no special authority to make improvements, will be allowed only for such as are absolutely necessary for the support of the property, and to keep it from waste and damage. Charges for the construction of fences will not be allowed unless they were necessary for the protection of the crops. Hidden *v.* Jordan, 28 Ca[l]. 301.

stances; as where a person, actually mortgagee, honestly supposed himself to be the absolute owner of the premises, and under that belief made improvements on the estate, the mortgagor for several years before and after the improvement asserting no title or interest in the premises, the mortgagee may be allowed for the improvements, even where they amount to more than the rents and profits;[2] or, where the holder of the equity looks on in silence, and sees the purchaser of the premises, in good faith, make improvements thereon; in which case he must, when he redeems, allow for the improvements, in the account.[3] All expenses necessary to the preservation of the estate or to its beneficial use and enjoyment, being incurred in good faith, whatever may be the nature of them, may be brought into the account.[4] The expense of making an aqueduct was allowed to a mortgagee, the charge being small, and it appearing that the aqueduct was necessary for supplying the mortgaged premises with water.[5]

Disbursements made by a mortgagee in possession, to which the mortgagor or his assignee, with a knowledge or means of knowledge of the facts and circumstances, agrees and consents, are to be deemed reasonable and must be reimbursed.[6]

*1244 * Where the mortgage was of mines, and the mortgagee was in possession of them, with the right to work the same, and had expended large sums in so doing, he was held entitled to recover, not only the sums expended, but also interest on them.[1]

There has been considerable diversity of opinion, in different Courts on the question, whether the mortgagee is entitled to charge for beneficial and lasting improvements. But the value of lasting improvements has sometimes been allowed, under peculiar circumstances.[2]

The allowance of sums expended by the mortgagee in necessary re-

[2] Mickles *v.* Dillaye, 17 N. Y. (3 Smith) 80; Neale *v.* Hagthorp, 3 Bland, 590; McConnel *v.* Holobush, 11 Ill. 61; Thorne *v.* Newman, Cas. tem. Finch, 38; Reed *v.* Reed, 10 Pick. 398.

[3] Bradley *v.* Snyder, 14 Ill. 263; see Cazenove *v.* Cutler, 4 Met. 246.

[4] Reed *v.* Reed, 10 Pick. 400; Saunders *v.* Frost, 5 Pick. 259, 270; Cazenove *v.* Cutler, 4 Met. 246, 250; Pierce *v.* Faunce, 53 Maine, 351, 354; Ruby *v.* Abyssinian Society, 15 Maine, 306; Sandon *v.* Hooper, 6 Beav. 246; Brown *v.* Simons, 44 N. H. 477; Williams *v.* Hilton, 35 Maine, 354; Page *v.* Foster, 7 N. H. 392; Kortright *v.* Cady, 23 Barb. 497.

[5] Saunders *v.* Frost, 5 Pick. 259. Where it appeared that the mortgaged premises were valuable, were handsomely laid out, and had on them many young fruit-trees and ornamental trees, which needed care and management, it was held that if the mortgagee could not, by reasonable diligence, let the estate for a sum sufficient to keep it in a state of reasonable repair, including the preservation of the trees, he might be allowed, upon a bill, to redeem the expenses, beyond what was received for rent, necessary to keep it in such repair; but that he could not be allowed for money paid, for a horse and a cart, cow and farming utensils, and other expenditures in cultivating the land. Sparhawk *v.* Wills, 5 Gray, 423.

[6] Cazenove *v.* Cutler, 4 Met. 246. See Montgomery *v.* Chadwick, 7 Clarke (Iowa), 114.

[1] Norton *v.* Cooper, 39 Eng. Law & Eq. 130. A mortgagee, who opened a slate quarry, was not allowed the expenses incurred. Hughes *v.* Williams, 12 Ves. 493. In Thorneycroft *v.* Crockett, 16 Sim. 445, a mortgagee in possession opening and working mines, was charged with receipts and disallowed expenses.

[2] Exton *v.* Greaves, 1 Vern. 138; Talbot *v.* Braddill, 1 Vern. 183, note: 3 Powell on Mort. (Rand's ed.) 956, n. (2); Quarrell *v.* Beckford, 14 Ves. 177; S. C. 1 Mad. 273; Webb *v.* York, 2 Sch. & Lef. 676.

In the United States, expenditures for such improvements have sometimes been allowed, and at other times disallowed. The clearing of uncultivated land, though an improvement, was not allowed for in Moore *v.*

pairs and improvement of the mortgaged premises cannot be * objected to on the ground that those sums exceed the amount *1245 of the rents and profits.[1] If the mortgagor seek to deprive the mortgagee of the usual allowance for necessary repairs and lasting improvements, on the ground that they were not necessary, he must make a case in his bill, otherwise the decree will be in the usual form.[2]

The mortgagee in possession will be allowed for sums expended by him in fines for the renewal of leases;[3] and interest on the money advanced, at the rate his mortgage carries.[4] So for sums expended in redemption of land tax, if the mortgagor elects to take it.[5] So sums expended by him in supporting the title of the mortgagor to the estate,[6] or for dis-

Cable, 1 John. Ch. 385, on account of additional difficulties it would throw in the way of the ability of the debtor to redeem. "In some cases the Court will relieve where the mortgagee will suddenly bestow unnecessary costs upon the mortgaged lands, on purpose to clog the lands to prevent the mortgagor's redemption." Viner's Abr. Tit. Mortgages, X. 1, citing a case from Tothill, 231; Hoff. Mast. in Chan. 248. In Gordon *v.* Lewis, 2 Sumn. 155, Story J. said: "The mortgagee may entitle himself, under circumstances, to compensation for all lasting improvements upon the premises." An allowance for permanent improvements was directed in Conway *v.* Alexander, 7 Cr. 218. So in other cases, but no uniform rule has been established. Bollinger *v.* Chouteau, 20 Miss. 89; Ford *v.* Philpot, 5 Harr. & J. 312; see Norton *v.* Cooper, 39 Eng. Law & Eq. 130; Givens *v.* M'Calmont, 4 Watts, 463; McCarron *v.* Cassidy, 18 Ark. 34; Mickles *v.* Dillaye, 17 N. Y. 80; McConnel *v.* Holobush, 11 Ill. 61. But in Hidden *v.* Jordan, 28 Cal. 301, it was said that, as a general rule, the cost of permanent improvements cannot be allowed.

In Massachusetts, the statute (Genl. Sts. c. 140, § 15), provides that allowances shall be made to the mortgagee "for all sums expended in reasonable repairs and improvements." Under this provision, expenditure for improvements are allowed to the mortgagee only so far as they appear to be beneficial to the estate. Adams *v.* Brown, 7 Cush. 220, 221, 222; Tucker *v.* Buffum, 16 Pick. 46; Strong *v.* Blanchard, 4 Allen, 538; Boston Iron Co. *v.* King, 2 Cush. 400, 405. In this last case, Wilde J. said, "The Master reports, that the improvements made on the estate, according to the evidence, appeared to him necessary and permanent, and that the cost, according to the evidence, was not allowed in full, but only so much as, in the opinion of the Master, the improvements would have cost an experienced and judicious farmer. We think these allowances were made on a correct principle. 'The true rule,' as it is laid down in the case of Reed *v.* Reed, 10 Pick. 400, 'undoubtedly is, that the mortgagor shall be charged no more of the cost than that which is beneficial to the estate.' As we understand the report, the allowances were made in conformity with this rule, although it is not so expressed in terms." The same rule was acted on in Adams *v.* Brown, *supra*. This rule gives to the mortgagee in making improvements no credit for honest effort, *bonâ fide* purpose, or the conduct of a prudent owner. If he undertakes to make any improvements, it must be done at his own risk, that they shall be beneficial. In Woodward *v.* Phillips, 14 Gray, 132, it was held, that the mortgagee in possession is entitled to be allowed, upon redemption, his necessary expenses for keeping the estate in repair, but not expenditures for convenience or ornament. In this case, the Master found as follows, *viz.*, "for reasonable repairs and improvements, $205.22 was expended, and I am satisfied that the said premises were increased in value that sum." But he also found, upon certain principles stated by him, that the plaintiff was entitled to redeem the premises upon the payment of $124.52 to the defendant. The Court decided that the amount allowed to the mortgagee should be limited to $124.52 for "necessary expenses," according to the report of the Master. In this case no allowance was made for improvements, though found to be beneficial in increasing the value of the estate. The question whether a mortgagee's charges are reasonable is to be decided by the Court according to the facts and circumstances of the case; it is not to be left as an open question to the jury. Cazenove *v.* Cutler, 4 Met. 246.

[1] Reed *v.* Reed, 10 Pick. 398; Mickles *v.* Dillaye, 17 N. Y. 80.

[2] Powell *v.* Trotter, 1 Dr. & S. 388.

[3] Manlove *v.* Ball, 2 Vern. 84; Lacon *v* Mertins, 3 Atk. 4; Hamilton *v.* Denny, 1 B & B. 202; Clark *v.* Smith, Saxton Ch. (N.J.) 122.

[4] Woolly *v.* Drag, 2 Anstr. 551.

[5] Knowles *v.* Chapman, Seton, 151.

[6] Godfrey *v.* Watson, 3 Atk. 518; Powell Mortg. 986, n.; Hagthorp *v.* Hook, 1 Gill & J. 270; Clark *v.* Smith, Saxton, 121; Miller *v.* Whittier, 36 Maine, 577; McCumber *v.* Gilman, 15 Ill. 381; Riddle *v.* Bowman, 27 N. H. 236; 4 Kent, 166, 167; Brown *v.* Simons, 44 N. H. 477, 478; Allen *v.* Robbins, 7 R. I. 33, 40; Neale *v.* Hagthorpe, 3 Bland, 591; Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. 334.

charging prior incumbrances ;[7] so the extra costs of defending the mortgagor's title at Law ;[8] so the costs of procuring administration to the mortgagor.[9] And on redemption by a second mortgagee, the original mortgagee will be allowed extra costs incurred by him in foreclosing the mortgagor.[10]

The mortgagee may charge for sums paid by him for taxes *1246 upon * the premises, and also for assessments which he has been obliged to pay in order to preserve the security ; and in the case of taxes the mortgagee may presume them to have been legally assessed, and may therefore pay them, without inquiring into their validity, unless notified by the mortgagor of their invalidity, and indemnified against hazard of losing the estate by omitting to pay them.[1]

If the land be lost by failure to pay the tax upon it, the mortgagee is not chargeable with the loss.[2]

Where it was a condition of the mortgage that the mortgagor should keep the premises insured in a certain sum for the benefit of the mortgagee, the mortgagee was allowed for premiums paid by him for such insurance, which the mortgagor had not obtained, although the insurance obtained by the mortgagee was "for whom it may concern," and payable to the mortgagee.[3] But where there is no provision made for insurance in the mortgage, the mortgagee is not allowed to charge for insurance effected by him on the mortgaged premises.[4]

[7] Page *v.* Foster, 7 N. H. 392; Miller *v.* Whittier, 36 Maine, 577; Silver Lake Bank *v.* North, 4 John. Ch. 370; Marine, &c. *v.* Biayes, 4 Harr. & J. 343; Arnold *v.* Foot, 7 B. Mon. 66; Stone *v.* Bartlett, 46 Maine, 438; Woodstock Bank *v.* Lawson, 36 Vt. 118, 123. Where the mortgaged estate is incumbered with dower, the mortgagee, so long as he occupies the estate, may either permit the dowress to enter, or he may pay her a reasonable sum for her right of dower during the period of his occupation; and the mortgagee is to be allowed for the sum thus paid. Pierce *v.* Faunce, 53 Maine, 351, 354.

But in proceedings to redeem mortgages, the mortgagee must include, in his account rendered, only such prior incumbrances as he has actually paid, and no others. Stone *v.* Bartlett, *ubi supra.*

[8] Ramsden *v.* Langley, 2 Vern. 536.

[9] *Ibid.*

[10] Lomax *v.* Hide, 2 Vern. 185; see Gage *v.* Brewster, 30 Barb. 387; Currier *v.* Webster, 45 N. H. 226, 235; Woodstock Bank *v.* Lawson, 36 Vt. 118, 123.

The necessary expenses, incurred by a subsequent mortgagee, to redeem a first mortgage, which it was the duty of the mortgagor to cancel, are justly chargeable upon the owner of the estate; being expenses by which the estate was preserved from forfeiture. Miller *v.* Whittier, 36 Maine, 577.

[1] Williams *v.* Hilton, 35 Maine, 547; Pierce *v.* Faunce, 53 Maine, 354; Brown *v.* Simons, 44 N. H. 475; Woodstock Bank *v.* Lawson, 36 Vt. 123; Hidden *v.* Jordan, 28 Cal. 301; Mix *v.* Hotchkiss, 14 Conn. 32; Faure *v.* Winans, Hopk. 283; Kortright *v.* Cady, 23 Barb. 290; Bollinger *v.* Chouteau, 20 Mo. 89; Eagle Ins. Co. *v.* Pell, 2 Edw. Ch. 631; Clark *v.* Smith, Saxton, 122; see Veach *v.* Schaup, 3 Clarke (Iowa), 194.

[2] Harvie *v.* Banks, 1 Rand. 408; Williams *v.* Hilton, 35 Maine, 547.

[3] Fowley *v.* Palmer, 5 Gray, 549; Mix *v.* Hotchkiss, 14 Conn. 32; Vanderhaise *v.* Hugues, 2 Beasley, 410, 412. But in a case under the usual form of reference to a Master, directing him to take an account of the amount due to the plaintiffs upon their bond and mortgage, the sum paid for insurance was regarded as no part of the amount due on the bond and mortgage. Stonington Savings Bank *v.* Davis, 2 McCarter, 30. In this case the mortgage contained an agreement that the mortgagor should keep the buildings insured, and that the policy should be assigned to the mortgagees; and in default thereof, it was agreed that the mortgagees might insure, and add the premiums to the amount due on the bond under the security of the mortgage. But inasmuch as neither the plaintiff's right to insure, nor the fact of the insurance was averred in the bill, and no relief was prayed on that account, the Court refused to allow the amount paid by the mortgagees for insurance, although, by a liberal construction of the order of reference, it might be deemed within the cognizance of the Master. *Ibid.*

[4] Saunders *v.* Frost, 5 Pick. 259; King *v.* State Mut. Fire Ins. Co., 7 Cush. 1, 8; White *v.* Brown, 2 Cush. 412; Dobson *v.* Land, 8 Hare, 216; S. C. 13 Law Rep. 247; Clark *v.* Smith, Saxton (N. J.), 121; Pierce *v.* Faunce, 53 Maine, 351, 354; Mix *v.* Hotchkiss, 14 Conn. 32.

Compensation to Mortgagee for his Trouble, &c.

A mortgagee is not entitled to make any charge, by way of commission, for his own personal services and trouble in managing the property, and collecting and receiving the rents, while in possession, but he may charge for the expenses of a bailiff or receiver, when it becomes proper to employ one.[5]

* *As to the Mode of Stating the Account.* *1247

Where the assignee of a mortgage, made to secure payment of a note for $700 in two years, with interest semi-annually, took possession of the mortgaged premises, under a judgment, after the expiration of the two years, and received rents and profits, and it appeared upon a bill in Equity to redeem and upon a report of the Master, which did not make annual rests, that the net annual rents would exceed the year's interest on the note, the Court directed that annual rests should be made, and that the Master should (1) state the gross rents, received by the defendant, to the end of the first year, (2) state the sums paid by him for repairs, taxes, and a commission for collecting the rents, and deduct the same from the gross rents, and the balance will show the net rents to the end of the year. (3) compute the interest on the note for one year, and add it to the principal, and the aggregate will show the amount due thereon to the end of the year. (4) If the net annual rent exceeds the year's interest on the note (as it will), deduct that rent from the amount due, and the balance will show the amount remaining due at the end of the year. (5) At the end of the second year, go through the same process, taking the amount due at the beginning of the year as the new principal to compute the year's interest upon; and so on to the time of judgment.[1]

[5] Bonithon *v.* Hockmore, 1 Vern. 316; French *v.* Baron, 2 Atk. 120; Godfrey *v.* Watson, 3 Atk. 517; Langstaffe *v.* Fenwick, 10 Ves. 405; Davis *v.* Dendey, 3 Mad. Ch. 170; Clark *v.* Robbins, 6 Dana (Ken.), 350; 4 Kent, 193; M'Connel *v.* Holobush, 11 Ill. 61; Gilbert *v.* Dyneley, 3 M. & Gr. 12.

The same rule has been followed in some of the United States. Breckenridge *v.* Brooks, 2 Marsh. (Ken.) 339; Moore *v.* Cable, 1 John. Ch. 385, 388; Benham *v.* Rowe, 2 Cal. 387; Vanderhaise *v.* Hugues, 2 Beasley (N. J.), 410.

In Massachusetts and some other States an allowance will be made to the mortgagee for his personal services in the management of the estate, collecting the rents, &c. In Gibson *v.* Crehore, 5 Pick. 161; Tucker *v.* Buffum, 16 Pick. 46, [and Gerrish *v.* Black, 104 Mass. 400,] a commission of five per cent on the rents received was allowed. In Adams *v.* Brown, 7 Cush. 220, 222, 223, it was said, that "each case in this respect must depend upon its own peculiar circumstances. In many cases, a commission of five per cent on the rents received would be wholly inadequate," and the Master was directed to allow such further sum as he might think just and reasonable. See Cazenove *v.* Cutler, 4 Met. 246, 250; Waterman *v.* Curtis, 26 Conn. 241; Granberry *v.* Granberry, 1 Wash. (Va.) 246; Wilson *v.* Wilson, 3 Binn. 557.

But if the mortgagee actually occupies the estate himself, he can claim no allowance for his care and trouble. Eaton *v.* Simonds, 4 Pick. 105. In this case, Wilde J. said, "The rule is, that a mortgagee in possession, who manages the estate himself, is not to be allowed for his own care and trouble; otherwise, if he employs a bailiff, or lets the estate to a tenant, and so is the rule in England;" see Brown *v.* Simons, 45 N. H. 211, 212.

[1] Van Vronker *v.* Eastman, 7 Met. 163, per Shaw C. J. [*Infra*, 1251, n. 1.] In a case where rests were not directed, it was held that in stating the account between the parties to a bill in Equity to redeem, the Master should ascertain the gross amounts of

*1248 * The amount is to be made up to the time of the Master's report.[1] But the mortgagee must account for the rents and profits subsequent to the decree of foreclosure, where he is in possession, and the premises are redeemed within the time allowed by the decree.[2] The remedy, is, however, wholly in Equity and not at Law.[3]

Effect of Master's Report upon Mortgagee's Account of Rents, Profits, Expenditures, &c.

All questions and inferences of fact involved in the account of the mortgagee are peculiarly fit for the consideration of the Master, and, if he adopts the correct principle in point of law, his report will be conclusive, unless it clearly appears from the report or otherwise that he has acted under a mistake, or has abused or exceeded his authority.[4] And the burden is on the excepting party, to establish the mistake or misconduct alleged.[5]

Partnership Accounts.

A decree for the dissolution of a partnership ordinarily directs an account to be taken of all dealings and transactions between the partners; either generally, or from the foot of the last stated account, or other specified time; and also an account of the credits, property, and effects due and belonging to the partnership: and directs a receiver to be appointed of the outstanding debts and effects, and provides some other means of realization.[6]

A decree for a partnership account in its simplest form is to this effect: "Let an account be taken of all partnership dealings and transactions between the plaintiff and the defendant, from the —— *1249 day of ——. Just allowances ——. And let what, upon * taking the said account, shall be certified to be due from either of

rents and profits; and then the costs of reasonable repairs and improvements on the premises; the taxes thereon; together with a suitable compensation for the care and management of the estate; from the gross amount of rents and profits the charges against the estate are to be taken, and, whenever the balance in the hands of the mortgagee exceeds the interest on the mortgage debts at that time, it is to be regarded and deducted, as in case of a partial payment on such debt, and so on from year to year. Pierce *v.* Faunce, 53 Maine, 351; Reed *v.* Reed, 10 Pick. 398; Ireland *v.* Abbott, 24 Maine, 155.

[1] Holabird *v.* Burr, 17 Conn. 556; Smith *v.* Brush, 11 Conn. 366; Adams *v.* Brown, 7 Cush. 223, 224; Mann *v.* Richardson, 21 Pick. 355; Stewart *v.* Clark, 11 Met. 384.

[2] Ruckman *v.* Astor, 9 Paige, 518; *ante*, p. 1224, note.

[3] Chapman *v.* Smith, 9 Vt. 153.

[4] Sparhawk *v.* Wills, 5 Gray, 423; Adams *v.* Brown, 7 Cush. 220, 222; Reed *v.* Reed, 10 Pick. 398, 400; Boston Iron Co. *v.* King, 2 Cush. 405, 406; Howe *v.* Russell, 36 Maine, 115; McKinney *v.* Pierce, 5 Ind. (Porter) 422; Merriam *v.* Baxter, 14 Vt. 514; Ashmead *v.* Colby, 26 Conn. 289, 312, 313; Holabird *v.* Burr, 17 Conn. 563; Izard *v.* Bodine, 1 Stockt. (N. J.) 309; Sinnickson *v.* Bruere, 1 Stockt. (N. J.) 659.

[5] Da Costa *v.* Da Costa, 3 P. Wms. 140, note; Howe *v.* Russell, 36 Maine, 127; [Cary *v.* Herrin, 62 Mo. 18. *Infra*, 1298, 1300, notes]. In Mott *v.* Harrington, 15 Vt. 185, it was held not to be proper for the Court, on exceptions to a Master's report, to review his proceedings in relation to an account, or the items thereof. Nor will the Master's decision on the evidence before him be reviewed on appeal; see Van Vronker *v.* Eastman, 7 Met. 163. But if the plaintiff, in a bill to redeem a mortgage, admits that a certain sum is due, and the defendant claims a larger sum, the Master to whom the case has been referred to take an account cannot report that nothing is due. Bellows *v.* Stone, 18 N. H. 465.

[6] See Seton, 542–561.

the said parties to the other of them, be paid by the party from whom to the party to whom the same shall be certified to be due. Liberty to apply."

The method of taking a partnership account under such a decree is, —

First, to ascertain how the firm stands in relation to third parties.

Second, to ascertain what each partner is entitled to charge in account with his copartners, remembering, in the words of Lord Hardwicke, that "each is entitled to be allowed as against the other, every thing he has advanced or brought in as a partnership transaction, and to charge the other in account with what that other has not brought in, or has taken out more than he ought." [1]

Third, to apportion between the partners all profits to be divided or losses to be made good; and ascertain what, if any thing, each partner must pay to the others, in order that all cross-claims may be settled.

In taking an account on a bill filed by one partner against his copartners after the termination of the partnership, all the parties are to be regarded as actors, and the decree should settle the partnership concerns between all the individual partners, as if each was a plaintiff in a bill against his copartners. The whole case should be adjudicated upon, not only the claims of the plaintiff against the defendants, but also the claims of the defendants between themselves: and an execution may be issued in favor of each partner to whom a balance is found due, against such as are equitably liable to pay the same.[2]

Where the bill prays that a full and just account may be taken of the partnership concerns, and the Master is directed to state such an account, and to report all the facts touching the same, which he may judge material, he is authorized to examine and state all the partnership accounts, whether the items are mentioned in the bill or not.[3]

But no final decree can be made in a suit between partners for a settlement, while debts due from the firm remain unadjusted; unless the plaintiffs will deduct the amount of such debts from the sum which they seek to recover.[4]

When a partnership account is decreed, it is not usual for the Court to determine beforehand what are, and what are not, just * allowances. That is determined on taking the account, and *1250 if necessary the decree will direct a statement to be made of the facts and reasons upon which any allowances shall be judged to be just allowances.[1]

The partnership books being accessible to all the partners, and being kept more or less under the charge of them all, are *primâ facie* evidence against each of them, and therefore, also for any of them against the

[1] West *v.* Skip, 1 Ves. Sen. 242. [See Hicks *v.* Chadwell, 1 Tenn. Ch. 251.]

[2] Raymond *v.* Came, 45 N. H. 201, 202; Grove *v.* Fresh, 9 Gill & J. 280; Scott *v.* Pinkerton, 3 Edw. Ch. 70.

[3] Copeland *v.* Crane, 9 Pick. 73; [Little *v.* Merrell, 62 Maine, 328].

[4] Tyng *v.* Thayer, 8 Allen, 391, 397.

[1] See Crawshay *v.* Collins, 2 Russ. 347; Brown *v.* De Tastet, Jac. 294, 298, 299; Cook *v.* Collingridge, Jac. 623, 625; Wedderburn *v.* Wedderburn, 2 Keen, 753; [Eden *v.* Lingenfelter, 39 Ind. 19].

others;[2] but subject to the right of either party to show errors or mistakes in the account.[3] But entries made by one partner without the knowledge of the other, do not, of course, prejudice the latter as between him and his copartner;[4] and where a surviving partner drew up an account which he furnished to the executors of his late partner, it was held that such account was admissible against the partner who furnished it, and that the executors were not bound by using it against him, to admit its correctness throughout.[5] Generally, it is sufficient to examine and state the books of the copartners, without requiring vouchers in support of each particular item.[6]

The decree for an account usually directs that all parties shall produce on oath, all books and papers in their custody relating to the taking of the accounts. If any partner has kept accounts relating to the partnership in private books of his own, he must produce such books.[7] As between partners and their representatives material documents must be produced, though they may be privileged as between them and other persons.[8] If a partner has books or accounts in his possession, and will not produce them, an account may, nevertheless, be arrived at by presuming every thing against him.[9]

*1251 *The Master, in taking an account does not, in general, strike any balance till the whole charge and discharge have been gone through, and he is not at liberty to make rests in the account, unless directed so to do by the decree.[1] It frequently happens,

2 [Philips *v.* Turner, 2 D. & B Eq. 123; Ringold *v.* Jones, 1 Bland, 91; Taylor *v.* Boyd, 6 Heisk. 613; Budeke *v.* Ratterman, 2 Tenn. Ch. 463. And see the case last cited for the mode of using the books, and also Poor *v.* Robinson, 13 Bush, 290; McLear *v.* Hunsicker, 29 La. Ann. 539. *Ante*, 1222, note.] And this is true, although the books are inaccurately kept. Topliff *v.* Jackson, 12 Gray, 565.

3 Lodge *v.* Pritchard, 3 De G., M. & G. 906; Smith *v.* Chandos, 2 Atk. 158; Heartt *v.* Corning, 3 Paige, 566; Stoughton *v.* Lynch, 2 John. Ch. 218.

4 Hutcheson *v.* Smith, 5 Irish Eq. 117.

5 Morehouse *v.* Newton, 3 De G. & Sm. 307.

6 Fletcher *v.* Pollard, 2 Hen. & M. 544; Brickhouse *v.* Hunter, 4 Hen. & M. 363; Turner *v.* Hughes, 1 Busbee Eq. (N. C.) 116; Reed *v.* Jones, 8 Wis. 421.

7 Toulmin *v.* Copland, 3 Y. & C. Ex. 655; Freeman *v.* Fairlie, 3 Mer. 43. In taking the accounts of a partnership, after a dissolution, neither partner can be compelled to make out the accounts, *ante*, p. 724, note. It is competent to either to prepare and bring in the accounts; and for that purpose he is entitled to access to such books and papers, relating to the partnership affairs, as are in the possession, custody, or power of the other; and may obtain discovery and inspection, on deposit thereof; see *post*, Chapter on *Production of Documents*. In cases of this description, the assistance of an accountant is often obtained, under the sanction of the Court, to complete the books, and make out the accounts required to be taken by the decree. As to the employment of accountants; see 15 & 16 Vic. c. 80, § 42; *ante*, pp. 983, 1225.

8 See Brown *v.* Perkins, 2 Hare, 540.

9 Walmsley *v.* Walmsley, 3 Jo. & Lat. 556; and see Gray *v.* Haig, 20 Beav. 219; Copeland *v.* Crane, 9 Pick. 73. Unless there be an express stipulation, or a particular course of practice shown by the partnership books to the contrary, interest between partners is not allowed. Sir W. Page Wood V. C. in Rishton *v.* Grissell, L. R. 5 Eq. 331.

1 Webber *v.* Hunt, 1 Mad. 13; Hall *v.* Hallett, 1 Cox, 134, 138; Powell on Mort. 958 *a*, n.; Hoff. Mast. in Chan. 244; Davis *v.* May, Coop. 238; Yates *v.* Hambly, 2 Atk. 362; Donovan *v.* Fricker, Jac. 168. "Courts of Equity will not, ordinarily, require annual rests to be made in settling accounts." 2 Story Eq. Jur. § 1016 *a*.

The direction to take the accounts of a mortgagee in possession with rests, is not of course, but a case must be made out, showing its propriety under the circumstances, and it is never directed for a broken period. Davis *v.* May, 19 Ves. 383; Donovan *v.* Fricker, Jac. 168; Nasom *v.* Clarkson, 4 Hare, 104. In Davis *v.* May, *supra*, Lord Eldon said: "From precedents of decrees that I have seen, I collect, that the usual course is not to give that direction." And in that case it was also held, that rests could not be directed from a particular period of the account.

however, that, upon further directions, he is ordered to make yearly or half-yearly, or other rests; the object of which direction is, to enable the Court to see what balances the accounting party has, from time to time, retained in his hands, in order that it may judge whether he ought to be charged with interest on his balances or not;[2] and to apply the excess of the rents and profits beyond the interest, to the reduction of the principal.[3] Where, therefore, such a direction occurs in a decree, the course for the Master to pursue is, to strike a balance at each rest, which the decree requires him to make, by deducting the amount of the discharge from the amount of the charge up to that period.[4] Where * rests are directed to be made, and interest com- *1252

But in Wilson *v.* Metcalf, 1 Russ. 530, rests were directed from the time the mortgage appeared to have been paid off. See also Shaeffer *v.* Chambers, 2 Halst. Ch. (N. J.) 548. In Boston Iron Co. *v.* King, 2 Cush. 400, where a mortgagee of real estate, who had been some time in the possession and occupation of the same, sold and conveyed the estate to a purchaser, who entered and took possession thereof, it was held, that, in stating an account on a bill in Equity to redeem, the Master could not properly make a rest in the computation of the interest, at the time of the assignment, and add the interest then due to the principal, even in favor of such purchaser who had paid the full amount of the mortgage debt and interest computed to the day of his purchase.

The interest never having been in arrears, and the rents having annually exceeded the amount of the interest, rests were directed in Sheppard *v.* Elliott, 4 Mad. 254.

In Raphael *v.* Boehm, 11 Ves. 102, it is said, that every receipt forms a rest. But it seems that the usual direction is for annual rests. Knowles *v.* Chapman, Seton on Dec. 112; Yates *v.* Hambly, *supra;* Webber *v.* Hunt, 1 Mad. Ch. 13; Quarrell *v.* Beckford, 14 Ves. 177; S. C. 1 Mad. 273; Robinson *v.* Cumming, 1 Atk. 410. Rests will be allowed upon the amount of an occupation rent, as well as upon rents and profits received. Wilson *v.* Metcalf, 1 Russ. 530.

[2] Hall *v.* Hallett, 1 Cox, 138; Raphael *v.* Boehm, 11 Ves. 110. In Nelson *v.* Booth, 3 De G. & J. 119, 122, Lord Justice Turner, "With respect to the question of rests, I have always understood it to be the settled course of the Court not to direct an account with annual rests against a mortgagee in possession, unless at the time when he took possession there was no arrear of interest due to him. I conceive the principle to be this, a mortgagee is not bound to receive payment of his debt by driblets, but he has the right to do so if he thinks fit. If he enters into possession where no arrear of interest is due, he evidences his intention so to receive payment of the debt, and the account therefore goes with rests; but if the interest is in arrear when he enters into possession, the fact of his taking possession affords no evidence of his intention to receive payment by driblets, as he is driven to take possession by the non-payment of the interest, and the account therefore goes on, till the whole debt has been satisfied. I have often had occasion to consider the point, and my impression is, that this is the result of the authorities."

[3] Hoff. Mast. in Chan. 243; Gould *v.* Tancred, 2 Atk. 533.

[4] As to computing interest with rests, see *post*, 1259. Upon a bill to redeem against the assignee of a mortgage, where the rents and profits were considerable, and the interest of the debt was payable semi-annually, it was decreed, that interest should be computed upon the rents and profits, making semi-annual rests. Gibson *v.* Crehore, 5 Pick. 160, 161; see Reed *v.* Reed, 10 Pick. 400; Farwell *v.* Sturdivant, 37 Maine, 308. In a case, where it does not appear at what times the interest of the debt was payable, the Master was directed "to cast interest on the rents and profits, making proper rests;" and he cast interest accordingly, making annual rests; the Court held, that if any rests were proper, annual rests were undoubtedly to be made. Gordon *v.* Lewis, 2 Sumner, 146. It seems that the usual direction, when any is made, is for annual rests. Seton Decrees, 112; Knowles *v.* Chapman, *ibid.;* Yates *v.* Hambly, 2 Atk. 362; Webber *v.* Hunt, 1 Mad. 13; Van Vronker *v.* Eastman, 7 Met. 162, 163. A mortgagee in possession has a right to apply the rents and profits received by him first to satisfy the expenditures made by him in the proper management of the estate. If there be any excess, it should be applied to the payment of the interest on the mortgage debt. No case for rests arises unless there is an excess of rents and profits above the expenditures and interest. When such excess arises, it is to be applied to the reduction of the principal debt, and interest is afterwards to be computed on the balance of principal so reduced. Rests will not, ordinarily, be directed, when the effect of such direction might be to give interest on interest. See Reed *v.* Reed, 10 Pick. 398, 400, 401; Gibson *v.* Crehore, 5 Pick. 146; Saunders *v.* Frost, 5 Pick. 259, 270; Shaeffer *v.* Chambers, 2 Halst. Ch. (N. J.) 548; Wilson *v.* Cluer, 3 Beav. 136; Horlock *v.* Smith, 1 Coll. 287; Finch *v.* Brown, 3 Beav. 70; Blackburn *v.* Warwick, 2 Y. & C. 92; Pierce *v.* Faunce, 53 Maine, 151; Ireland *v.* Abbott, 24 Maine, 155; *ante*, 1247. Rests are not

puted on the balances, the interest of each preceding balance must be included in the balance then stated, and interest computed on the total amount; so as to charge the accounting party with compound interest.[1]

It sometimes happens that, in decrees directing accounts, the Court orders the Master, if he shall find that there are stated accounts, not to disturb the same.[2] This direction is usually inserted where a settled account is insisted upon in the answer and proved;[3] and unless it is inserted, any settled accounts will be disregarded, in taking the accounts under the decree or order;[4] except in the case of the ordinary accounts in an administration suit, in taking which, it seems that settled accounts may be allowed without any express direction.[5] Settled accounts must be proved before the Master in the usual manner: and the direction not to disturb them only applies to accounts settled between the plaintiff and defendant, and not to accounts settled between co-defendants.[6] Where a settled account is insisted upon by the answer, but not proved, the order, not to disturb the accounts will be accompanied by a direction that the plaintiff shall have liberty *1253 to surcharge and *falsify.[1] A settled account must, in such cases, be established before the Master, in the same manner as before the Court. In some cases of this description, the accounts have been ordered to be considered as *primâ facie* conclusive, but with liberty to the parties to show any error therein.[2] The method of proceeding, where liberty is given to surcharge and falsify an account, has been before pointed out.[3]

Computation of Interest.[4]

A direction to the Master to compute interest upon debts, legacies,

directed, if there was an arrear of interest when the mortgagee took possession. Nelson *v.* Booth, 3 De G. & J. 119. And in such case, in general, not till the whole debt is paid. Wilson *v.* Cluer, 3 Bea. 136; see Latter *v.* Dashwood, 6 Sim. 462. Annual rests were directed on the ground that the incumbrancer set up an adverse title as owner, where otherwise they would not have been, in Incorporated Society *v.* Richards, 1 Dr. & War. 258, 290; see Montgomery *v.* Calland, 14 Sim. 79; Smith *v.* Pilkington, 1 De G., F. & J. 120.

[1] See forms of decrees in Seton, 469, 762; *ante*, 1125; Cotham *v.* West, Seton, 762; Heighington *v.* Grant, 5 M. & C. 258; Knott *v.* Cottee, 16 Jur. 752, 754, M. R.; Seton, 762, No. 6; *post*, Vol. 3; Farwell *v.* Sturdivant, 37 Maine, 308.

[2] *Post*, Vol. 3.

[3] Cole *v.* Cole, cited 14 Ves. 579; Buckeridge *v.* Whalley, 33 L. J. Ch. 649, V. C. K.

[4] Fitzpatrick *v.* Mahony, 1 J. & Lat. 84; Carmichael *v.* Carmichael, 2 Phil. 101; 10 Jur. 908.

[5] Newen *v.* Wetten, 31 Beav. 315.

[6] Carmichael *v.* Carmichael, 2 Phil. 101; 10 Jur. 908.

[1] Kinsman *v.* Barker, 14 Ves. 579; Connop *v.* Hayward, 1 Y. & C. C. C. 33, 35; Allfrey *v.* Allfrey, 10 Beav. 353; 1 M'N. & G. 87, 93; Buckeridge *v.* Whalley, 33 L. J. Ch. 649, V. C. K.; Seton, 109. For what is meant by surcharging and falsifying, see *ante*, 668. For forms of orders, see Seton, 108, 111; *post*, Vol. III. p. 2207.

[2] English *v.* Baring, Seton, 108, No. 4, 109; see also Stainton *v.* Carron Co., 24 Beav. 346, 361; 3 Jur. N. S. 1235.

[3] *Ante*, p. 668; see 1 Story Eq. Jur. §§ 524-529; Matthews *v.* Walwyn, 4 Sumner's Ves. 118, and note (*b*); Story Eq. Pl. § 800; Boyle *v.* Hardy, 28 Miss. 390.

[4] Courts of Equity will not decree current interest, when it could not be recovered at Law. Stewart *v.* Wilson, 5 Dana, 54. Interest is to be allowed upon money paid to the use of another by his request, from the time of payment. Gibbs *v.* Bryant, 1 Pick. 118; Reed *v.* Rens. Glass Manuf. Co., 3 Cowen, 436; S. C. 5 Cowen, 587; Rector *v.* Mark, 1 Miss. 288; Barnard *v.* Bartholomew, 22 Pick. 291. As to the effect of custom and usage on the allowance of interest, see Reab *v.* M'Allister, 8 Wendell, 109.

&c., frequently forms part of the decree.[5] In ordinary suits for the administration of assets, the direction is, that the Master shall compute interest on such of the testator's [or intestate's] debts as carry interest, after the rate the same respectively carry interest,[6] and upon his legacies, from the time and after the rate directed by the testator's will;[7] and where no time of payment or rate of interest is thereby directed, then after the rate of four per cent per annum, which is the ordinary rate of interest given by the Court upon legacies and portions, where no specific rate of interest is directed by the will,[8] from the end of one year after the testator's death.[9]

* With respect to interest on specialty debts, no question can *1254 arise as to its computation, — the rate at which it is to be allowed upon such debts, generally appearing upon the deed or instrument by which the debt is created.

It is to be noticed, however, that, with respect to a debt due on bond, the rule is to calculate interest up to the amount of the penalty of the bond;[1] the Master cannot go beyond the amount of the penalty[2] unless the creditor claims upon two securities for the same sum, one of which is a bond with a penalty, and the other a mortgage; in which case the Master may calculate interest beyond the penalty of the bond. It

[5] By Chancery Rule 107, in New York, on a reference to take and to state an account, the Master was at liberty to allow interest as should be just and equitable, without any special directions for that purpose; unless a contrary direction was contained in the order of reference. [See *infra*, 1368, notes 9 and 10, as to interest on further directions.]

[6] Seton on Decrees, 51.

[7] A legatee being entitled to a residuary bequest, which the executor was directed by the will to make productive, may claim compound interest, to be calculated (the circumstances considered), with biennial rests. Smith *v.* Lampson, 8 Dana, 73. As a general rule, a trustee, however, is chargeable with compound interest only in cases of gross delinquency. Clarkson *v.* Depeyster, 1 Hopk. 424. As, where the trustee refuses to account. Myers *v.* Myers, 2 M'Cord Ch. 214, 266. Or, where he has used the money for his own purposes. Schieffelin *v.* Stewart, 1 John. Ch. 620. Though in cases of the latter kind, it has been said, that the ground of this allowance is, the actual or presumed gain of the trustee, by the use of the funds; and that where circumstances forbid the presumption of gain by him, it will not be allowed. Ringgold *v.* Ringgold, 1 Harr. & Gill, 11.

[8] Guillam *v.* Holland, 2 Atk. 343; Wood *v.* Briant, *ib.* 523.

[9] Seton on Decrees, 63; Hammond *v.* Hammond, 2 Bland, 306; Jones *v.* Stockett, 2 Bland, 409; Birdsall *v.* Hewlett, 1 Paige, 32; Gillon *v.* Turnbull, 1 M'Cord Ch. 148; Ingraham *v.* Postell, *ib.* 98; Shobe *v.* Carr, 3 Munf. 10; Cogdell *v.* Cogdell, 3 Desaus. 387; Bitzer *v.* Hahn, 14 Serg. & R. 238; Crickett *v.* Dolby, 3 Sumner's Ves. 10, note (*a*). Where legacies were given to children, and there was no other provision made for them, interest was allowed on the legacies from the testator's death. Hite *v.* Hite, 2 Rand, 409; Sullivan *v.* Winthrop, 1 Sumner, 14, 15; Crickett *v.* Dolby, 3 Sumner's Ves. 10, note (*a*); 2 Williams's Ex. 1022 *et seq.*; Eyre *v.* Golding, 5 Binney, 475.

[1] Sharp *v.* Earl of Scarborough, 3 Ves. 557.

[2] Tew *v.* Earl of Winterton, 3 Bro. C. C. 489, Perkins's ed. note (*a*); 1 Ves. J. 451, S. C. Sumner's ed. 452, note (2); Knight *v.* Maclean, 3 Bro. C. C. 496; Clark *v.* Seton, 6 Ves. 411; Hughes *v.* Wynne, 1 M. & K. 20; [State *v.* Blakemore, 7 Heisk. 657]. That interest may be computed beyond the penalty of a bond, see Tew *v.* Winterton, *ubi supra*; Mower *v.* Kip, 6 Paige, 89; Judge of Probate *v.* Heydock, 8 N. H. 491; Baker *v.* Morris, 10 Leigh, 285; Francis *v.* Wilson, 1 Ry. & M. 105; Lewis *v.* Dwight, 10 Conn. 95; Bank of U. States *v.* Magill, 1 Paine C. C. 661; Long *v.* Long, 1 C. E. Green, 59. In Harris *v.* Clap, 1 Mass. 308, interest was given in the shape of damages, even as against a surety, although the principal and interest exceeded the penalty of the bond. See also Pitts *v.* Tilden, 2 Mass. 118, Rand's ed. note (*b*), page 119; Atwell *v.* Fowles, 1 Munf. 175; Tenant *v.* Gray, 5 Munf. 494; Smedes *v.* Houghtaling, 3 Caines, 48; Potter *v.* Webb, 6 Greenl. 14; United States *v.* Arnold, 1 Gall. 348; Moffatt *v.* Barnes, 3 Caines, 49 n. (*a*); Lyon *v.* Clark, 4 Selden. 148; Goldhawk *v.* Duane, 2 Wash. C. C. 323; Carter *v.* Carter, 4 Day, 36; Carter *v.* Thorn, 18 B. Mon. 613; State *v.* Wayman, 2 Gill & J. 254, 279; Brainard *v.* Jones, 18 N. Y. 35; Baker *v.* Morris, 10 Leigh, 284; Tazewell *v.* Saunders, 13 Grattan, 354.

appears also not to be important in such a case which instrument was executed first, the bond or the mortgage,[3] nor that the party charged executed as a surety only.[4]

The rule which limits the computation of the amount due upon a bond to the amount of the penalty, has been held to extend to a bond for securing the payment of an annuity;[5] but in *Jeudwine* v. *Agate*,[6] which was a suit by annuitants, whose annuities were secured by a bond, claiming to be creditors in respect thereof, to an amount beyond the penalty, Sir Lancelot Shadwell V. C. observed, "that whenever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an estate, the relinquishment of a right, *the payment* of an annual sum, or the payment of a sum of indefinite amount (as in the case of *Logan* v. *Weinholt*),[7] there, notwithstanding the agreement appears in the form of a bond with a penalty, the Court will consider that the recital in the condition of the bond is evidence of the agree-
*1255 ment, and will not limit the relief it gives to the amount of * the penalty;"[1] and accordingly gave relief beyond the penalty of the bond.[2]

Formerly it was held that in suits for the administration of assets no interest was to be computed upon a judgment, unless either an action at Law had been brought upon the judgment, to recover interest in the shape of damages,[3] or a bill had been filed for the purpose of obtaining the benefit of the judgment in Equity.[4] Now, however, it is enacted, "that every judgment debt shall carry interest, at the rate of 4*l.* per centum, per annum, from the time of entering up the judgment, until

3 Clark *v.* Lord Abington, 17 Ves. 106.
4 *Ibid.*
5 Mackworth *v.* Thomas, 5 Ves. 329.
6 3 Sim. 129.
7 1 Cl. & Fin. 611.
1 3 Sim. 140.
2 See Long *v.* Long, 1 C. E. Green, 59.
3 Gaunt *v.* Taylor, 3 M. & K. 302.
4 Hyde *v.* Price, 8 Sim. 578; see Lewes *v.* Morgan, 3 Y. & J. 394; see upon the point of interest on judgments, Creuze *v.* Hunter, 2 Sumner's Ves. 157, note (*c*), and cases cited; Hodgden *v.* Hodgden, 2 N. H. 169; Saver *v.* Austin, 3 Wend. 496; Mahurin *v.* Bickford, 6 N. H. 567. Interest has been held recoverable on a judgment in many cases. See Fitzgerald *v.* Caldwell, 4 Dall. 251; Houston *v.* Mossman, Charlt. 138; Norwood *v.* Manning, 2 Nott & M'C. 395; Fishourn *v.* Sanders, 1 Nott & M'C. 242; Gwinn *v.* Whitaker, 1 Harr. & J. 754; Fries *v.* Watson, 5 Serg. & R. 220; Berryhill *v.* Wells, 5 Binn. 56; Walker *v.* Kendall, Hardin, 404; Mason *v.* Eakle, Breese, 52; Smith *v.* Vanderhurst, 1 M'Cord, 328; Watson *v.* Fuller, 6 John. 284; Winslow *v.* Ancram, 1 M'Cord Ch. 104; Stafford *v.* Mott, 3 Paige, 100; Klock *v.* Robinson, 22 Wend. 157. A judgment carries only such rate of interest as is legal at the time of the judgment, whatever rate was recoverable on the contract on which the judgment was rendered. Verree *v.* Hughes, 6 Halst. 91; Mason *v.* Eakle, Breese, 52; Aldrich *v.* Sharp, 3 Scam. 261; Wernwag *v.* Brown, 3 Blackf. 457.

In New Jersey, decrees in Equity, as well as judgments at Law, universally bear the legal rate of interest, without regard to the terms of the contract or to the place where it was executed, whether within the State or abroad. A decree will bear only six per cent interest, although founded on a mortgage drawing seven per cent; the contract being merged in the decree, and the decree by statute drawing only six per cent. Wilson *v.* Marsh, 2 Beasley, 289.

As to interest on judgments in actions sounding in damages, see Daub *v.* Martin, 2 Bay, 193; Smith *v.* Todd, 3 J. J. Marsh. 306; Marshall *v.* Dudley, 4 J. J. Marsh. 244; Younge *v.* Pate, 3 J. J. Marsh. 100; Thomas *v.* Wilson, 3 M'Cord, 100. Interest may be recovered in such cases by way of damages, for the detention of the debt, in an action of debt, on the judgment. Stafford *v.* Mott, 3 Paige, 100. In determining the amount equitably due, where payments have been made upon successive executions under a judgment, they shall be first applied to the interest. Fay *v.* Bradley, 1 Pick. 194. Interest was allowed on a decree for injunction damages from the date of the decree, in Sturges *v.* Knapp, 36 Vt. 439.

the same shall be satisfied."[5] So that no action at Law, or suit in Equity, is necessary to enable a Master to compute interest on a judgment debt, but interest must be computed by the Master upon every sum of money due upon judgment, or upon a decree or order in Equity, &c., at the rate of four per cent from the entry of such judgment or decree, &c.[6]

Formerly interest was allowed upon the arrears of an annuity, where they were secured by a bond with a penalty,[7] or where the annuity was given for maintenance,[8] or where it was left to a wife *by her husband's will.[1] It has also been allowed, where there *1256 have been great arrears,[2] or where there has been an obstinate delay of payment,[3] or where the annuitant has been compelled, by the delay, to borrow money at interest.[4] The allowance of interest on such arrears was, however, always held to be discretionary in the Court; and in later cases, it has been refused notwithstanding the existence of circumstances which before induced the Court to allow it.[5] In *Robinson* v. *Cumming*,[6] Lord Hardwicke said, there was no instance where the Court had ever allowed interest upon such an annuity, namely, an annuity secured by grant, by way of mortgage, with power of entry in case of arrears, unless, indeed, the annuitant had entered and been in possession of the estate charged with the annuity; in which case the Court would not have obliged him to have quitted the possession, unless the grantor had agreed to allow him interest for the arrears of his annuity down to the day. This seems to be consistent with the rule laid down by Lord Talbot, in the *Countess of Ferrers* v. *Earl Ferrers*,[7] *viz.*, that "arrears of an annuity or rent-charge are never decreed to be paid with interest, but where the sum is certain and fixed; and also where there is either a clause of entry, *in nomine pœnæ*, or some penalty upon the grantor, which he must undergo if the grantee sued at Law, and which would oblige him to come into this Court for relief, which the Court will not grant but upon equal terms, and those can be no other than decreeing the grantor to pay the arrears with interest, for the time during which the payment was withheld."

[5] 1 & 2 Vic. c. 110, § 17. Judgments carry interest by statute in Massachusetts. Genl. Sts. c. 133, § 8. So do awards, reports of auditors, or of Masters in Chancery, and verdicts of juries, carry interest from the time when made, to the time of making up judgment. *Ibid.*

[6] By 1 & 2 Vic. c. 110, § 18, decrees and orders of Courts of Equity have in certain cases the same effect as judgments at Law; *ante*, p. 986, note, 1031–1038.

[7] Newman *v.* Auling, 3 Atk. 579.

[8] *Ibid.*

[1] Litton *v.* Litton, 1 P. Wms. 543; see also Drapers' Company *v.* Davis, 2 Atk. 211; Irby *v.* M'Crea, 4 Desaus. 422.

[2] Batten *v.* Earnley, 2 P. Wms. 163

[3] Stapleton *v.* Conway, 1 Ves. 428; Martyn *v.* Blake, 3 Dr. & War. 125; see also Crosse *v.* Bedingfield, 12 Sim. 35, 40; Willcocks *v.* Butcher, 16 Sim. 366; Taylor *v.* Taylor, 8 Hare, 120.

[4] Anon., 2 Ves. 661; Bignal *v.* Brereton, 1 Dick. 278

[5] See Tew *v.* Earl of Winterton, 1 Ves. J. 451; 3 Bro. C. C. 489, S. C.; Anderson *v.* Dwier, 1 Sch. & Lef. 301; Morris *v.* Dillingham, 2 Ves. S. 170; Creuze *v.* Hunter, 2 Ves. J. 157, 168; S. C. *nom.* Creuze *v.* Lowth, 4 Bro. C. C. 316; Aylmer *v.* Aylmer, 1 Moll. 87; Booth *v.* Leycester, 3 M. & C. 459; 1 Keen, 247; Torre *v.* Brown, 5 H. L. Cas. 555; Jenkins *v.* Bryant, 16 Sim. 272; Lainson *v.* Lainson, 18 Beav. 7; 17 Jur. 1044; Earl of Mansfield *v.* Ogle, 4 De G. & J. 38; 5 Jur. N. S. 419; Booth *v.* Coulton, 7 Jur. N. S. 207; 9 W. R. 330.

[6] 2 Atk. 411.

[7] Ca. Temp. Talb. 2.

A creditor, whose debt does not carry interest, who comes in and establishes the same before the Master, under a decree or order in a suit, is entitled to interest upon his debt, at the rate of four per cent from the date of the decree or order, out of any assets which may remain after satisfying the costs of the suit, the debts established, and *1257 the interest of such debts as by law carry interest.[8] * If the debt has accrued subsequently to the date of the decree or order, the creditor is only entitled to interest from the time when it accrued due;[1] and a creditor under a voluntary bond is entitled to receive his principal, before any simple contract creditors can be paid their interest.[2]

Under the above order, a creditor is only entitled to interest from the date of the decree, and only out of such assets as remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest.

It may, therefore, in many cases, be important to determine whether a creditor is entitled to interest independent of this order. In the investigation of the question in what cases debts carry interest, it must be remembered that, by the 3 & 4 Will. IV. c. 42, § 28, it is enacted, "That upon all debts or sums certain payable at a certain time, or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument, at a certain time; or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor, that interest will be claimed from the date of such demand until the term of payment; provided, that interest shall be payable in all cases in which it is now payable by Law."

It may also be remarked, that it always was the practice in Equity, to allow interest to be computed upon promissory notes, and upon all other sums payable on demand, or on a day certain, upon which interest may, according to the practice of Courts of Law, be calculated, either from the time of the demand made, or from the fixed period of payment.[3]

[8] Ord. XLII. 10; and see Davis *v.* Combermere, 15 Sim. 394; Ginggen *v.* Cockrane, 13 W. R. 520. Interest may be allowed in Equity on all sums due and payable, or from the time when rests should be made in the accounts. The practice of the parties may be followed, or annual rests allowed. Hollister *v.* Barkley, 11 N. H. 501. The period of the dissolution of a partnership is a proper time to make a rest, and interest is allowed on the balance. Stoughton *v.* Lynch, 2 John Ch. 210; Hollister *v.* Barkley, 11 N. H. 501, 512; [Shepard *v.* Akers, 2 Tenn. Ch. 627].

[1] Lainson *v.* Lainson, 18 Beav. 7; 17 Jur. 1044.

[2] Garrard *v.* Lord Dinorben, 5 Hare, 213

[3] Lowndes *v.* Collens, 17 Ves. 27; Upton *v.* Lord Ferrers, 5 Ves. 803; Parker *v.* Hutchinson, *ubi supra;* Lithgow *v.* Lyon, G. Coop. 29; Mildmay *v.* Methuen, 3 Drew. 91; Craven *v.* Tickell, 1 Sumner's Ves. 63, note (1); Van Giesen *v.* Van Houten, 2 South, 822; Francis *v.* Castleman, 4 Bibb. 282; Collier *v.* Gray, 1 Overt. 110; Cannon *v.* Beggs, 1 M'Cord, 370; Patrick *v.* Clay, 4 Bibb, 246; Bartlett *v.* Marshall, 2 Bibb, 467; Pollard *v.* Yoder, 2 A. K. Marsh. 264; Daggett *v.* Pratt, 15 Mass. 677; Gully *v.* Remy, 1 Blackf. 69; Schmidt *v.* Limehouse, 2 Bailey, 276. [Whether a note payable at a future day, and calling for a rate of interest higher than the usual legal rate under a statute, will continue to bear the conventional rate after maturity,

Where there has been a stated account between the parties, the balance appearing due on such account, will carry interest,[4] because, * in such a case, it is held that there is an implied contract on *1258 the part of the debtor to pay; and all contracts to pay give a right to interest from the time when the principal ought to be paid.[1] Such balance, however, must appear upon a regular statement of accounts; and to constitute such a statement, there must be a settlement or acknowledgment by *the debtor*, raising the contract to pay as the ground upon which alone interest will be given.[2]

As a general rule, a charge of debts on real estate does not entitle simple contract creditors to interest.[3] In *Barwell* v. *Parker*, Lord Hardwicke is reported to have said, that if a man, in his life, creates a trust for the payment of debts, annexes a schedule of some debts, and creates a trust term for the payment, as that is in the nature of a specialty, that will make them, though simple contract debts, carry interest.[4]

It seems, however, that in order to effect this, the deed must have been executed by the simple contract creditors; and that they must have given up the right to sue the debtor upon his debt; otherwise, there would be nothing to show that they had contracted for a specialty, by taking a security upon the land, and discharging the person of their debtor.[5]

It may be mentioned here, that in *Shirt* v. *Westby*,[6] a charge, by will on real estate, of the simple contract debts of another person was considered as a legacy; and interest was ordered to be computed on such debts at the rate of four per cent, from the testator's death.

In calculating interest, under a decree, the Master usually calculates it up to the date of his report,[7] but it generally forms part of the decree

or only the legal rate, is a point on which the authorities are in conflict. That it will bear only the legal rate of interest has been held in Cook *v.* Fowler, L. R. 7 H. L. 27; Brewster *v.* Wakefield, 22 How. 118; Burnhisel *v.* Firman, 22 Wall. 170; and see Duncan *v.* Ewing, 3 Tenn. Ch. 33. On the other side see Overton *v.* Bolton, 9 Heisk. 762, and the cases there cited *pro* and *con.*]

[4] Barwell *v.* Parker, 2 Ves. 363; Vernon *v.* Cholmondeley, Bunb. 119; see 2 Eq. Ca. Ab. 532, pl. 17, 20; Blaney *v.* Hendricks, 2 Black. 61; 3 Wils. 205; Dickinson *v.* Legare, 1 Des. 537. But interest will not be allowed on unliquidated demands, unless there is some precise time fixed for payment, an account rendered, a demand made, or some universal custom or usage to warrant it. See Eckert *v.* Wilson, 12 Serg. & R. 393; Graham *v.* Williams, 16 Serg. & R. 257; Waggoner *v.* Grey, 2 Hen. & M. 603; M'Connico *v.* Curzen, 2 Call. 358; South *v.* Leavy, Hard. 518; Consequa *v.* Fanning, 3 John. Ch. 601; Kerr *v.* Love, 1 Wash. 172; Neal *v.* Keel, 4 Monroe, 164; Roper *v.* Wren, 6 Leigh, 38; Craig *v.* Craig, 1 Bailey Eq. 103; Dennison *v.* Lee, 6 Gill & J. 383; Hunt *v.* Nevers, 15 Pick. 500; Brewer *v.* Tyringham, 12 Pick. 547; Barnard *v.* Bartholomew, 22 Pick. 291; Dodge *v.* Perkins, 9 Pick. 368; Cole *v.* Trull, 9 Pick. 325; Raymond *v.* Isham, 8 Vt. 258; Evarts *v.* Nason, 11 Vt. 122; Marr *v.* Southwick, 2 Porter, 351. In such cases interest will be allowed from the commencement of the suit. Stimpson *v.* Green, 13 Allen, 326.

[1] Boddam *v.* Riley, 2 Bro. C. C. 2; 4 Bro. P. C. 561, 8vo ed.; see also, *Ex parte* Furneaux, 2 Cox, 219; and *Ex parte* Champion, 3 Bro. C. C. 436.

[2] *Ibid.*

[3] Barwell *v.* Parker, 2 Ves. 363; Earl of Bath *v.* Earl of Bradford, *ib.* 588; Lloyd *v.* Williams, 2 Atk. 109; Hamilton *v.* Houghton, 2 Bli. 186; Shirley *v.* Earl Ferrers, cited *ibid.*; see *contra*, Maxwell *v.* Wettenhall, 2 P. Wms. 26.

[4] Barwell *v.* Parker, *ubi supra*; Stewart *v.* Noble, Vern. & Scriv. 528, 537.

[5] Hamilton *v.* Houghton, 2 Bli. 186.

[6] 16 Ves. 393.

[7] As to the effect of tender, to stop interest, see Brown *v.* Simons, 45 N. H. 211, 213; McNeil *v.* Call, 19 N. H. 403; Tucker *v.* Buffum, 16 Pick. 46; Woodruff *v.* Depue, 1 McCarter, 168.

The plaintiff, in a bill to redeem, must account for the interest, if any, received by him on the money tendered to and refused by the defendant. Tucker *v.* Buffum, *ubi supra.*

upon further direction, that the Master shall compute subsequent
*1259 interest on the debts mentioned in his report, on * which he has computed interest according to the rates they respectively carry.[1]

Although in computing subsequent interest on the debts which carry interest, it was formerly held that the interest, when computed by the Master, became principal, and would carry interest,[2] the rule now is, not to compute interest upon interest reported to be due, even in the case of a mortgage,[3] except where a later mortgagee pays off a prior mortgagee, under a foreclosure or redemption decree.[4] The ground for the former practice was, that as the party came for the favor of the Court, he was ordered to pay a given sum on a certain day; and if he did not, he was put under terms of paying what would indemnify the other party completely.[5]

When the Master is ordered to compute interest with rests, the object of the Court is to charge the accounting party with compound
*1260 interest;[6] and the proper course is, to add the interest to * the

1 Seton on Decrees, 58.

2 See Bacon *v.* Clerk, 1 P. Wms. 480.

3 Whatton *v.* Craddock, 1 Keen, 26. The general rule is, that compound interest is not allowed. Dunshee *v.* Parmelee, 19 Vt. 172; Kittredge *v.* McLaughlin, 38 Maine, 513; Doe *v.* Warren, 7 Greenl. 48; Barrell *v.* Joy, 16 Mass. 227; Reed *v.* Reed, 10 Pick. 400, 401; Stone *v.* Locke, 38 Maine, 513.

4 See Seton, 144, 375.

5 Turner *v.* Turner, 1 J. & W. 47; Perkyns *v.* Baynton, 1 Bro. C. C. 574; and see Brown *v.* Barkham, 1 P. Wms. 653; Butler *v.* Duncomb, 1 P. Wms. 453; Astley *v.* Powis, 1 Ves. 496; Creuze *v.* Hunter, 2 Ves. J. 157, 168; S. C. 4 Bro. C. C. 316; Hunn *v.* Norton, Hopk. 344; Dunbar *v.* Woodcock, 10 Leigh, 629; Kittredge *v.* M'Laughlin, 38 Maine, 513, dissenting opinion of Hathaway J., p. 517.

6 "The Court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's money by directing rests, or payment of compound interest, but proceeds upon this principle, either that he has made, or has put himself into such a position as that he is to be presumed to have made, five per cent or compound interest, as the case may be." Lord Hatherley L. C. in Burdick *v.* Garrick, L. R. 5 Ch. Ap. 233, 241. "The questions of interest clearly depends upon the amount which the person who has improperly applied the money may be fairly presumed to have made." Sir G. M. Giffard L. J. in Burdick *v.* Garrick, L. R. 5 Ch. Ap. 243; see per Lord Cranworth in Attorney-General *v.* Alford, 4 De G., M. & G. 843, for a statement of the principles on which compound interest is allowed. See Hollister *v.* Barkley, 11 N. H. 501, 511, 512; Gibson *v.* Crehore, 5 Pick. 160, 161; Reed *v.* Reed, 10 Pick. 400, 401; Marr *v.* Southwick, 2 Porter, 351; Myers *v.* Myers, 2 M'Cord Ch. 214, 266; *ante*, 1251, 1252, and note; Nelson *v.* Booth, 3 De G. & J. 119, 122. On a bill in Equity to redeem land, mortgaged to secure a sum with its semi-annual interest, the interest computed for the first half year, together with the principal, will constitute a new principal, upon which in the same mode, the interest is to be computed and compounded for each succeeding half year; the Master having found that the debtor agreed to it. Farwell *v.* Sturdivant, 37 Maine, 308; but see Kittredge *v.* McLaughlin, 38 Maine, 513; Stone *v.* Locke, 46 Maine, 445. Compound interest is not illegal, and may be recovered on an express promise, or one implied by law as part of the contract. Bainbridge *v.* Wilcocks, 1 Bald. 538; Ringgold *v.* Ringgold, 1 Harr. & G. 11; Breckenridge *v.* Brooks, 2 A. K. Marsh. 335 339; Armstrong *v.* Campbell, 3 Yerger, 201; [Woods *v.* Rankin, 2 Heisk. 46;] Kennon *v.* Dickins, Cam. & Nor. 357. An *agreement* to pay interest on interest, which has already become due, is not usurious. Mowry *v.* Bishop, 5 Paige, 98; Camp *v.* Bates, 11 Conn. 487, and other cases cited in note (*b*), to Champion, *ex parte*, 3 Bro. C. C. 440; Farwell *v.* Sturdivant, 37 Maine, 308, 312. The *taking* of compound interest is not usury. Otis *v.* Lindsay, 1 Fairf. 315. If compound interest is voluntarily paid by the debtor, it cannot be recovered back. Mowry *v.* Bishop, 5 Paige, 98; Camp *v.* Bates, 11 Conn. 487; Barker *v.* Gregory, 7 B. Mon. 439. A note made payable with interest annually does not entitle the holder to compound interest. Doe *v.* Warren, 7 Greenl. 48; Kittredge *v.* McLaughlin, 38 Maine, 513; Hastings *v.* Wiswall, 8 Mass. 455. Original contracts for annual compound interest have been held oppressive and invalid. Rodes *v.* Blythe, 2 B. Mon. 336; see Connecticut *v.* Jackson, 1 John. Ch. 13; Van Benschooten *v.* Lawson, 6 John. Ch. 313; Childers *v.* Deane, 4 Rand. 408; Mowry *v.* Bishop, 5 Paige, 98. In Breckenridge *v.* Brooks, 2 A. K. Marsh. 335, 339, it was held that compound interest was not forbidden by the Statute of Usury, but it is to be regarded as

principal, at the time of the rest, and to compute interest upon the aggregate sum.[1]

It may here be remarked, that in the recent case of *Bower* v. *Marris*,[2] where one of two obligors in a joint and several bond had become bankrupt, and the obligee had, by several dividends in the bankruptcy, been paid the principal and interest due at the date of the commission, Lord Cottenham held, that the obligee was still entitled to claim, in respect of the same bond, in an administration suit against the estate of the co-obligor; and that the amount due to the obligee in respect of such claim was to be computed by treating the dividends as ordinary payments on account; that is, by applying each dividend in the first place to the payment of the interest due at the date of such dividend, and the surplus, if any, in reduction of the principal.[3]

Additional Accounts and Inquiries.

Under the present practice in the Judges' Chambers, where, in the prosecution of the decree or order, it appears to the Judge that it would be expedient that further accounts should be taken, or further inquiries made, he may order the same to be taken or made accordingly; or, if desired by any party, may direct the same to be considered in open Court.[4] The further accounts or inquiries must be such accounts or inquiries only as are auxiliary to the final working out of the decree which has been pronounced by the Court; not such as are at variance with its principle. Thus, a direction, charging the defendant with the moneys he might have received but for his wilful default, cannot be added to the decree in an ordinary administration suit;[5] nor, in * taking the accounts under the order, can the executor be charged upon an admission of assets;[1] nor can a direction for making annual rests be added to the ordinary decree against a mortgagee in possession,[2] nor, in a specific performance suit, will the Court direct a further inquiry as to objections to the title which have been abandoned.[3]

iniquitous, and is not to be decreed in Chancery, though agreed to by the parties. A special case must always be made out for the allowance of compound interest. Armstrong *v.* Campbell, 3 Yerger, 201; Connecticut *v.* Jackson, 1 John. Ch. 13; Darrel *v.* Eden, 3 Desaus. 241; Mowry *v.* Bishop, 5 Paige, 98; Ringgold *v.* Ringgold, 1 Harr. & G. 11; Myers *v.* Myers, 2 M'Cord Ch. 214, 266; Van Benschooten *v.* Lawson, 6 John. Ch. 313; 2 Story's Eq. Jur. § 1277.

[1] Raphael *v.* Boehm, 11 Ves. 97, 103; Farwell *v.* Sturdivant, 37 Maine, 308; see also Heighington *v.* Grant, 5 M. & C. 258.

[2] Cr. & Ph. 351.

[3] As to the rule for computing interest when partial payments have been made, see Connecticut *v.* Jackson, 1 John. Ch. 17, 18; Dean *v.* Williams, 17 Mass. 417; Scanlan *v.* Houston, 5 Yerger, 310; [Jones *v.* Ward, 10 Yerg. 310;] Harvey *v.* Crawford, 2 Blackf. 43; Black *v.* Blakely, 2 M'Cord Ch. 10; Wright *v.* Wright, 2 M'Cord Ch. 204; Lightfoot *v.* Price, 4 Hen. & M. 431; Williams *v.* Houghtaling, 3 Cowen, 87, note (*a*); Pierce *v.* Faunce, 53 Maine, 352, 353; Leonard *v.* Wildes, 36 Maine, 265. By the law of what place the rate of interest is determined, see Bailey on Bills (2d Am. ed.), 79, 82, 378; Bailey *v.* Leal, 1 Harring. 232; Hosford *v.* Nichols, 1 Paige, 225; Story Confl. Laws (2d ed.), 241–243, and notes.

[4] Ord. XXXV. 19.

[5] Partington *v.* Reynolds, 4 Drew. 253, 266; 4 Jur. N. S. 200, V. C. S.; Mirehouse *v.* Herbert, 5 W. R. 583, V. C. S.; Mutter *v.* Hudson, 2 Jur. N. S. 34, V. C. S.; Blakeley *v.* Blakeley, 1 Jur. N. S. 368, V. C. K.; *Re* Fryer, Martindale *v.* Picquot, 3 K. & J. 317.

[1] *Re* Wiltshire, 6 Jur. N. S. 190; 8 W. R. 133, V. C. S.

[2] Nelson *v.* Booth, 3 De G. & J. 119; 5 Jur. N. S. 28; Foster *v.* Foster, L. R. 3 Ch. Ap. 330; *ante*, 1251.

[3] Curling *v.* Austin, 2 Dr. & S. 129.

The application for the order for the further accounts and inquiries is made by summons which must be served on all parties ;[4] including persons who have obtained orders to attend the proceedings ; but the application need not, in general, be supported by evidence ; a reasonable suggestion on the part of the applicant, the onus of rebutting which is thrown on the other side, being sufficient.[5]

Settlement of Deeds, &c.

When a conveyance, or other deed, is ordered to be executed, it usually forms part of the order directing it, that it shall be settled by the Master, in case the parties differ about the same.[6]

Where a Master is directed to settle a conveyance, in case the parties differ about the same, then the party entitled to prepare the conveyance shall bring the draft of the conveyance into the Master's office, and give notice of his having so done to the other party. This notice may be given by serving the usual warrant "on leaving;" after which the other party is at liberty, within eight days, to inspect the same without fee, and to take a copy thereof, if he thinks proper.[7] The Master may, on application, grant further time, if necessary.

If the party does not obtain an extension of time, he must at or before the expiration of the eight days (or having obtained such extension, at or before the expiration of such further time as the Master in his discretion shall allow), either adopt the conveyance or signify his dissent therefrom, which he must do by delivering a statement, in writing, of the alterations which he proposes to make in the draft of the conveyance, serving, at the same time, a warrant "on leaving."

If the party does not signify his dissent, or deliver a statement, in writing, of his proposed alterations, within the eight days, or *1262 * such further time as the Master may have appointed for that purpose, the Master, at the expiration of the eight days, or the further time which he has appointed, may proceed to settle the conveyance according to the practice of the Court, which he must also do where a statement of proposed alterations has been delivered, and the party bringing in the draft refuses to accede to them.

In case the Master shall adopt the proposed alterations in the draft of conveyance, then the costs of the proceeding in respect of the conveyance shall be borne by the other party.[1]

The rule as to settling conveyances, under the decree of this Court, is thus stated by Lord Hardwicke: "Where conveyances are to be made by a decree of this Court, the settling them, to be sure, is to be by the like kind of rule, as men of judgment among the conveyancers

4 Seton, 46.

5 Mutter *v.* Hudson, 2 Jur. N. S. 34, V. C. S.

6 The deed is sometimes directed to be settled by the Master, only in case the parties differ about the same: this, however, should not be done, if an infant is a necessary party to the deed. Calvert *v.* Godfrey, 2 Beav. 267; Richardson *v.* Watt, 11 Beav. 378; Sugd. V. & P. 106; Dart, 768; but see Seton, 1197.

7 76th of the Orders of 1828.

1 76th of the Orders of 1828.

would direct."[2] This being the rule, the Court sanctions the practice generally resorted to by the Masters, before settling a conveyance, of directing the draft to be laid before a conveyancer to advise upon it,[3] in which case the same course of proceeding must be adopted as when he directs an abstract to be laid before a conveyancer.[4]

When the Master has settled the draft of the conveyance, an engrossment of it will be made in the Master's office, and the Master will signify his allowance of it by signing his name in the first and last skins, and also his allocation in the last skin, in the following form, in the margin of the engrossment: "*A.* v. *B.* I approve of and allow this indenture, being the same mentioned in my report, dated the — day of —." He then signs a report or certificate of his having approved and allowed the engrossment, which must be filed in the usual manner.[5] But no warrants on preparing, or to sign certificate, are taken out, nor is any order necessary to confirm it.[6]

The conveyance, having been approved of by the Master, must be executed by the parties; and, if any thing is required to be done by the Court, or by the Accountant-General, on the execution of the conveyance, an affidavit of such execution must be made, and on such affidavit the Master will issue his certificate, which is filed in the usual manner.[7]

Exceptions lie to the Master's certificate of having settled a conveyance,[8] and in *Lloyd* v. *Griffith*,[9] the Court directed the Master forthwith to make his certificate or report of his approbation of the draft of a conveyance, which he was to settle, in order that the party might except thereto.

* *Appointment of New Trustees.* *1263

When it is referred to the Master to appoint new trustees, in the room of trustees who are dead or decline to act, &c., the course to be pursued is, for the party obtaining the reference, to leave, in the Master's office, a state of facts and proposal, stating the nature of the property, the interest of the parties, &c., and naming the parties proposed to be new trustees. In support of this state of facts, evidence should be adduced showing the eligibility of the proposed new trustees, and their consent in writing to act if appointed.[1] Warrants on leaving, and to proceed, &c., having been served, if the proposal is satisfactory, the Master prepares and signs his report appointing the new trustees. This report is filed, and may be excepted to in the same manner as other reports, of a similar nature, but, upon hearing the exceptions,

[2] Lloyd *v.* Griffith, 3 Atk. 264.
[3] Turn. & V. 421; see 3 Atk. 266.
[4] *Ante*, p. 1216.
[5] 1 Turn. & V. 422.
[6] *Ibid.*
[7] 2 Smith, 195.
[8] Wakeman *v.* Duchess of Rutland, 3 Ves. 504; Lloyd *v.* Griffith, 3 Atk. 264.
[9] 1 Dick. 103: and Huggins *v.* York, Buildings' Company, cited *ibid.*
[1] 2 Smith, 374, 3d ed.

the Court will not enter into the comparative merits of the several persons who have been proposed by the different parties.[2] It frequently happens that the order directing the appointment of new trustees directs a conveyance of the trust estates to such new trustees, to be executed, and orders the Master to settle such conveyance. When this is the case, after the Master has made his report of the appointment of the new trustees, the proper conveyances for vesting the estate in such new trustees are prepared, and brought into the Master's office, and proceeded upon, in the same manner as other deeds.[3]

It may be mentioned, with reference to this subject, that in the conveyance to new trustees, the Court will not insert a clause to enable the new trustees to appoint others in their stead, unless there is provision to that effect in the original instrument by which the trust is created;[4] and that when the original deed does contain such a clause, the Court will not, on the application of the trustees themselves, appoint new trustees, without a reference to the Master;[5] the rule of the Court being, that when persons are authorized to choose, if they will not exercise the power without coming to the Court, there must be a reference.[6]

*1264 ** Sales of Property.*

Formerly, a sale of real estate was not directed until the original hearing of the cause, or the hearing on further directions.[1] Now, however, if, after a suit has been instituted in relation to any real estate, it appears to the Court that it will be necessary or expedient that such real estate, or any part thereof, should be sold for the purposes of the suit, the Court may direct the same to be sold at any time after the institution thereof; and such sale will be as valid to all intents and purposes as if directed to be made by a decree or decretal order on the hearing of such cause; and any party to the suit in possession of such estate, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser, or such other person as the Court shall direct.[2]

[2] Attorney-General *v.* Dyson, 2 S. & S. 528.

[3] *Ante*, pp. 1261, 1262; Cooper *v.* Macdonald, 14 W. R. 755, M. R.

[4] Bayley *v.* Mansell, 4 Mad. 226; Bowles *v* Weeks, 14 Sim. 591; Oglander *v.* Oglander, 2 De G. & S. 381; 12 Jur. 786; Holder *v.* Durbin, 11 Beav. 594; and see Seton, 348, 361; Lewin, 549, but see White *v* White, 5 Beav. 221. By 23 & 24 Vic. c. 145, §§ 27, 32, a trustee appointed by the Court of Chancery, unless expressly prohibited by the instrument creating the trust, has the same powers, authorities, and discretions, and is in all respects to act, as if he had been originally nominated a trustee by the instrument creating. [A new trustee will, upon petition, be allowed to take the place of his predecessor in the prosecution of a suit commenced by the latter, and will not be required to file a supplemental bill. Murray *v.* Delon, 102 Mass. 11.]

[5] —— *v.* Hobarts, 1 J. & W. 251.

[6] *Ibid.*; see Webb *v.* Lord Shaftsbury, 7 Ves. 480.

[1] Bailie *v.* Jackson, 10 Sim. 167, 173; Seton, 236. [The power to order a sale of property before final decree, even when conferred by statute, is one of an extraordinary character, and should never be exercised except in a plain case, and where it is made clearly to appear that a sale on final hearing is inevitable. Cornell *v.* McCam, 37 Md. 89. But see Gleaves *v.* Ferguson, 1 Tenn. Leg. Rep. 25.]

[2] 15 & 16 Vic. c. 86, § 55.

This provision does not give the Court jurisdiction to sell real estate, in cases where no such jurisdiction previously existed: it only applies to those cases where a sale would formerly have been directed at the hearing;[3] or in which, for the protection of property, or other like cause, it is necessary to come to the Court for a sale; and does not enable a party, in a contested suit, and upon an interlocutory application before the hearing, to obtain a decision upon the main questions at issue in it.[4]

Where the estate is subject to any incumbrance, it cannot be sold free therefrom, except the incumbrancer is bound by the decree;[5] or consents to the sale. Unless, therefore, it is known that the estate is free from incumbrances, or it is to be sold under the provisions of the 15 & 16 Vic. c. 86, § 48,[6] the decree or order for sale usually directs a preliminary inquiry to be made, whether there are any and what incumbrances affecting the estate:[7] and directs it to be sold, free from the incumbrances of such of the incumbrancers as consent to the sale, and subject to the incumbrances of such of them as do not consent. It also directs an account to be taken of what is due to those incumbrancers who consent; and their priorities to be ascertained; and provides that the proceeds of sale shall be applied, in the first place, in payment of what shall *appear to be due to them, according to *1265 their priorities; and be, in the mean time, paid into the bank, to a separate account in the cause.[1]

An incumbrancer who consents to the estate being sold free from his incumbrance, does not thereby deprive himself of the ordinary rights of a mortgagee as to costs; but is entitled to be paid his principal, interest, and costs out of the purchase-money, in priority to the costs of the suit.[2] If he is paid within six months from the date of his consent, he is entitled to six months' interest: and if paid afterwards, to interest up to the day of payment.[3]

An incumbrancer who concurs in a sale, may be ordered to produce and deposit in Court the title deeds necessary for the sale; but such deeds will not be delivered out to the purchaser, without notice to the incumbrancer.[4] The consent of an incumbrancer to the sale is usually given during the proceedings in Chambers; and should be in writing.[5]

In any suit for the foreclosure of the equity of redemption in any

[3] Mandeno *v.* Mandeno, Kay Ap. 2: Swan *v.* Webb, 1 W. R. 90, V. C. T.; Martin *v.* Hadlow, *ib.* 101, V. C. S.; Prince *v.* Cooper, 16 Beav. 546.

[4] Prince *v.* Cooper, *ubi sup.*

[5] See 15 & 16 Vic. c. 86, § 48, *post*, p. 1265.

[6] *Ibid.*

[7] The Chief Clerk need not make a certificate as to preliminary inquiries, before proceeding with the sale: see Dykes *v.* Taylor, 16 Sim. 563.

[1] See Seton, 1185; and forms of orders, *ib.* 231, 251, 1182; Langton *v.* Langton, 7 De G., M. & G. 30; Wickenden *v.* Rayson, 6 De G., M. & G. 210.

[2] Hepworth *v.* Heslop, 3 Hare, 485; Ward *v.* Mackinlay, 10 Jur. N. S. 1063; 13 W. R. 65, L. JJ.; and see Dart, 747, 759, 764, 766, 770; Seton, 1201. [And see Hudnit *v.* Nash, 1 C. E. Green, 550; Cloud *v.* Hamilton, 3 Yerg. 81; Stark *v.* Cheatham, 2 Tenn. Ch. 300.]

[3] Day *v.* Day, 31 Beav. 270; and see Dart, 770; Seton, 1202; see, however, Matson *v.* Swift, 5 Jur. 645, M. R.

[4] Livesey *v.* Harding, 1 Beav. 343, 346.

[5] For form of consent, see Vol. III.

mortgaged property, the Court may, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct; and, if the Court so thinks fit, without previously determining the priorities of incumbrancers, or giving the usual or any time to redeem; but if such request is made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the Court is not to direct any such sale without the consent of the mortgagee, or the persons claiming under him: unless the party making such request deposits in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court may think fit to impose on the party making such request.[6]

The Court will only direct a sale, where it is satisfied that a sale will be for the benefit of the persons interested in the property.[7]

Thus, a sale will be directed where there is such a complication *1266 * that the common decree cannot be conveniently worked out;[1]

but it will not be directed where it would be oppressive: as where it would deprive the mortgagor of an old family estate.[2] Where the Court is satisfied that it is for his benefit, the sale of the estate of an infant mortgagor may be directed.[3] A sale may be directed, though the mortgagor,[4] or some of the incumbrancers, do not consent;[5] but was refused where the plaintiff, who was a judgment creditor, insisted on a foreclosure.[6] Where the mortgaged property consisted of leaseholds, a sale was ordered at the instance of the first mortgagee; the property being unproductive.[7]

A sale will not be directed upon an interlocutory application;[8] nor, except by consent, after a decree has been made for foreclosure.[9] The usual course is, for the decree at the hearing to direct a sale, in the event of default being made in payment of what is found due by the Chief Clerk's certificate, within a limited time (usually six months),[10]

[6] 15 & 16 Vic. c. 86, § 48. For forms of orders under this section, see Seton, 365, 366; and see Hutton *v.* Sealy, 4 Jur. N. S. 450; 6 W. R. 350, V. C. S., where the bill prayed for a sale and not for a foreclosure, although there was the usual power of sale in the deed.

[7] Hurst *v.* Hurst, 16 Beav. 372, 374, 375; Cator *v.* Reeves, 9 Hare Ap. 53, n.; Paine *v.* Edwards, 10 W. R. 709, V. C. S.; and see Robert *v.* Price, 1 W. R. 303.

[1] Hiorns *v.* Holtom, 16 Jur. 1077, M. R.; Wickham *v.* Nicholson. 19 Beav. 38.

[2] Hurst *v.* Hurst, *ubi sup.*

[3] Mears *v.* Best, 10 Hare Ap. 51; Siffken *v.* Davies, Kay Ap. 21; Wigham *v.* Measor, 5 W. R. 394, V. C. W.

[4] Newman *v.* Selfe, 33 Beav. 522; 10 Jur. N. S. 251.

[5] Wickham *v.* Nicholson, *ubi sup.* 38; and see Wickenden *v.* Rayson, 6 De G., M. & G. 210.

[6] Messer *v.* Boyle, 21 Beav. 559; and see Jones *v.* Bailey, 17 Beav. 582.

[7] Phillips *v.* Gutteridge, 4 De G. & J. 531; Foster *v.* Harvey (2), 11 W. R. 899, V. C. W.; affd., 12 W. R. 92, L. JJ.

[8] Wayn *v.* Lewis, 1 Drew. 487.

[9] Girdlestone *v.* Lavender, 9 Hare Ap. 53, Campbell *v.* Moxhay, 18 Jur. 641, V. C. S.; see, however Laslett *v.* Cliffe, 2 Sm. & G. 278.

[10] Boydell *v.* Manby, 9 Hare Ap. 53; Staines *v.* Rudlin, *ib.* n.; 16 Jur. 965; Bellamy *v.* Cockle, 18 Jur. 465, 466, V. C. W.; Loyd *v.* Whittey, 17 Jur. 754, V. C. W. Smith *v.* Robinson, 1 Sm. & G. 140; Whitfield *v.* Roberts, 5 Jur. N. S. 113; S. C. *nom.* Whitbread *v.* Roberts, 7 W. R. 216, M. R.

after the date of such certificate;[11] but by consent, or where it is for the benefit of all parties, the sale will be directed to take place within a shorter period;[12] or even immediately.[13] If the sale is directed at the request of a subsequent mortgagee, or of the mortgagor, the Court cannot, except by consent, dispense with a deposit: which must be enough to cover the possible expense of a sale.[14] Where the sale is at the request of a subsequent incumbrancer, or of the mortgagor, a reserved bidding will be fixed of sufficient amount to cover what is due to the first mortgagee.[15] Where a sale was directed, in a suit in which a subsequent incumbrancer was plaintiff, the conduct of the sale was given to the first mortgagee.[16]

Sales may be made by the Court with an indefeasible title, upon *the application, by petition or otherwise, as general *1267 orders may direct, of any of the persons empowered to apply for registration of titles.[1]

Where an estate, or other property, is directed to be sold to the best bidder, with the approbation of the Master, it must be sold by public auction, unless the Court specially directs that a different method of disposing of the property shall be adopted, which it will sometimes do, under circumstances which will be hereafter pointed out.[2]

The conduct of the sale is usually given to the plaintiff, or other party having the carriage of the general proceedings;[3] although, if the sale were out of Court, he would not be the party to sell.[4] Where, however, he has leave to bid at the sale,[5] or it would clearly be more beneficial for the persons interested in the estate, the conduct may be given to any other party;[6] and we have seen that, where a sale instead of a foreclosure is directed, the conduct may be given to the first mortgagee.[7]

Where all parties to the suit have liberty to bid, a solicitor not concerned for any of them, to be mutually agreed upon, or, if they cannot agree, to be nominated by the Judge, will be appointed to conduct the

[11] See, for form of decree, Seton, 365, No. 4.

[12] Staines *v.* Rudlin, 9 Hare Ap. 53, n.; 16 Jur. 965; Newman *v.* Selfe, 33 Beav. 522; 10 Jur. N. S. 251.

[13] Cator *v* Reeves, 9 Hare Ap. 53 n.; 16 Jur. 1004; Mears *v.* Best, 10 Hare Ap. 51; Anning *v.* Lavers, 1 W. R. 19, V. C. S.; Siffken *v.* Davies, Kay Ap. 21; Wigham *v.* Measor, 5 W. R. 394, V. C. W.; Marriott *v.* Kirkham, 3 Giff. 536; 8 Jur. N. S. 379; Phillips *v.* Gutteridge, 4 De G. & J. 531; Foster *v.* Harvey (2), 11 W. R. 899, V. C. W.; 12 W. R. 92, L. JJ.

[14] Bellamy *v.* Cockle, 18 Jur. 465, V. C. W.; Whitfield *v.* Roberts, 5 Jur. N. S. 113; S. C. *nom.* Whitbread *v.* Roberts, 7 W. R. 216, M. R. In these cases, the deposit required was 200*l.*

[15] Whitfield *v.* Roberts, *ubi sup.*

[16] Hewitt *v.* Nanson, 7 W. R. 5, V. C. K.

[1] 25 & 26 Vic. c. 53, § 41; and see Bradish *v.* Ellames, 10 Jur. N. S. 251, V. C. K.; Bradish *v.* Ellames, 10 Jur. N. S. 1231, V. C. K.; S. C. *nom. Re* Ellames, 13 W. R. 170. No general orders have yet been made by the Court under this Act. As to sales under this Act, see *post*, Chap. XLV., *Statutory Jurisdiction* (*Transfer of Land Act*).

[2] The personal effects of a person deceased are generally ordered to be sold by the legal representatives, under the direction of the Master. See Cobden *v.* Maynard, 1 N. R. 354, V. C. W.; *Re* Hirst, 13 W. R. 225, V. C. K.

[3] Knott *v.* Cottee, 27 Beav. 33; Cobden *v.* Maynard, 1 N. R. 354, V. C. W.

[4] Dale *v.* Hamilton, 10 Hare Ap. 7.

[5] Domville *v.* Berrington, 2 Y. & C. Ex. 723; and see Sidney *v.* Ranger, 12 Sim. 118, 120.

[6] Dixon *v.* Pyner, 7 Hare, 331; 14 Jur. 217; Hewitt *v.* Nanson, 7 W. R. 5, V. C. K.; Knott *v.* Cottee, 27 Beav. 33.

[7] Hewitt *v.* Nanson, 7 W. R. 5, V. C. K.

sale, or a portion of the business thereof; and he is usually designated in the proceedings as "the person appointed to conduct the sale in this suit." [8]

The solicitor of the party having the conduct of the sale is, in all questions which may arise between the purchaser and the vendor, considered as the agent of all the parties to the suit.[9]

In strictness, all sales ought to take place in the public room at the Master's office in London, and should be effected by the Master's clerk; [10] and formerly it was considered for the benefit of the parties interested that the estate should be sold in the country, or if by any
* 1268 other person than the Master's clerk, it was necessary to * have a special order of the Court, to warrant such a deviation from the ordinary practice; [1] but the necessity for such an order has been taken away by the 75th of the Orders of 1828, which directs, "That where estates or other property are directed to be sold before the Master, the Master shall be at liberty, if he shall think it for the benefit of the parties interested, to order the same to be sold in the country, at such place, and by such person, as he shall think fit." [2]

Under this order, a party desirous that the property should be sold in the country, or by an auctioneer, instead of the Master's clerk, should prepare and leave a proposal to that effect; and if, upon attending the warrant "to proceed," the Master is of opinion that the proposal should be adopted, he makes a report to that effect, which is filed in the usual manner, and does not require confirmation.[3]

It is to be observed, that the auctioneer, or person appointed to sell, is not allowed a percentage upon the purchase-money, but it is usual for the vendor's solicitor to make an arrangement with him, to sell the property for a fixed sum, the amount of which it is prudent to submit to the Master, on attending the warrant upon the proposal, so that no question may arise, on the taxation of costs, as to the propriety of the payment.[4] It may be useful here to remark, that a proposal to appoint a London auctioneer or surveyor, to sell an estate in the country, would be rejected, and that an attorney or solicitor is disqualified.[5]

If the auctioneer, or other person appointed to sell, is to be authorized to receive deposits, or any other money, in respect of the property, he should give security, to be approved by the Master, duly to account.

Where it is desirable to have a reserved bidding appointed by the Master, for the purpose of preventing an estate from being sold at an

[8] See Rowland *v.* Evans, M. R., in Chambers, 23 April, 1862; Pilling *v.* Pilling, M. R., in Chambers, 3 June, 1863.

[9] Dalby *v.* Pullen, 1 R. & M. 296; Dale *v.* Hamilton, 10 Hare Ap. 7; see Hurt *v.* Stull, 4 Md. Ch. Dec. 391.

[10] A sale of mortgaged premises under a decree must be made by the Master himself, or under his immediate direction. Hyer *v.* Deaves, 2 John. Ch. 154. A sale by a person deputed by the Master, in his absence, is irregular, and will be set aside. *Ibid.* This decision was made under the statute of New York which directs "that all sales of mortgaged premises, under a decree, shall be made by a Master." *Ibid.*

[1] 1 T. & V. 401.

[2] A sale on the land, under a decree ordering it to be made there, is entirely proper. Mitchell *v.* Berry, 1 Met. (Ky.) 602.

[3] 2 Smith, 193, 3d ed.

[4] *Ib.* 194.

[5] 1 T. & V. 403.

undervalue, the proper course is to apply to the Court, by motion, for such a direction,[6] when an order will be made for the Master to fix a reserved bidding, if he should think fit.[7] The form of the order is usually the same as that in *Jervoise* v. *Clarke*,[8] and in acting upon it a correct valuation of the estate should be made by a skilful surveyor, setting out, in schedules, the amount of the rental, and the estimated value of the whole estate, and of *each lot separately, *1269 and the sum at which the same ought to be sold together, and also at what stated sum each lot ought to be sold. A state of facts, comprising, shortly, the valuation of the estate, and an affidavit of the surveyor, in support of the valuation, must be brought into the Master's office, whereupon the usual warrants "on leaving," and "to proceed," must be served and attended. The Master then draws a conclusion from the evidence before him, and fixes a bidding, as directed by the order, which he commits to writing, and encloses under a sealed cover, and delivers to the person appointed to sell the estate, for the purposes mentioned in the order, but he makes no report or certificate of the proceedings.[1]

Where an estate is directed to be sold before a Master, the particulars and conditions of the sale are prepared by the solicitor of the plaintiff,[2] or other party having the conduct of the cause.[3] They are intituled in the cause,[4] and contain a general description of the nature and situation of the property, in whose possession it is or has lately been, and of the manner in which it is proposed to lot the same.[5]

The conditions of sale, which should be annexed to the particulars, are generally similar to those annexed to sales of estates by auction in the ordinary way.[6] If a reserved bidding has been appointed by the Master, it should be mentioned in the conditions.[7]

After the particulars and conditions of sale have been prepared and allowed by the Master, the first advertisement for the sale must be prepared either by the plaintiff's solicitor or by the Master's clerk,[8] and the signature of the Master must be obtained to authorize the insertion of

[6] Such a direction ought not to be inserted in a decree for sale, but ought to be the subject of a separate order. Per Sir J. Leach M. R. in Brooker *v.* Collier, 3 Russ. 369.

[7] Shaw *v.* Simpson, cited 1 J. & W. 392.

[8] Shaw *v.* Simpson, cited 1 J. & W. 389.

[1] 1 T. & V. 404.

[2] Harr. ed. Newl. 490.

[3] For information as to the form, &c., of these particulars, see 1 Sugden V. & P. 30 *et seq.*

[4] See Ray *v.* Oliver, 6 Paige, 489.

[5] 2 Smith, 175, 3d ed. The Master must not, in his description of the property, add any particulars which may unduly enhance the value thereof, or mislead the purchaser. Veeder *v.* Fonda, 3 Paige, 97, 490; see Post *v.* Leet, 8 Paige, 337; Seaman *v.* Hicks, 8 Paige, 656. The advertisement should give such a description of the property as to indicate and identify it. Kauffman *v.* Walker, 9 Md. 229; Merwin *v.* Smith, 1 Green Ch. 182; Den *v.* Tellers, 2 Halst. (N. J.) 154; Hodgdon *v.* Farrell, 4 C. E. Green, 88.

[6] See 1 Sugden V. & P. 30.

[7] 2 Smith, 176, 3d ed. The sale by an officer will not be set aside because the terms of a sale are unusually strict or severe, if the circumstances of the case call for rigid measures, and no design is manifested to oppress or injure the defendants. Coxe *v.* Halsted, 1 Green Ch. 311. But if the officer's conduct is grossly improper and oppressive, upon a sale by him, it seems he will be ordered to pay the costs of setting aside his report of sale, and of the subsequent proceedings therein. Baring *v.* Moore, 5 Paige, 48; Johnson *v.* Garrett, 1 C. E. Green, 31; Tiernan *v.* Wilson, 6 John. Ch. 411.

[8] This is sometimes done, for the purpose of saving time, before the particulars are settled.

the advertisement in the Gazette.[9] The advertisement should *1270 also be inserted in other newspapers in London, * and, if the sale is in the country, in the provincial papers published near the place where the property lies.

There are always two advertisements: in the first, no time is appointed for the sale.[1] About three weeks or a month after the insertion of the first advertisement, a warrant must be taken out to fix a time for the sale, which must be served on the solicitors of all the parties. The warrant being attended, the Master, with the approbation of all parties, will fix the time; and the second advertisement, which is usually called the *peremptory advertisement*, stating the time, must then be prepared, and inserted in the Gazette and other newspapers.[2]

By a general order of the Court, dated the 24th of March, 1814,[3] it is ordered, that the solicitor for the party prosecuting any decree or order of the Court for a sale, shall be at liberty, in cases in which the Master shall think fit, to print and disperse as many particulars as shall be thought beneficial,[4] under the direction of the Master, in whose office

[9] 1 Sugd. V. & P. 55; 2 Harr. ed. Newl. 490; see *ante*, pp. 1203, 1204. It is not necessary that advertisements of the sale of real estate by a sheriff or Master in Chancery should be signed by the officer with his own proper signature; whether the officer's name is signed to the advertisement by himself, or printed or signed by another, is immaterial. In either case it is a virtual signing by the officer. Coxe *v.* Halsted, 1 Green Ch. 311.

[1] A reasonable notice, in the sale of lands under a decree of Chancery, is all that can be required, and such sale may be ordered in the discretion of the Chancellor for cash or on credit. Darrington *v.* Borland, 3 Porter, 12; see Penn *v.* Tolleson, 20 Ark. 652; Cummins *v.* Little, 1 C. E. Green, 48. Where the sale is advertised for a specified day between the hours of *twelve and five o'clock in the afternoon*, and the property is sold in pursuance of such advertisement, the sale will not be set aside, although there is a propriety and convenience in specifying a particular hour between twelve and five o'clock for the sale. Coxe *v.* Halsted, 1 Green Ch. 311.

[2] 1 T. & V. 404; 1 Sugd. V. & P. 56. Where land is sold without being advertised for sale, for the time or in the manner prescribed by the order, the sale is invalid, and will be set aside. Baily *v.* Baily, 9 Rich. Eq. (S. C.) 392; Vanbussum *v.* Maloney, 2 Met. (Ky.) 602; Glenn *v.* Wotten, 3 Md. Ch. Dec. 514. In a case where the question was, whether an officer had fairly exercised his discretion in regard to setting up notices of a sale of property under an execution, it was held that if he abused the discretion vested in him by law to make such sale, to the detriment of subsequent incumbrances or of the defendant in the execution, a Court of Equity will grant relief, although there may have been a formal compliance in the conduct of the sale with all the requirements of the Statute respecting such notices. Cummins *v.* Little, 1 C. E. Green, 48. It is not necessary that there should be *actual* fraud, committed or meditated. The abuse of discretion in the execution of the trust is a *constructive* fraud against which Equity will relieve. *Ibid.* But a mere error of judgment, or mistaken exercise of discretion by the officer, in the absence of fraud or unfairness in the sale, affords no ground for the interference of the Court. Vanduyne *v.* Vanduyne, 1 C. E. Green, 93. The report on the record should show that an advertisement was made, in a case where the sale is ordered to be made after advertising. Clark *v.* Bell, 4 Dana, 15.

[3] Beames's Ord. 483; 2 V. & B. 417.

[4] In New Jersey, the Statute prescribes that the notices of sale shall be set up at five public places. Under this requirement, the Court, in Cummins *v.* Little, 1 C. E. Green, 48, hold that to be a public and suitable place for setting up advertisements, contemplated by the Act, which is likely to give information to those interested, and who may probably become bidders at the sale. The sheriff is bound to conduct the sale so as to protect the rights and promote the interests of all parties concerned, and to this end to secure, as far as practicable, the most general diffusion of the notices of sale. The true test of the propriety of the action of the officer, in setting up the notices, is this: Did he set them up as a discreet man, desirous of effecting a sale of his property to the best advantage, would have set them up? Where a sale by a public officer is conducted in violation of the spirit and policy of the law, and so as in fact to defeat the just claims, or greatly to prejudice the rights of parties interested, the sale will be set aside, though the formal requirements of the Statute have been complied with. The above case contains many valuable suggestions in regard to the duty of officers in giving notices of sales.

such sale shall be, paying 6*d.* per side for so many printed copies as there shall have been actual * bidders at the sale, and no more, *1271 and that such payments shall be allowed the solicitor upon the taxation of his costs.[1]

The sale, when it takes place at the Public Office, in Southampton Buildings, should be attended by the solicitor for the plaintiff, and is conducted in the following manner: The Master's clerk prepares a paper, on which the biddings for the different lots are to be marked.[2] This generally consists of a copy of the particulars of sale, with spaces between each lot.[3] The lots are successively put up, at a price offered by any person present, such person signing his name to the sum which he offers, on the above paper.[4] Every subsequent bidder must also sign his name to the sum he offers,[5] until no person will advance on the last bidder, who is then declared the purchaser, unless there has been a reserved bidding fixed by the Master, in which case, if the last bidding does not reach the reserved bidding, the Master's clerk, or person selling, is to declare that the lot has not been sold, but has been brought in by the persons interested in the estate.[6]

It is to be observed, that, although there can be no doubt that a residuary legatee, or a tenant for life, or the owner of a reversionary interest, may become a purchaser at a sale under the order of the Court,[7] it is necessary, if he be a party to the record, that he should have a previous order to warrant his being admitted as a bidder at the sale; and the Court will not permit a party, having such an order, to conduct the sale.[8]

The best bidder being declared the purchaser, must, in addition to the signature of his name after his bidding, add his description and place of abode. If he buys as agent, he signs A. B., agent for C. D., of ——, &c.[9]

The same process is gone through with respect to all the other lots, and if any lots are not sold, they must be again advertised for sale.[10]

* If the sale takes place in the country, and any other person *1272

[1] The fees to the Master's clerk are settled by an Order of the 23d of February, 1837, containing a schedule of fees, according to which, besides the usual fee of 1*l.* 1*s.* upon every advertisement, a fee of 3*l.* in addition to the reasonable travelling expenses of the Master's clerk, has been appointed to be paid upon every peremptory advertisement for the sale of property, to be repaid if the property shall not be offered for sale.

[2] 1 T. & V. 404; see note below.

[3] 1 Sugd. V. & P. 56.

[4] 1 T. & V. 405.

[5] *Ibid.*

[6] Bids for property sold by order of the Chancellor are mere propositions to be rejected by him in the exercise of a reasonable discretion, if the sale has not been perfectly fair, or if an unconscientious advantage has been obtained by the purchaser. Vanbussum *v.* Maloney, 2 Met. (Ky.) 550.

[7] Williams *v.* Attenborough, Turn. & R. 76; Elworthy *v.* Billing, 10 Sim. 98

[8] Domville *v.* Barrington, 2 Y. & C. 724. Exch. Rep.; Sidney *v.* Ranger, 12 Sim. 118, 120; *Ex parte* M'Gregor, 4 De G. & S. 603; nor a receiver: Alvine *v.* Bond, 1 Flan. & K. 316; nor a guardian *ad litem* of a party: Dodson *v.* Bishop, Seton, 1184; nor the trustee of the estate, or the executor, of the testator in the cause, unless all parties who are *sui juris* consent, and the Court is satisfied that it will benefit the sale: Campbell *v.* Walker, 5 Ves. 678, 681, 682; Geldand *v.* Randall, 9 Jur. 1085, V. C. K. B; and see Farmer *v* Dean, 32 Beav. 327; Lewin, 339.

[9] 2 Smith, 197, 3d ed.

[10] 1 T. & V. 405. It is the duty of the sheriff to sell property plainly divided, in separate parcels; Penn *v.* Craig, 1 Green Ch. 495; if the property is so situated that it will

than the Master's clerk is appointed to sell, the person so appointed must proceed in the same manner as the Master's clerk; it is necessary, however, that he should verify the accuracy of the proceedings by affidavit. This affidavit is prepared by the Master's clerk, and generally states that the deponent proceeded to sell the estate, according to the printed particulars and conditions of sale thereof settled and allowed by the Master, and specifies where and when the sale took place; and that he has annexed a schedule, containing a full and true account of all and every sum and sums of money which was or were bid for the said lots respectively, and also the names of all and every the persons and person who attended at the said sale, and bid for the lots respectively (this schedule is, generally, the original paper upon which the biddings taken at the sale were put down, and signed by the bidders); and he further swears that the respective sums lastly set down as being the highest bidding for the said lots, were the highest and largest sums that were offered and bid for the same respectively at the said sale, and verifies the handwriting of the highest bidder to each lot, and that the whole of the sale was conducted by him, the deponent, in a fair, open, and candid manner, &c.[1]

It is not usual, in sales of estates under the decrees of the Court, to require the purchaser to make any deposit.[2] It is, however, sometimes done; and it seems that, in cases where timber upon an estate is sold separately from the estate itself, the practice is to require a deposit; the conditions of a sale usually providing, that the purchaser of each lot shall sign an agreement for the performance of the conditions, and pay one-third of the amount of the purchase-money (or a certain percentage upon its amount), in cash or Bank of England notes, at the time of the sale, to the person appointed to sell.[3] Where such a direction occurs, or where from any other circumstance the person employed to sell any property, not being the Master's clerk under the direction of the Master, is to receive money either in shape of deposit or otherwise, on account of the purchase-money, he will be required to give *1273 security, * or enter into recognizances, to be approved by the Master, that he will duly pay the same into the Bank, in the name and with the privity of the Accountant-General.[1]

probably produce more by that mode of selling; or where a part only is required to be sold. Mohawk Bank *v.* Atwater, 2 Paige, 54; Merwin *v.* Smith, 1 Green Ch. 182; Coxe *v.* Halsted, 1 Green Ch. 319; Woods *v.* Monell, 1 John. Ch. 505; Amer. Ins. Co. *v.* Oakley, 9 Paige, 259; Coates *v.* Lashley, 2 McCarter, 116; Johnson *v.* Garrett, 1 C. E. Green, 31; Tiernan *v.* Wilson, 6 John. Ch. 411, 414; Stead *v.* Course, 4 Cranch, 403; Vanduyne *v.* Vanduyne, 1 C. E. Green, 93; Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587; Meeker *v.* Evans, 25 Ill. 322. But the sale of several parcels together does not render the sale void, but only voidable; and after a great lapse of time the sale will not be disturbed. Mohawk Bank *v.* Atwater, 2 Paige, 54; Penn *v.* Craig, 1 Green Ch. 495; [Lasell *v.* Powell, 7 Coldw. 278.] Where the order of the Court is that the premises be sold all in one lot, that order must be followed. Babcock *v.* Perry, 8 Wis. 277.

[1] 2 Smith, 199, 3d ed.

[2] *Ib.* 200.

[3] *Ib.* 240.

[1] On a Master's sale, which reserves to the Master a right to consider the biddings open until the deposit is paid, no sale can be enforced where the purchaser refuses to pay the deposit or sign an acknowledgment; and no order for a resale is necessary, — the Master will go on as if no sale had taken place. Hewlett *v.* Davis, 3 Edw. Ch. 338.

In a case mentioned by Mr. Smith,[2] where the sale was of the materials of the old mansion-house, — upon the Master's making a report approving the person to sell, an order appears to have been made that such person should be at liberty to receive the purchase-money for the lots comprising the materials of the mansion, and that he should pay the same, from time to time, into the bank, in the name and with the privity, &c., the amount of such payments to be verified by his affidavit.

It may be mentioned here, that where timber is sold under the direction of the Court, the conditions of sale, besides providing that the purchaser of each lot shall sign an agreement for the performance of the conditions, and pay one-third of the amount of the purchase-money, in cash or Bank of England notes, at the sale, generally stipulates that he shall give to the person appointed to sell, bills drawn upon and accepted by some other person or persons, for the remainder of the purchase-money, such bills to be approved of by the auctioneer, and made payable in London, at particular times in the conditions of sale expressed, and that no purchaser shall be permitted to enter or cut timber until such bills are given.[3] These conditions, however, vary according to the custom of the particular part of the country in which the estate, where the timber is growing, is situated; and, in some cases, instead of the above condition, it is provided that the purchaser, after making a deposit of 10*l.* per cent upon the amount of his purchase-money, shall, within a month, give security, to be approved by the Master, or enter into recognizances for the payment of the remainder.[4]

If the conditions are framed in this manner, the highest bidder of each lot signs an agreement, at the foot of the particulars of sale, whereby he agrees to become the purchaser of the lot, subject to the conditions; he then pays the deposit, and gives a bond, or enters into recognizances for payment of the residue, such bond or recognizances having been previously settled by the Master.[5] With reference to this part of the subject, it may be stated, that where timber had been sold under such conditions as those above stated, the purchasers were discharged from that part of them * which required them to enter *1274 into recognizances, on paying the remainder of the purchase-money to the receiver in the cause, deducting a discount of five per cent from the day of payment to the time the purchase-money was to be paid in.[1]

In ordinary sales by auction, or by private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales before a Master; in such cases the purchaser is not considered as

[2] Fournier *v.* Duchess of Kent V. C., 19th July, 1828, 2 Smith, 218.
[3] 2 Smith, 204, 3d ed.
[4] *Ib.* 243.
[5] See Sitwell *v.* Sitwell, 4 Mad. 183.
[1] Sitwell *v.* Sitwell, 4 Mad. 183.

entitled to the benefit of his contract till the Master's report of the purchaser's bidding is absolutely confirmed.[2]

In order to obtain the benefit of his contract, therefore, the purchaser must first procure, at his own expense, a report from the Master, of his being the best bidder for the lot he has purchased.[3]

After the report has been filed, and an office copy taken by the purchaser, he must, at his own expense, apply to the Court by motion, that the purchase may be confirmed.[4] This motion requires no previous notice,[5] and the order made upon it will be that the purchase may be confirmed *nisi*; *i. e.*, unless cause is shown against it within eight days after service of the order.[6] The purchaser must, at his own expense, procure an office copy of this order from the Registrar, and he may serve it on the solicitors for all the parties in the cause.[7] If no cause is shown within the eight days, the purchaser must, at his own expense, apply to the Court to confirm the order absolutely, which will be ordered of course on the production of an affidavit of the service of the order *nisi*, and a certificate of no cause having been shown. This certificate must bear date on the day of the application,[8] and is obtained from the Registrar by application to the entering clerk and leaving the order *nisi*, the day before.[9] Notice of this application need not be given, and it may be made on any day of the Court sitting, whether in term time or vacation.[10] But if the purchaser be served with notice of a motion to open the biddings, he cannot proceed to confirm his report absolutely.[11]

It may be observed here, that if the purchaser, after he has obtained his order *nisi*, neglects to confirm it, the vendor may move *1275 * to make it absolute without obtaining a new order *nisi*.[1] If the purchaser has not obtained an order *nisi*, the vendor may move for and obtain one; and it seems that, by consent, the order to confirm the report may be made absolute in the first instance; but this practice is irregular, as it precludes the opportunity given by the eight days in the order *nisi* to open the biddings.[2]

The bidder not being considered as the purchaser until the report is confirmed, is not liable to any loss by fire, or otherwise, which may

[2] 1 Sugd. V. & P. 58; and see Vesey *v.* Elworthy, 3 Dr. & W. 74. The purchaser takes subject to the ratification of the sale by the Court. Kauffman *v.* Walker, 9 Md. 229; Tooley *v.* Kane, 1 Sm. & M. Ch. 518.

But the effect of confirming the report of a Chancery sale is nothing more than the completion of the contract, and does not pass the legal title. Webster *v.* Hill, 3 Sneed (Tenn.), 333.

[3] 1 Sugd. V. & P. 59.

[4] It may also be done by petition of course at the Rolls, 21st Ord., 1828. Each purchaser must obtain an order to confirm his own purchase. If he has purchased more than one lot, they must all be included in the same order; but two or more purchasers of one lot must join in the application. See Darkin *v.* Marye, 1 Anst. 22.

[5] 1 Sugd. V. & P. 59.

[6] *Ibid.*

[7] 21st Order, 1828.

[8] 1 T. & V. 405; and see *ante*, p. 1178, note.

[9] 1 Sugd. V. & P. 59.

[10] Lord Harborough *v.* Wartnaby, 1 Ph. 364.

[11] 1 Sugd. V. & P. 59; Vansittart *v.* Collier, 2 S. & S. 608.

[1] Chillingworth *v.* Chillingworth, 1 Sim. 291; Lidbetter *v.* Smith, 5 Beav. 377.

[2] 1 T. & V. 406.

happen to the estate in the interim :[3] nor is he until the confirmation of the report, compellable to complete his purchase.[4]

When the report has been absolutely confirmed, the purchaser is entitled to a conveyance, on payment of the purchase-money, and may, after giving notice of his intentions, apply to the Court for leave to pay his purchase-money into the bank, and to be let into the possession of the estate,[5] but this application should, of course, not be made until the title be approved of.[6] For this purpose the solicitor for the purchaser, before he suffers his client to part with his purchase-money, usually applies to the plaintiff's solicitor for an abstract of the title to the lots purchased[7] which he may be compelled to deliver by order as before pointed out,[8] and he should also ascertain that the sale has been made according to the decree; for it is a settled maxim of Equity, that persons purchasing under a decree of the Court, are bound to see that the sale is made according to the decree;[9] and if the Master has sold Greenacre when he ought to have sold Blackacre, it is a good ground of objection.[10] It is also the business of a purchaser to see that all the persons who are necessary to convey are before the * Court; *1276 for if he takes a title which a decree in an imperfect suit does not protect, he must abide the consequence.[1] A purchaser, however, will not be affected by error in the decree;[2] *e. g.*, such as not giving an infant a day to show cause, in cases in which a day ought to be given,[3]

[3] 1 Sugd. V. & P. 60; *Ex parte* Minor, 11 Ves. 559; and see 13 Ves. 518; 1 J. & W. 639; [Eakin *v.* Herbert, 1 Coldw. 116; Aspinwall *v.* Balch, 4 Abb. N. Cas. 193; Mutual Life Ins. Co. *v.* Balch, 4 Abb. N. Cas. 200].

[4] Anon., 2 Ves. J. 335. A purchaser of a life-estate is bound from the moment his name as purchaser is entered in the bidding paper. Anson *v.* Towgood, 1 J. & W. 637, 639; and see Millican *v.* Vanderplank, 11 Hare, 136; Robertson *v.* Skelton, 12 Beav. 260; Paramore *v.* Greenslade, 1 Sm. & G. 541. On a sale by the Court by auction, it is the duty of the vendor to observe all covenants, and keep the title unimpeachable, until completion, unless delay is clearly attributable to the purchaser. Palmer *v.* Goren, 4 W. R. 688, V. C. K.

[5] A Court of Equity, in order to give to the plaintiff the full benefit of the decree of a sale under a mortgage, will put the purchaser into possession of the premises sold and conveyed in pursuance of its decree. But in so doing it will not interfere with, nor attempt in cases of doubt to settle the rights of any party claiming possession by title paramount to that of the mortgagee or other party in whose favor the decree was made. Thomas *v.* De Baum, 1 McCarter, 37; Schenck *v.* Conover, 2 Beasley, 220; McComb *v.* Kankey, 1 Bland Ch. 163, note c. [*Ante*, 1062, n. 3.]

[6] 1 Sugd. V. & P. 102; Man *v.* Ricketts, 5 De G. & Sm. 116.

[7] 1 T. & V. 414. The purchaser should satisfy himself, not only that the title to the property sold is good, but also that the Court had jurisdiction to direct the sale. Calvert *v.* Godfrey, 6 Beav. 97, 107; Sugd. V. & P. 209; and see Lechmere *v.* Brasier, 2 J. & W. 287, 290; Waters *v.* Waters, 1 W. N. 343, V. C. K.

[8] *Ante*, p. 1216; see Wood *v.* Mann, 3 Sumner, 331, 332, as to the circumstances which would amount to a waiver by the purchaser of a reference of the title to a Master.

[9] Colclough *v.* Sterum, 3 Bligh, 181, 186.

[10] Lutwych *v.* Winford, 1 Bro. C. C. 250.

[1] Colclough *v.* Sterum, *ubi supra;* and see Hamilton *v.* Houghton, 2 Bl. 169; Giffard *v.* Hort, 1 Sch. & Lef. 386; Bennett *v.* Hamill, 2 Sch. & Lef. 566; Alvanly *v.* Kinnaird, 2 Mac. & Gor. 1. Where Chancery has full jurisdiction as to both persons and property, and decrees that a Master of the Court sell and convey real estate, the subject of a bill before it, a sale and conveyance in conformity to such decree are as effectual to convey the title as the deed of a sheriff, made pursuant to execution on a judgment at Law. The defendant whose property is sold need not join in the deed. Miller *v.* Sherry, 2 Wallace U. S. 237. [See as to the rule of *caveat emptor* at Master's sales, *infra*, 1282, n. 7.]

[2] See Winchester *v.* Winchester, 1 Head (Tenn.), 460: Vanbussum *v.* Malconey, 2 Met. (Ky.) 550; Walker *v.* Morris, 14 Geo. 323; [Livingston *v.* Noe, 1 Lea, 55].

[3] *Ante*, p. 165. The doctrine of giving a day in Court to infants is not applicable to a divestiture of title by decree, but only where the infant is directed to convey. Winchester *v.* Winchester, 1 Head (Tenn.), 460.

or decreeing a sale of lands to satisfy judgment debts, without an account of personal estate.[4] But where there is an error in the decree, such as omitting to direct an inquiry whether the testator was a trader within the meaning of the bankrupt laws, the Court will not compel a purchaser to take an estate sold under it, even though the parties are proceeding to rectify the error.[5]

If the title is satisfactory, notice of motion that the purchaser may be at liberty to pay in his purchase-money into the bank, must be served upon the solicitor for the plaintiff. When the purchaser is liable to interest, the motion usually extends to the payment of interest, from the time at which his liability to interest commenced to the day of payment into Court, "to be verified by affidavit." If the title is not satisfactory the purchaser will have to carry in his objections, and, if allowed, he will be entitled to be discharged from his purchase, and to his costs of becoming a purchaser and of investigating the title.[6]

With respect to the time from which a party is entitled to possession of the thing purchased, and liable to interest on his purchase-
*1277 money, it may be mentioned, that the rule of Court in the * case of the purchase of a fee-simple estate, is to give the profits from the quarter day preceding the date of his being allowed the purchaser; he paying his purchase-money into Court before the following quarter day;[1] and that, in conformity with this rule, the notice of motion for payment of the purchase-money generally, prays that the purchaser may be let into the possession or into the receipt of the rents and profits of the estate from that time.[2] The rule above stated, however, does not apply to collieries and mines, there being no such thing as quarter days in concerns of that description; the purchaser of such property is, therefore, only entitled to the profits from the commencement of the month in which he purchased, he paying his purchase-money in the course of that month.[3]

[4] Bennett *v.* Hamill, 2 Sch. & Lef. 566; see also Lloyd *v.* Johnes, 9 Ves. 37; Curtis *v.* Price, 12 Ves. 89; Burke *v.* Crosbie, 1 B. & B. 489; Lightburn *v.* Swift, 2 B. & B. 207; Baker *v.* Morgan, 2 Dow, 526; Mullins *v.* Townshend, 1 Dow & Clark, 430. The title of a purchaser at a sale under a decree, made by a Court of competent jurisdiction, is valid, although the decree be reversed, and the purchaser a party to the suit. Gossom *v.* Donaldson, 18 B. Mon. 230; Ward *v.* Hollins, 14 Md. 158. But in Wambaugh *v.* Gates, 4 Selden (N. Y.), 138, it was held that a title to land, acquired at a sale on a decree authorizing it, is extinguished by the reversal of the decree. A purchaser at a Chancery sale is not answerable for any disposition which the Court may make of the purchase-money. Brown *v.* Wallace, 4 Gill & J. 479.

[5] Lechmere *v.* Brasier, 2 J. & W. 287; and see Calvert *v.* Godfrey, 6 Beav. 97; Sherwood *v.* Beveridge, 2 De G. & Sm. 432. If the error is not manifest, a reference will be directed. Whitfield *v.* Legautre, 3 De G. & Sm. 466.

[6] Pegg *v.* Wisdin, 16 Jur. 1105; Perkins *v.* Ede, 16 Beav. 268; see Attorney-General *v.* Corporation of Newark, 8 Sim. 71; Falkner *v.* Equitable Reversionary Society, 4 Drew. 352; 4 Jur. N. S. 1214; Warde *v.* Dickson, 7 W. R. 148, V. C. K.; Reynolds *v.* Blake, 2 S. & S. 117; Ward *v.* Trathen, 4 Sim. 82; Calvert *v.* Godfrey, 6 Beav. 97, 110; Lachlan *v.* Reynolds, Kay. 52; Smith *v.* Nelson, 2 S. & S. 557; Berry *v.* Johnson, 2 Y. & C. Ex. 564.

[1] Anson *v.* Towgood, 1 J. & W. 637; Maurice *v.* Wainewright, 1 C. P. Coop. t. Cott. 378. [In Tennessee, the purchaser is entitled to rent only from the confirmation of the sale by the Court. Armstrong *v.* McClure, 4 Heisk. 80. In Lathrop *v.* Nelson, 4 Dill. 194, the confirmation was held to relate back to the day of sale, so as to give the purchaser the rents from that date. And see Taylor *v.* Cooper, 10 Leigh, 317; Wagner *v.* Cohen, 6 Gill, 102.]

[2] Hand, 145.

[3] 1 Sugden V. & P. 62; Wren *v.* Kirton, 8 Ves. 502; Williams *v.* Attenborough, 1 T. & R. 70.

It is to be observed, that a purchaser of a freehold estate is not entitled to the rents for a period beyond the quarter day preceding the payment of his money, merely because he has been ready to complete his purchase, and has had his money lying dead in his banker's hands.[4]

If a purchaser gets into possession of the estate without the sanction of the Court, he will be compelled to pay the money into Court, although he entered with the permission of the parties in the cause: the Court only can give such permission.[5]

A purchaser of a reversionary interest will be ordered to pay interest on his purchase-money from the time of his purchase.[6]

In the case of a sale of a life-interest in the dividends of stock in the public funds, the purchaser is liable to interest, from the time of the contract, and is entitled to the next dividend which becomes due after the sale, even if it be on the day next after that of the sale.[7] In the sale of an annuity, secured by deed and payable quarterly, a different rule appears to prevail; there the purchaser is considered as entitled to the annuity from the confirmation of the report, he paying interest from the first day on which the report might have been confirmed.[8]

* If the estate is subject to an incumbrance, which appears *1278 upon the report, the purchaser, instead of the usual notice of motion, should apply to the Court for leave to pay off the charge, and to pay the residue of the purchase-money into the bank, &c.[1] This, however, can only be done where the incumbrance appears on the Master's report; where this is not the case, and any of the parties refuse, or are incompetent to consent, a purchaser cannot apply any part of his purchase-money in discharge of the incumbrance, though, perhaps, if the parties be all competent to consent and do consent, it may be done.[2]

Where two or more persons purchase one lot, the money must be

[4] Barker *v.* Harper, G. Cooper, 32; Hutton *v.* Mansell, 2 Beav. 260. Immediate possession will not be ordered where it will be attended with the loss of the then growing crop. Chapline *v.* Chapline, 1 Bland, 364; Wright *v.* Wright, *ib.* 365; Taylor *v.* Colegate, *ib.* 365; Dorsey *v.* Campbell, *ib.* 365.

[5] 1 Sugd. V. & P. 105; Wilding *v.* Andrews, 1 C. P. Coop. t. Cott. 380. The purchaser at a Chancery sale buys subject to the final order or decree of the Court, and if he take possession after the sale, at which he purchased, has been set aside, and the order of confirmation vacated, he is a trespasser, and is liable for all the mesne profits that accrue from the time of his entry, till his eviction, and for all the crops and produce on the estate at the time of his entry. Lapton *v.* Almy, 4 Wis. 242.

[6] Trefusis *v.* Lord Clinton, 2 Sim. 359; see Wallis *v.* Sarel, 5 De G. & S. 429; Bailey *v.* Collett, 18 Beav. 179. As to the payment of interest, see Dyson *v.* Hornby, 4 De G. & Sm. 481; Storry *v.* Walsh, 18 Beav. 559; Wood *v.* Mann, 3 Sumner, 318.

[7] Anson *v.* Towgood, 1 J. & W. 637.

[8] Twigg *v.* Fifield, 13 Ves. 517; see Jackson *v.* Lever, 3 Bro. C. C. 605.

[1] 1 Sugd. V. & P. 61. As to costs in such a case, see Hepworth *v.* Heslop, 3 Hare, 485.

[2] 1 Sugd. V. & P. 61; —— *v.* Stretton, 1 Ves. J. 266. The conditions of sale usually provide that the purchaser may deduct property tax from the interest, payable by him on his purchase-money. Where no such provision is made, the purchaser is not entitled to deduct it. Holroyd *v.* Wyatt, 1 De G. & S. 125; Dawson *v.* Dawson, 11 Jur. 984, V. C. E.; Humble *v.* Humble, 12 Beav. 43; Flight *v.* Comac, 2 W. R. 437, V. C. K.; see also Bebb *v.* Bunny, 1 K. & J. 216; 1 Jur. N. S. 203. It will, however, be repaid to him on application, when his purchase-money is dealt with by the Court. Duval *v.* Mount, cited 1 K. & J. 219; 1 Jur. N. S. 203. [See Ellis *v.* Foster, 7 Heisk. 131; Kirk *v.* Jones, 8 Heisk. 829; Staunton *v.* Harris, 9 Heisk. 579; Childress *v.* Vance, 1 Baxt. 406.]

paid altogether; the Court will not allow them to pay their proportions separately, on account of the confusion which might ensue.[3]

Only the solicitor for the party conducting the sale, who, as we have seen, acts for all the parties, is entitled to appear on the motion to pay in the purchase-money, and he must take care that the amount of the purchase-money to be paid in, and the time when possession is sought, are correctly stated. He should also ask that any interest or other money which the purchaser ought to pay, but which is not specified in the notice of motion, should be included in the order.[4] He may also ask that the money, when paid in, may be laid out in the purchase of stock in the public funds, and accumulated, though if such a direction is omitted, it may be made the subject of a separate order.

It is clearly the rule that, on a special case, as where a purchaser is entitled to relieve himself from paying interest, the Court will receive the purchase-money, on the application of the purchaser, without his accepting the title;[5] but, in such case, he will not be permitted to take possession of the property, till he accepts the title.[6]

It is generally the practice, where the purchaser applies to pay in his purchase-money, to ask, on his behalf, that it may not be *1279 * paid out again without notice to him. The object of this is, to give him a lien upon the purchase-money, till possession has been delivered, and his conveyance executed; and until he has got his conveyance, the Court will not, without his consent, pay off any incumbrance out of his purchase-money; although he has been guilty of delay.[1] But the Court will not impound the money, upon an objection from the purchaser, grounded on notice of an adverse claim. If evicted, he must resort to the covenants in his conveyance;[2] nor will the Court prevent the distribution of the purchase-money because the heir is an infant, or retain any part of it to answer the expense of a fine, which would become payable upon his coming of age.[3] Where, however, an immediate conveyance cannot be obtained, the distribution of the purchase-money will be suspended.[4]

When a "stop order," to the effect above stated, has been made, the purchase-money cannot be distributed without the consent of the purchaser given in Court, or serving him with a copy of the order for setting down the cause for further directions, or of the petition for the distribution of the fund, and producing an affidavit of such service at the hearing of the cause or of the petition.[5]

[3] Darkin *v.* Marye, 1 Anst. 22; Bulmer *v.* Allison, 15 L. J. N. S. 11.

[4] See 2 Smith, 205, 3d ed.

[5] Per Lord Cottenham in De Visme *v.* De Visme, 1 M'N. & G. 344; and see Barker *v.* Harper, 9 Coop. 32; Hutton *v.* Mansell, 2 Beav. 260; Hinde *v.* Dakin, 1 C. P. Coop. t. Cott. 378; C. P. Coop. 381; Dempsey *v.* Dempsey, 1 De G. & S. 691; Morris *v.* Bull, *ibid.*; 12 Jur. 4, n. (*a*); Ousley *v.* Anstruther, 11 Beav. 399; Rutley *v.* Gill, 3 De G. & S. 640; but see Denning *v.* Henderson, 1 De G. & S. 689; 11 Jur. 687; Rutter *v.* Marriott, 10 Beav. 33.

[6] Hutton *v.* Mansell, 2 Beav. 260; Dempsey *v.* Dempsey, 1 De G. & S. 691.

[1] Bevan *v.* Bevan, 1 C. P. Coop. t. Cott. 381.

[2] Thomas *v.* Powell, 2 Cox, 334.

[3] Morris *v.* Clarkson, 3 Swanst. 558.

[4] Heming *v.* Archer, 9 Beav. 366.

[5] See Barton *v.* Latour, 18 Beav. 526.

Under the 13th and 15th of the Orders of August, 1841, a purchaser is now enabled to enforce the order for letting him into possession by the ordinary process of contempt, and by the writ of assistance.[6]

The purchaser, upon payment of his purchase-money into Court, is entitled to a conveyance of the estate, and it is incumbent on his solicitor to prepare the draft of the conveyance, and to tender it to the vendor's solicitor for his approbation.[7] If objections are made to the draft which the solicitors cannot decide, and neither the decree nor the order for paying in the purchase-money authorizes the Master to settle the conveyance, an order of reference to the Master to settle the conveyance, with the usual directions for the production of the title-deeds, &c.,[8] must be obtained and served, and, with the draft of the conveyance, must be left at the Master's office, when the course already pointed out, with respect to the settlement of conveyances by the Master, will be pursued.[9]

The conveyance having been settled and engrossed, must be executed by the parties; and if any party refuses, an application
* should be made by the purchaser to the Court for an order that *1280 he may execute it.[1]

The conveyance being executed, the purchaser is entitled to have the title-deeds relating to the estate delivered up to him. A direction for the delivery of them frequently forms part of the order for payment of the purchase-money into Court; if it does not, and the documents are in the Master's office, an order, that they may be delivered to him, may be obtained by the purchaser upon motion.[2] Where there are several lots, and the purchaser has not bought them all, the form of the order generally is, "that such of the title-deeds, &c., as relate solely to the lot purchased, and also such as relate to the same jointly with other lots of less value, be delivered to the purchaser, or to whom he shall appoint, he submitting to produce such last-mentioned deeds and writings, on necessary occasions, and to enter into a covenant for that purpose, and to give attested copies thereof when required, at the expense of the party requiring the same; but as to such title-deeds, as relate to the estate purchased jointly with other estates of greater value, he is to have attested copies thereof, at the expense of the estate; and the persons entitled to such estates of greater value, are to execute to him the like covenants, to produce such deeds and writings, on necessary occasions; and in case any dispute shall arise between the parties touching

[6] See *ante*, pp. 1061, 1062; see Planters' Bank *v.* Fowlkes, 4 Sneed (Tenn.), 461; Tonybee *v.* Ducknell, and Wilson *v.* Angers, cited Seton, 1229.

[7] 1 T. & V. 421.

[8] *Ante*, p. 1176.

[9] *Ante*, p. 1181. It is now usual in England for the Judge himself, in Chambers, to decide upon questions in dispute concerning the draft conveyance. The purchaser must pay his own costs of settling the conveyance, unless he can make out a special case for exemption. Hodgson *v.* Shaw, 11 Jur. 95, V. C. K. B.

[1] Sitwell *v.* Millersh, 4 M. & C. 581; and 15th Order of August, 1841; see Miller *v.* Sherry, 2 Wallace U. S. 237, cited *ante*, 1276 note; Ayles *v.* Cox, 17 Beav. 584; Rowley *v.* Adams, 14 Beav. 130. A creditor who had obtained an administration decree was held a proper person to apply. *Re* Wragg, 1 De G., J. & S. 356.

[2] Hand, 154.

the copies of any particular deeds, the said Master is to settle the same." [3]

One order may embrace the delivery of all the deeds to the purchasers of the several lots.

It may be mentioned here, that the rule laid down in the above order (which was settled by Lord Hardwicke) is the rule generally adopted by the Court with regard to the right to the title-deeds of an estate sold by order of the Court. In *Kennard* v. *Christie*,[4] Lord Eldon determined, that the purchaser of the largest lot is to have the title-deeds, and not the purchaser of several lots, although such several lots together were larger than the largest single lot.

We have hitherto discussed the course of proceeding to complete a sale, as applicable to those cases only in which the purchaser is desirous and willing to complete it himself. It may, however, happen, *1281 that after he has been purchaser of a lot, he * becomes unwilling to complete his purchase, — in that case it is for the vendor, or rather for the solicitor of the plaintiff, who, as we have seen,[1] is the person who acts on behalf of all parties, to take the necessary steps to compel him.[2]

The rule, that the Master's report of a purchase must be absolutely confirmed before the contract can be considered as binding, applies equally to cases in which it is sought to compel a purchaser to complete his purchase, as where it is sought to enforce the contract against the vendor.[3] As a preliminary step, therefore, towards enforcing the completion of the contract, it is necessary to have the report confirmed.[4] This may be done, by the plaintiff's solicitor obtaining the report from the Master's office, and procuring the usual order *nisi*, that the report may be confirmed within a limited time, unless cause is shown to the contrary,[5] and serving it upon the purchaser in person, as well as upon

[3] Rand. 152; 1 Davidson Conv. 539, 560; and see Griffiths *v.* Hatchard, 1 K. & J. 17; 18 Jur. 649; Lord Kinnaird *v.* Christie, Seton, 1200; Scott *v.* Jackman, 21 Beav. 110.

[4] March, 1809; cited 2 Smith, 211, 3d ed.; see Griffiths *v.* Hatchard, 1 K. & J. 17; 18 Jur. 649; Lord Kinnaird *v.* Christie, Seton, 1200.

[1] *Ante*, p. 1267.

[2] Where a person becomes a purchaser under a decree of the Court of Chancery, he submits himself to the jurisdiction of the Court, in that suit, as to all matters connected with such sale, or relating to him in the character of purchaser. Requa *v.* Rea, 2 Paige, 339; Clarkson *v.* Read, 15 Grattan (Va.), 288; Gross *v.* Pearsy, 2 P. & H. (Va.) 483; Blackmore *v.* Barker, 2 Swan (Tenn.), 340; Stimson *v.* Meade, 2 R. I. 541; Shann *v.* Jones, 4 C. E. Green, 251. And the Court may by attachment compel a purchaser at a sale by the Master, to complete his purchase, by paying in the purchase-money. So of a surety for the purchaser Wood *v.* Mann, 3 Sumner, 318; Gordon *v.* Sims, 2 M'Cord Ch. 151. [Or give judgment against the purchaser and his sureties. Deaderick *v.* Smith, 6 Humph. 147.] But they will not be attached for contempt, in refusing to pay the purchase-money, until an order to pay the purchase-money has been passed. Cowell *v.* Lippitt, 3 R. I. 92.

[The parties may, if they see proper, instead of proceeding by attachment, file a bill for specific performance. Bowne *v.* Ritter, 11 C. E. Green, 457. And see Caret *v.* Hubbell, 36 N. Y. 677.]

[3] Anon., 2 Ves. J. 336; Childress *v.* Hurt, 2 Swan (Tenn.), 487; Vincent *v.* Going, 3 Dr. & War. 75, n. (*a*). [In Virginia, at any time before action on the report of sale, the Master or commissioner may make a supplemental report, correcting any mistake, supplying any omission, or explaining any ambiguity in a previous report. Crockett *v.* Sexton, 29 Gratt. 46.]

[4] Anon., 2 Ves. J. 336. Payment cannot be resisted on the ground of irregularity in a sale, after the sale has been confirmed by the Court, and the time for appeal has expired. Todd *v.* Dowd, 1 Met. (Ken.) 281. [See Spence *v.* Armour, 9 Heisk. 167.]

[5] *Ante*, pp. 1273, 1274.

the solicitors of the other parties to the suit. If no cause is shown, then he must proceed to have the report confirmed, absolutely, in the manner before pointed out.[6] Where the purchaser has already obtained an order *nisi*, the plaintiff may, as we have seen, proceed to confirm it, absolutely, without a fresh order *nisi*.[7]

Having confirmed the Report of the Master, an important consideration arises, *viz.*, whether the purchaser is in a situation to complete his contract; for if he is not a responsible person, it will be better that the matter should stop here than that any further expense should be incurred. If, therefore, it should appear that the purchaser is unable to perform his contract, a motion may be made to discharge him from his bidding, and that the estate may be resold with the approbation of the Master.[8] An order may be made upon this motion, with the purchaser's consent;[9] but if he does not consent, notice of it should be served on the purchaser, * and it should be supported by an affi- *1282 davit of the facts upon which it is considered right to make it.[1]

According, however, to the present practice, a more complete remedy is afforded against a purchaser refusing without cause to fulfil his contract, for the plaintiff may obtain an order for the estate to be resold, and for the purchaser to pay as well the expenses arising from the non-completion of the purchase, the application and the resale, as also any deficiency in price arising upon the second sale.[2] This order was made by Lord Cottenham, in *Harding* v. *Harding*,[3] after consultation with the other Judges of the Court; and although in that case the purchaser was a defendant in the cause, it does not seem that that fact was considered as necessary, in order to enable such an order to be made.[4]

It may be mentioned here, that if it is discovered that the purchaser

[6] *Ante*, pp. 1273, 1274.

[7] *Ante*, pp. 1273, 1274.

[8] Hodder *v.* Ruffin, 1 V. & B. 544; 1 Sug. V. & P. 60; Cunningham *v.* Williams, 2 Anst. 344.

[9] Hand, 153.

[1] See 2 Smith Ch. Pr. (2d Am. ed.) 204, note (*a*), 174, note (*a*); Deaver *v.* Reynolds, 1 Bland, 50.

[2] See Simmons *v.* Tongue, 3 Bland, 341; Mullikin *v.* Mullikin, 1 Bland, 541; Vanmerson *v.* Cord, 1 S. & M. Ch. 345; Gross *v.* Pearcy, 2 P. & H. (Va.) 483; Clarkson *v.* Read, 15 Grattan, 288. In Matter of Yates, 6 Jones Eq. 212, 306; Harding *v.* Yarbrough, 6 Jones Eq. 215, n.; Gray *v.* Gray, 1 Beav. 199; S. C. *nom.* Saunders *v.* Gray, 4 M. & C. 515, n. (*a*); Folingo *v.* Martin, 16 Beav. 586; Sweet *v.* Meredith, 4 Giff. 207; 9 Jur. N. S. 569; Robertson *v.* Skelton, 13 Beav. 91. [To hold the purchaser liable for the deficiency, the order of resale should, after notice to him, declare the sale to be at his risk. Sharp *v.* Hess, 1 Tenn. Leg. Rep. 23. A person who makes an advance on a bid may be thus held liable. Allen *v.* East, 4 Baxt. 308. See Townsend *v.* Simon, 9 Vroom, 239. If the purchaser claims that he has paid the purchase-money, he must object to the register's report, or file a petition in the cause; he cannot assert his rights by an original bill. Haralson *v.* George, 56 Ala. 295.] Upon a sale by a Master, if the bidder to whom the property is struck off refuses to complete the purchase, the Master should not allow another person to take it at the former bid. Thompson *v.* Dimond, 3 Edw. Ch. 298. Where, by the conditions of sale, it is provided, that "if the purchaser do not comply with the conditions, the property shall be resold," the officer is not bound, upon a failure of the purchaser to comply with the conditions, to make a second sale, though requested to do so by the defendant in execution. Woodhull *v.* Neafie, 1 Green Ch. 409; see Thompson *v.* Dimond, 3 Edw. Ch. 298; Hewlett *v.* Davis, 3 Edw. Ch. 338. It is the custom in New Jersey, at public sales, where a bid is fairly claimed by two or more persons, to put the property up again at the price bid, and as at the bid of such one of the competitors as the auctioneer may declare entitled to it. Conover *v.* Walling, 2 McCarter, 173.

[3] 4 M. & C. 514. [See Long *v.* Weller, 29 Gratt. 347, 356.]

[4] Saunders *v.* Gray, quoted 4 M. & C. 515.

was insane at the time of the bidding, he may be discharged from his purchase. The Court, however, will not in such case, direct the next best bidder to be declared purchaser, although asked to do so on behalf of all the parties in the cause, and the bidder consents, but will direct a resale.[5]

If the purchaser is responsible, the Court will, if required, make an order that he shall, within a given time, pay the money into Court, and be let into possession.[6] Upon hearing the motion for this order, the Court will, if the purchaser appears and asks for it, and has not precluded his right to object to the title, direct a reference to the *1283 Master to inquire whether a good title can be made.[7] * The purchaser may also set up any claim he may have to compensation for any deficiency.[1]

The same rule was laid down by Lord Thurlow in *Bannister* v. *Way*,[2] and appears to have been acted upon by Lord Eldon in *Hodder* v. *Ruffin*[3] and in *Sanders* v. *Gray*;[4] and it has been recently acknowledged by Lord Langdale M. R.,[5] so that it seems to be now the undoubted prac-

[5] Blackbeard *v.* Lindigren, 1 Cox, 205; see, however, Dart, 752, n. (*y*), and Hughes *v.* Lipscombe, 6 Hare, 142.

[6] 1 Newl. 335; [Silver *v.* Campbell, 10 C. E. Green, 465].

[7] *Ib.* 336; Gordon *v.* Sims, 2 M'Cord Ch. 167. When the purchaser at the Master's sale, purchases under the assurance that he is to receive a perfect title, if such title cannot be given, he will not be compelled to complete the purchase. Morris *v.* Mowatt, 2 Paige, 586; Myers *v.* Raymond, 5 Florida, 516. A purchaser has a right to require, under such circumstances, a title which is good both at Law and in Equity. Morris *v.* Mowatt, *supra;* see Seaman *v.* Hicks, 8 Paige, 656. Where the person conducting the sale of personal property gives notice at the sale that there is no warranty of the soundness of the property, the rule *caveat emptor* applies, and the purchaser will be bound to pay, though the property should prove unsound. Parker *v.* Partlow, 12 Rich. Law (S. C.), 679. In Maryland, the rule of *caveat emptor* applies to all judicial sales. Chancery in no case attempts to sell any thing more than the title of the parties to the suit; and it allows of no inquiry into the title, at the instance of the purchaser or any one else. Brown *v.* Wallace, 4 Gill & J. 479; Anderson *v.* Foulke, 2 Harr. & G. 346; Farmers' and Planters' Bank *v.* Martin, 7 Md. 342; see Atkinson *v.* Farmer, 2 Murph. 291. [See, to same effect, Osterberg *v.* Union Trust Co., 93 U. S. 424; Thomas *v.* De Baum, 1 McCarter, 37; Brown *v.* Wallace, 2 Bland, 599. And, when the proceedings are *in invitum*. Hously *v.* Lindsay, 10 Heisk. 651; Staunton *v.* Harris, 9 Heisk. 579; Foster *v.* Bradford, 1 Tenn. Ch. 400. *Aliter*, of sales for partition. Smith *v.* Britain, 3 Ired. Eq. 347; Deaderick *v.* Smith, 6 Humph. 147.] In Spring *v.* Sandford, 7 Paige, 556, it was held that where real estate is sold by a Master under a decree of a Court of Chancery, as and for a good title, the purchaser is only entitled to such a title as a purchaser of the premises at a private sale would be bound to receive from his vendor. See Jackson *v.* Edwards, 7 Paige, 386; S. C. 22 Wend. 498; Matter of Browning, 2 Paige, 64; Dunham *v.* Minard, 4 Paige, 441; Weems *v.* Brewer, 2 Harr. & G. 390.

[1] 2 Smith, 224, 3d ed. The conditions of sale ordinarily provide, that any error or misstatement in the particulars is not to annul the sale, or entitle the purchaser to be discharged from his purchase; but that compensation, the amount thereof to be settled by the Judge at Chambers, is to be made to or by the purchaser, as the case may be. Regul. 8 Aug., 1857, Sched. No. 7 (9). As to compensation in such cases, see Ridgway *v.* Gray, 1 M'N. & G. 109; Alvanley *v.* Kinnaird, 2 M'N. & G. 1; 14 Jur. 897. Where the purchaser claims compensation, he should apply by summons for the allowance thereof, either out of his purchase-money, and for leave to pay in the remainder; or as a separate application. On the other hand, where the vendor claims compensation against the purchaser, the solicitor conducting the sale should apply by summons, which must be served on the purchaser's solicitor, that he may be ordered to pay compensation, in addition to his purchase-money. Under special circumstances leave has been given to a purchaser to pay in his purchase-money, without prejudice to his claim of compensation. Man *v.* Ricketts, 5 De G. & S. 116.

[2] *Ex relatione* E. D. Colvill, Regist.; see also Reg. Lib. A. 1788, 425, S. C.

[3] Cited 1 Newl. 336; and see Reg. Lib. A. 1810, 44, S. C.

[4] This case is cited by Mr. Newland, Vol. I. p. 337, as an authority for the contrary proposition; but upon reference to the Registrar's book, it appears that a reference was made to the Master to inquire into the title. Reg. Lib. B. 1810, 456.

[5] Smart *v.* M'Lellan, Rolls, 14 Jan., 1840.

tice of the Court, that, before an order can be made to compel an absent purchaser to pay in his money, the solicitor for the plaintiff must deliver to the purchaser an abstract of the title, and procure the Master's report that a good title can be made.[6]

The order for payment of the purchase-money being made must be served personally upon the purchaser, and if not complied with, may be enforced in the ordinary manner.[7]

A sale before a Master is not within the Statute of Frauds, and after a confirmation will be enforced against the representatives of the purchaser, although not signed; the judgment of the Court taking it out of the statute.[8] The Court, however, cannot enforce the contract against them, without a suit, but it will allow the heir to have the benefit of the contract,[9] upon payment of the * purchase-money, leaving *1284 it to him to compel the executors to reimburse him, if they have assets; and, where the heir refused to accede to this arrangement, the Court directed a resale, reserving the consideration as to any deficiency that might arise on the resale, and by whom the costs of it were to be repaid.[1]

From what has been stated, it will be perceived, that where a sale has been fairly and properly conducted, and the party is able to complete his contract, he will be held strictly to his bargain.[2] Where, however, the contract is unreasonable, the Court will relieve the purchaser as well as the seller.[3] Thus, in *Savile* v. *Savile*,[4] a purchaser at a sale under the Court, which took place about the time of the South Sea bubble, was discharged from his purchase on submitting to forfeit his deposit, on the ground of the exorbitance of the price.[5]

With respect to the last case, however, it is to be observed that there is no doubt, now, that the circumstance, that the price given is much beyond the value of the estate, will not be, of itself, a sufficient ground to release a purchaser from his contract even upon the terms of forfeiting a deposit.[6] Where, however, the purchaser has, by *mistake*, given an unreasonable price for an estate, the Court will, in a proper case, wholly rescind the contract.[7] But if a person without authority

[6] *Ante*, p. 1275.

[7] *Ante*, p. 1042 *et seq.*

[8] 1 Sugd. V. & P. 65, cites Attorney-General *v.* Day, 1 Ves. 218.

[9] A bidder, at a sale by a Clerk and Master in Equity, may assign his bid, and a deed to the assignee passes the title. Campbell *v.* Baker, 6 Jones Law, 255.

[1] Lord *v.* Lord, 1 Sim. 203.

[2] See Jewett *v.* Miller, 10 N. Y. 402.

[3] 1 Sugd. V. & P. 119; Clayton *v.* Glover, 3 Jones Eq. (N. C.) 371; Lachlan *v.* Reynolds, 1 Kay, 52; M'Cullock *v.* Gregory, 1 K. & J. 286; see Lankford *v.* Jackson, 21 Ala. 650.

[4] 1 P. Wms. 745.

[5] See Gist *v.* Frazier, 2 Litt. 118; Amer. Ins. Co. *v.* Oakley, 9 Paige, 259; Tripp *v.* Cook, 26 Wend. 143.

[6] 1 Sugd. V. & P. 71, and the case of General Birch's estate there cited; and see Sewell *v.* Johnson, Bunb. 76; see Gardner *v.* Schermerhorn, 1 Clarke, 101; Tripp *v.* Cook, 26 Wend. 143; Reed *v.* Brooks, 3 Litt. 127; Hart *v.* Bleight, 3 Monroe, 273. A purchaser under a Master's sale will not be let off from his purchase by a submission to forfeit his deposit. Wood *v.* Mann. 3 Sumner, 317.

[7] 1 Sugd. V. & P. 72; Morshead *v.* Frederick, cited *ibid.* A sale was set aside at the instance of the purchaser, on account of a serious mistake in the representation of the lands. Gordon *v.* Sims, 2 M'Cord Ch. 159; Laight *v.* Pell, 1 Edw. Ch. 577. So a sale was set aside because it was knocked off to the purchaser prematurely, by a mistake of the auctioneer, who did not hear a higher bid. Gordon *v.* Sims, 2 M'Cord Ch. 159; see

*1285 interfere in a sale and * bid, although he does it to prevent the property being sold at an undervalue, the Court will not release him.[1]

It is to be remarked, that if a purchase be rescinded, after the purchaser has paid his money into Court, he must, if it has been laid out upon his application, take back the stock, whether the funds have fallen or risen since the investment.[2]

It may be mentioned here, that if, after becoming the bidder for an estate, the purchaser is desirous of being discharged from his contract, and of substituting another person in his stead, the Court will, on motion, make an order to that effect; he must, however, support his motion by an affidavit that there is no under-bargain, for the new purchaser may give the other a sum of money to stand in his place, and so deceive the Court:[3] and the rule appears to be, that if a purchaser resell behind the back of the Court before the purchase is confirmed, the second purchaser is considered a substituted purchaser, and must pay the additional price into Court for the benefit of the estate.[4] Where the highest bidder at an auction induced the auctioneer to accept another person in his place, concealing the fact that he had sold his bargain at an advance, which he received and then absconded, the property was ordered to be resold; reserving all questions of liability of the original or sub-purchaser.[5]

Where estates are sold before a Master, under the decree of a Court

Anderson *v.* Foulke, 2 Harr. & G. 346; Campbell *v.* Gardner, 3 Stockt. (N. J.) 423. So where there has been surprise. Williamson *v.* Dale, 3 John. Ch. 290. So where the party conducting the sale had been guilty of misrepresentation. Lachlan *v.* Reynolds, Kay, 52; see also Culvert *v.* Godfrey, 6 Beav. 97, 106, 110; Grissell *v.* Peto, 2 Sm. & G. 39; and where a purchaser was induced to enter into the contract on the faith of a statement, untruly made by the solicitor conducting the sale, that a good title could be made to the property, he was discharged out of custody, under an attachment for non-payment of the purchase-money, and the contract was rescinded. Bromage *v.* Davies, 4 Jur. N. S. 683, V. C. S. See, for other causes for which a resale will be ordered, Millspaugh *v.* McBride, 7 Paige, 509; Tripp *v.* Cook, 26 Wend. 143; Brown *v.* Frost, 10 Paige, 243; American Ins. Co. *v.* Oakley, 9 Paige, 259; *post*, 1285, note; Conover *v.* Walling, 2 McCarter, 173; [Weltzler *v.* Shaunman, 9 C. E. Green, 60]. Where land sold under a decree has been sacrificed by the neglect or mistake of the Master, the parties injured are entitled to a resale, or such other relief as can be given, without doing injustice to *bonâ fide* purchasers. Amer. Ins. Co. *v.* Oakley, 9 Paige, 259. A sale may be restrained where there is an attempt to make it under such circumstances as must necessarily cause a sacrifice. McGown *v.* Sandford, 9 Paige, 290. [A purchaser will not be relieved after confirmation because of an incumbrance of which he had knowledge at the time, and which he then supposed the estate would be able to pay. Mountcastle *v.* Moore, 11 Heisk. 481.]

[1] Nelthorpe *v.* Pennyman, 14 Ves. 517. Where conduct of sale had been given to a defendant, leave was given to a purchaser to apply as to his costs, but no order was made for payment. Mullens *v.* Hussey, L. R. 1 Eq. 488, M. R.

[2] Hodder *v.* Ruffin, V. C., 21st March, 1825, cited Sugd. V. & P. 71.

[3] Rigby *v.* Macnamara, 6 Ves. 515; Vale *v.* Davenport, *ib.* 515; Holroyd *v.* Wyatt, 2 Coll. 327; 9 Jur. 1072; Seton, 1208; and see Dowell *v.* Tuffnell, 1 K. & J. 324; Pearce *v.* Pearce, 7 Sim. 138. Formerly the practice appears to have been, to make the order on consent of all parties without such affidavit. Matthews *v.* Stubbs, 2 Brown, 391. Where neither the original purchaser nor the vendor consented, the application was refused. *Re* Settled Estates Act, 4 Giff. 90; S. C. *nom. Re* Goodwin, 8 Jur. N. S. 1173.

[4] Hodder *v.* Ruffin, 1 Tamlyn, 341; see Proctor *v.* Farnam, 5 Paige, 614; Campbell *v.* Baker, 6 Jones Law (N. C.), 255.

[5] Holroyd *v.* Wyatt, 2 Coll. 327; 9 Jur. 1072; In *Re* Settled Estates Act, 4 Giff. 90; S. C. *nom. Re* Goodwin, 8 Jur. N. S. 1173, a resale was ordered on the terms of the original purchaser paying the advance into Court.

of Equity, the Court considers itself to have greater power over the contract than it would have were the contract made between party and party;[6] and, as the chief aim of the Court is to obtain as great a price for the estate as can possibly be got, it is in the habit, after the estate has been sold, of "opening the biddings," that is, of allowing a person to offer a larger price than the estate was originally sold for, and, upon such offer being made, and a proportionate deposit paid in, of directing a resale of the property.[7]

*Any person may open the biddings, and there seems to be no doubt that a person who is interested in the produce of the estate, such as a residuary legatee,[1] or a tenant for life or reversioner may do so;[2] but the opinion of the Court appears to have fluctuated upon the question, whether the Court will entertain an application to open biddings on behalf of a party who was present at the sale.[3] *1286

Mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings,[4] and they may be opened more than once.[5]

[6] See Savile *v.* Savile, 1 P. Wms. 747; Barlow *v.* Osborne, 6 H. L. Ca. 556; 4 Jur. N. S. 367; S. C. *nom.* Osborne *v.* Foreman, 8 De G., M. & G. 122; 2 Jur. N. S. 361; Harper *v.* Hayes, 7 Jur. N. S. 245; 9 W. R. 504, L. C.; Waterhouse *v.* Wilkinson, 1 H. & M. 636.

[7] [But the practice has been changed by Statute, 30 & 31 Vic. c. 48, § 7.] The English practice in opening biddings upon an advance on a Master's sale is not recognized in New York, North Carolina, Maryland, New Jersey, or South Carolina. Gardner *v.* Schermerhorn, 1 Clarke, 101; Lefevre *v.* Laraway, 22 Barb. 167; Andrews *v.* Scotton, 9 Bland, 629; Young *v.* Seague, 1 Bailey Eq. 14; Seaman *v.* Riggins, 1 Green Ch. 214; Conover *v.* Walling, 2 McCarter, 173; Williamson *v.* Dale, 3 John. Ch. 290; Penn *v.* Tolleson, 20 Ark. 652; Gordon *v.* Sims, 2 M'Cord Ch. 158; and the Chancellor of New York, in Duncan *v.* Dodd, 2 Paige, 100, observes that it is not desirable that it should be introduced there. See also, to the same effect, Collier *v.* Whipple, 13 Wend. 224. See further upon the practice of opening biddings, Scott *v.* Nesbitt, 3 Bro. C. C. (Perkins's ed.) 475, notes (1), (*a*), and (*b*), and cases cited; Anon., 1 Sumner's Ves. 453, note (*a*), and cases cited; Andrews *v.* Emerson, 7 Sumner's Ves. 420, note (*a*); Chetham *v.* Grugeon, 5 *id.* 86, note (*a*); Anderson *v.* Foulke, 2 Harr. & G. 346. The biddings will not be opened in New York, except for special cause. Lefevre *v.* Laraway, 22 Barb. 167; and not then, unless the purchaser, being himself free from fault, is fully indemnified for all damages, costs, and expenses, to which he has been subjected. Duncan *v.* Dodd, 3 Paige, 100; Collier *v.* Whipple, 13 Wend. 224; Lansing *v.* M'Pherson, 3 John. Ch. 425; Williamson *v.* Dale, 3 John. Ch. 290; Requa *v.* Rea, 2 Paige, 339; North River Ins. Co. *v.* Holmes, 1 Hoff. Ch. Pr. 146, 149; Amer. Ins. Co. *v.* Oakley, 9 Paige, 257; Post *v.* Leet, 8 Paige, 357; Lefevre *v.* Laraway, 22 Barb. 167. So in South Carolina, Frazier *v.* Hall, 2 M'Cord Ch. 159, note (2). So in Maryland, Anderson *v.* Foulke, 2 Harr. & G. 343. See Wood *v.* Hudson, 5 Munf. 423; Campbell *v.* Gardner, 3 Stockt. (N. J.) 423. [In Tennessee, the biddings are now opened on an advance of ten per cent. Click *v.* Burris, 6 Heisk. 539; Atkison *v.* Murfree, 1 Tenn. Ch. 51. And may be reopened upon good cause and a sufficient advance. Mound City Mut. Life Ins. Co. *v.* Hamilton, 3 Tenn. Ch. 228; Mayo *v.* Harding, 3 Tenn. Ch. 237.] The expediency of this practice of "opening biddings" seems very doubtful. See remarks of Lord Eldon, in T. & R. 75; Jac. 526; and 2 J. & W. 348; and of the learned Lords in Barlow *v.* Osborne, 6 H. L. Ca. 556.

[1] Hooper *v.* Goodwin, G. Coop. 95; Chapman *v.* Fowler, 3 Hare, 577.

[2] Williams *v.* Attenborough, T. & R. 70; M'Cullock *v.* Cotbatch, 3 Mad. 314; Preston *v.* Barker, 16 Ves. 140; Thornhill *v.* Thornhill, 2 J. & W. 347.

[3] See M'Cullock *v.* Colbatch, 3 Mad. 314; Thornhill *v.* Thornhill, 2 J. & M. 347; Tyndale *v.* Warre, Jac. 525; Lefroy *v.* Lefroy, 2 Russ. 606; Cockrane *v.* Cockrane, 2 R. & M. 684; Shallcross *v.* Hibberson, 1 C. P. Coop. t. Cott. 380; *Re* Jones, 1 Giff. 284, 5 Jur. N. S. 1243; Ware *v.* Watson, 7 De G., M. & G. 739; 2 Jur. N. S. 129; Somner *v.* Charlton, cited 5 Ves. 655; Preston *v.* Barker, 16 Ves. 140. [See Bradford *v.* Hamilton, 3 Tenn. Ch. 334.]

[4] A resale will not be ordered in New York either before or after the confirmation of the report of sale, upon an offer of an increased price alone. Lefevre *v.* Laraway, 22 Barb. 167.

[5] 1 Sugd. V. & P. 66; Scott *v.* Nesbitt, 3 Bro. C. C. 475.

An advance of 10*l.* per cent was formerly considered to be sufficient on a large sum, to induce the Court to open the biddings;[6] but in *Andrews* v. *Emerson*,[7] Lord Eldon said that the rule of 10*l.* per cent was not a wise rule to establish, as the consequence was that *1287 you never got more, and desired it to be observed, that in * future there should be no such rule.[1] In *White* v. *Wilson*,[2] his Lordship repeated the same opinion as to the impolicy of such a rule, but nevertheless said, that in some cases he should be satisfied with that (*i. e.* an advance of 10*l.* per cent); in some, he should be satisfied with less; and in some he should require more. And accordingly, in *Brooks* v. *Smith*,[3] it being a creditor's suit, his Lordship permitted the biddings to be opened upon an advance of 5*l.* per cent on 10,000*l.* In *Garstone* v. *Edwards*,[4] however, Sir J. Leach V. C., who appears to have been favorable to an adherence to the rule of 10*l.* per cent,[5] refused an offer of 350*l.*, being at the rate of six and a half per cent on 5300*l.*, observing, that the case cited,[6] merely established, that where an advance so large as 500*l.* was offered, the Court would act upon it, though it was less than 10*l.* per cent;[7] so that, on the whole, it may be concluded that, although in the case of an advance of so large a sum as 500*l.*, the Court will permit the biddings to be opened, even if it is under 10*l.* per cent, yet the Court, in ordinary cases, considers 10*l.* per cent (which is the usual amount of the deposit paid upon sales by auction out of Court) as a proper deposit to be paid when biddings are opened.[8]

When, however, the timber upon a lot sold has been taken at a valuation, the advance must be calculated upon the amount of the timber, as well as upon the price of the lot.[9] Whatever the rate of the advance offered may be, the Court will not permit biddings to be opened unless the deposit offered amounts to at least to 40*l.*[10]

It may be mentioned here, that in *Watts* v. *Martin*,[11] where an estate had been sold before the Master, in separate lots, and an application was made that it might again be put up to sale in one lot, a consider-

[6] Anon., 3 Mad. 494. In many cases, however, the Court has opened biddings upon a less advance. See Tait *v.* Lord Northwick, 5 Ves. 655, where the biddings were opened on an advance of 200*l.* on 2360*l.*; and Anon., 5 Ves. 148, where the Court refused to open the biddings on an advance of 100*l.* upon 3200*l.*, but opened them on an advance of 200*l.* For other cases, see Barlow *v.* Osborne, 6 H. L. Cas. 556; 4 Jur. N. S. 367; Holroyd *v.* Wyatt, 2 Coll. 537.

[7] 7 Ves. 420.

[1] There is in Ireland no fixed rule of advance; therefore the Court will always open the biddings, where it is for the benefit of the estate to do so. Digby *v.* Browne, 1 Irish Eq. 377. Whether the biddings will be opened or not, is a question to be determined by the particular circumstances of each case. Mayne *v.* Macartney, 2 Irish Eq. 324; O'Connor *v.* Richards, Sausse & S. 246. After a sale of property by a decree to enforce a lien, a petition for a resale of the property will not be granted, unless the petitioner state the amount which he is ready to bid in advance of the bid already taken. Wright *v.* Cantzon, 31 Miss. 514. [And either execute notes for the advance in accordance with the terms of sale, or give security that he will comply. Childress *v.* Harrison, 1 Baxt. 415; Atchison *v.* Murfree, 3 Tenn. Ch. 728.]

[2] 14 Ves. 151.

[3] 3 V. & B. 144.

[4] 1 S. & S. 20.

[5] See Anon., 4 Mad. 494.

[6] Brooks *v.* Smith, *ubi supra*.

[7] See also Lefroy *v.* Lefroy, 2 Russ. 606.

[8] See Anon., 3 Mad. 494; see Bourn *v.* Bourn, 13 Sim. 189.

[9] Bates *v.* Bonnor, 6 Sim. 380.

[10] Farlow *v.* Wieldon, 4 Mad. 460; Leland *v.* Griffith, 2 Moll. 510.

[11] 4 Bro. C. C. 113.

able advance having been offered, the purchasers of the lots opposed the motion, on the ground that, in the expectation of a sale in different lots, they had expended their time and money in making surveys, &c., of the estate, which they would not have done had they known that the estate was to be sold in one lot; and that, in making the order (which was consented to by the residuary legatee and trustee), the Court in consequence of the hardship * of the case, directed the *1288 party applying to open the biddings to pay the costs, charges, and expenses occasioned to the purchasers by the biddings, to be settled by the Master, in case the parties differed.[1]

In that case, the Court favored the applicant, by departing, to a certain extent, from its ordinary rules; in general, however, as the biddings are merely opened for the benefit of the suitor, the Court will not step out of its course to favor any other person; therefore, where a motion was made to open a bidding of 5020*l.* on an advance of 150*l.* only, on the ground that the party had mistaken the time of sale, the Lord Chancellor held the circumstance, that the bidder was too late, to be no ground at all, and said he would not open the bidding for a less overbidding than 500*l.*[2]

Where the biddings are opened, the purchaser is entirely discharged from his purchase; and if he has paid a deposit, or any part of the purchase-money, into Court, he will be entitled to have it paid out to him. If he is the purchaser of more lots than one, and the biddings are ordered to be opened as to some of the lots which were first purchased, the purchaser will be allowed to have the biddings opened, and to be discharged from his purchase as to all the lots which he has purchased, it being considered but reasonable, that if, having become the purchaser of a subsequent lot, in consequence of his being declared the best bidder upon the prior lot, he should, if he is deprived of the purchase of the first lot, have the option of retaining or retiring from the subsequent lots.[3] The purchaser, in order to entitle himself to such an indulgence, should appear upon the motion to open the biddings, and produce an affidavit that he had bid for the subsequent lots in consequence of his having been declared the best bidder for the first lot.[4]

The rules which regulate the practice of opening biddings upon the sale of a landed estate, do not apply when a colliery is the subject of the sale. The proper time for opening the biddings is before the Master's report of the sale has been confirmed absolutely;[5] after that, increase of price alone, however large, is not sufficient to induce the

[1] See Watts *v.* Martin, 4 Bro. C. C. edit. Belt. 113; Raymond *v.* Lakeman, 34 Beav. 584.

[2] Anon., 1 Ves. J. 453.

[3] Price *v.* Price, 1 S. & S. 386; see also Fielder *v.* Fielder, cited *ibid.*; and Boyer *v.* Blackwell, 3 Anst. 656.

[4] See Fielder *v.* Fielder, *ubi supra*; Bates *v.* Bonnor, 6 Sim. 380.

[5] Bridger *v.* Parfold, 1 K. & J. 28; Ware *v.* Watson, 7 De G., M. & G. 739; 2 Jur. N. S. 129; Barlow *v.* Osborne, 6 H. L. Ca. 556; 4 Jur. N. S. 367; S. C. *nom.* Osborne *v.* Foreman, 8 De G., M. & G. 122; 2 Jur. N. S. 361.

Court to grant the application, although it is a strong auxiliary *1289 argument when there are other grounds.[6] In a case,[7] * however, before Lord Rosslyn, this rule, although so frequently acknowledged and acted upon, was not attended to, but biddings were opened after the report was absolutely confirmed, merely on an advance of price. This case is now completely overruled.[1]

But very particular circumstances may, perhaps, induce the Court to open the biddings, after confirmation of the report, if the advance be considerable.[2] Thus, in a case,[3] where the owner of the estate (who joined in a motion for the purpose of opening biddings, after the report was absolutely confirmed) was in prison at the time of the confirmation, and it appeared that he would have opened the biddings before confirmation of the report, had he been able; and had even directed persons to bid more than what the estate sold for, who deceived him, and an advance of 4000*l.* (being more than one-fourth of the original purchase-money) was offered, the biddings were opened on the deposit of the 4000*l.* being made.

Strong as the circumstances in this case were, Lord Eldon, in a subsequent case, expressed great disapprobation of the decision, and determined, generally, that after a purchaser has confirmed his report,

[6] 1 Sugd. V. & P. 67. The ratification of a judicial sale is final and conclusive, unless irregularly made by the Court, or unless the purchaser was prevented by misrepresentation, surprise, or fraud, of persons interested in the sale, from making his objection to the ratification in due time. Brown *v.* Gilmer, 8 Md. 322.

[7] Chethem *v.* Grugeon, 5 Ves. 86; and see his Lordship's decision, when Lord Commissioner, in Prideaux *v.* Prideaux, 1 Bro. C. C. 287.

[1] 1 Sugd. V. & P. 67.

[2] [Mound City Life Ins. Co. *v.* Hamilton, 3 Tenn. Ch. 228.] "The practice pursued by the Court of Chancery in New Jersey, in opening biddings, or setting aside sales after a decree, has assimilated very much to the English practice after a report of sale, and confirmation of the same. According to the practice in the Court of Chancery in England, if parties apply to open biddings before the report is confirmed, it is a matter of course to open them on payment of costs and making a deposit; but after confirmation, a special ground upon evidence is required. This Court has never interfered with a sale for mere inadequacy of price, but has uniformly declined doing so. See Weber *v.* Weitling, 3 C. E. Green, 441; Marlatt *v.* Warwick, 3 C. E. Green, 108; Hodgson *v.* Farrell, 4 C. E. Green, 88. It has always required some special ground to be laid, such as fraud or accident, which has prevented a fair sale of the property, and worked injustice to some party whose interest is effected by the sale. The special ground which, by the English practice, is required to open a sale after confirmation, has always been required by this Court to open a sale when the property has been struck off to the purchaser. In England, a sale confirmed is upon the same footing as a sale here, which has been confirmed (not by the Court, for that is not required), but the sheriff's completing all that is necessary to be done, as, sale upon his execution, and delivery of his deed to the purchaser. The same objection, therefore, which would exist to the opening of a sale by this Court, upon motion or petition, after the sheriff had delivered his deed, would operate with equal force against that practice after a confirmation of sale, if such confirmation were necessary." Chancellor Williamson, in Campbell *v.* Gardner, 3 Stockt. 424, 425. In this case it was held, that, after a sale upon an execution out of the Court of Chancery, and a delivery of the deed, the Court may, upon a proper case made, open the sale upon petition. See Conover *v.* Walling, 2 McCarter, 173. And it is not a valid objection to this course, that the deed has become a matter of record. If a resale is ordered, the Court may require the first purchaser to release to the purchaser on the resale, all the title he may have acquired by his deed, so that the title may stand upon the record wholly disembarrassed. Campbell *v.* Gardner, 3 Stockt. 427, 428. The jurisdiction of the Court of Chancery, in New Jersey to set aside sales, is not confined to cases of sales under a decree of that Court. It extends to all sales made by administrators, trustees, agents, and public officers acting either by authority of law, or by virtue of the process of the Court of Chancery, or any other Court. Howell *v.* Sebring, 1 McCarter, 84.

[3] Watson *v.* Birch, 2 Ves. J. 51; 4 Bro. C. C. 172, S. C.; see Seaman *v.* Riggins, 1 Green Ch. 214.

unless some particular principle arises out of his character, as connected with the ownership of the estate, or some trust * or *1290 confidence, or his own conduct in obtaining his report, the bidding ought not to be opened.[1] Lord Redesdale, also, in a case before him, held that biddings could not be opened after the report was absolutely confirmed, unless on the ground of fraud on the part of the purchaser; and said, he considered it to the advantage of suitors to observe greater strictness in opening biddings, as it would procure better sales.[2] And in a still later case, Lord Eldon adhered to the same rule, and said that he could not do a thing more mischievous to the suitors, than to relax further the binding nature of contracts in the Master's office, half the estates that are sold in the Court being thrown away, upon the speculation that there will be an opportunity of purchasing them afterwards, by opening the biddings.[3]

Fraud will, of course, be a sufficient ground for opening the biddings.[4] Therefore, if the parties agree not to bid against each other,[5] or if a survey be made of an estate with some degree of collusion with the tenants, and it misrepresents the value and quality of the estate, and some of the purchasers are aware of this fraud in making the survey, and the owner is ignorant of it; [6] or if the purchaser of the estate be a partner with the solicitor in the cause, and is in possession of some particular knowledge, to the benefit of which the other parties were entitled; [7] in all these cases the Court will open the biddings, although the report has been absolutely confirmed.[8] But the biddings will not be opened on * the mere ground that the pur- *1291

[1] Morice *v.* The Bishop of Durham, 11 Ves. 57.

[2] Fergus *v.* Gore, 1 Sch. & Lef. 350.

[3] White *v.* Wilson, 14 Ves. 151.

[4] Collier *v.* Whipple, 13 Wend. 224; Williamson *v.* Dale, 3 John. Ch. 296; Tripp *v.* Cook, 26 Wend. 143. So, mistake in some cases. Laight *v.* Pell, 1 Edw. Ch. 577; Gordon *v.* Sims, 2 M'Cord Ch. 159; Post *v.* Leet, 8 Paige, 337; Anderson *v.* Foulke, 2 Harr. & G. 346; Requa *v.* Rea, 2 Paige, 339; Amer. Ins. Co. *v.* Oakley, 9 Paige, 259; Greele *v.* Emery, in Chan. N. Y., Feb. 16, 1841; Lefevre *v.* Laraway, 22 Barb. 167; Campbell *v.* Gardner, 3 Stockt. 423; Morice *v.* Bishop of Durham, 11 Ves. 67; Fergus *v.* Gore, 1 Sch. & Lef. 350; White *v.* Wilson, 14 Ves. 151, 153.

The circumstance that there were but two purchasers present does not prove fraud in a sale, if it was duly advertised, and there is no proof of any attempt to keep away purchasers. Mitchell *v.* Berry, 1 Met. (Ky.) 602. But the sale was set aside in a case where the day of sale was so inclement as to deter several persons from attending who intended to be present, and only one bidder was present, and that bidder lived at the place. Roberts *v.* Roberts, 13 Grattan, 639. So, where a sale of land was directed, to pay a judgment, and there was a failure to advertise the sale in the manner prescribed by the judgment, and the land was sold for less than its real value. Williams *v.* Woodruff, 1 Duvall, 257.

[5] See Watson *v.* Birch, 2 Ves. J. 52; Story Sales, § 484, and cases cited in notes.

[6] Ryder *v.* Gower, 6 Bro. P. C. 306; S. C. *nom.* Gower *v.* Gower, 2 Eden, 348; and see Watson *v.* Birch, 2 Ves. J. 53.

[7] Price *v.* Moxon, July 14, 1754, before Lord Hardwicke; Ryder *v.* Gower, *ubi supra*; and see Watson *v.* Birch, 2 Ves. J. 54. Brinkerhoff *v* Brown, 4 John. Ch. 675.

[8] Where the purchase at a Chancery sale is not *bonâ fide*, it is not necessary, in order to set aside the sale, on the application of the parties injured, that an advance on the bid, or any sum whatever, should have been deposited in Court. Penn *v.* Tolleson, 20 Ark. 652; see Childress *v.* Hurt, 2 Swan (Tenn.), 487.

A resale will be ordered where there has been fraud or misconduct in the purchaser; fraudulent negligence or misconduct in any other person connected with the sale; surprise or misapprehension, created by the conduct of the purchaser, or of some person interested in the sale, or of the officer who conducts the sale. Lefevre *v.* Laraway, 22 Barb. 167; [Natl. Bank *v.* Sprague, 6 C. E. Green, 458].

The Court will not set aside a sale under its own decree for mere inadequacy of price.

chase was made by one of two intending purchasers, who had agreed that one should buy and share his bargain with the other.[1]

When a person is desirous of opening a bidding, he must, at his own expense, apply to the Court, by motion,[2] for that purpose, stating the advance offered. Notice of the motion must be given to the person reported to be the purchaser of the lot, as well as to the parties in the cause.[3] Where, however, the purchaser died before the report was confirmed, and his executors were served with notice of the motion, it was held that service on his heir was not necessary.[4] If the Court approve of the sum offered, the application will be granted, and, on the order being drawn up, entered, and served, a new sale must be had before the Master.[5]

The order is, in general, drawn upon the condition that the party applying do immediately pay the deposit.[6] He must also bear the expense of paying in his deposit, and pay the costs of the first pur-
*1292 chaser.[7] When the first purchaser has paid in his money, * and the purchase-money or any part of it has not been laid out, he must pay interest at the rate of four per cent on the money, or such part of it as the Master shall find to have lain dead.[1] When, however, the purchase-money has been laid out at the instance of the purchaser,

House *v.* Walker, 4 Md. Ch. Dec. 62; Ashbee *v.* Cowell, 1 Busbee Eq. 158; Sowle *v.* Champion, 16 Ind. 165; Glenn *v.* Clapp, 11 Gill & J. 1, unless it is such as to create an inference of fraud. Eberhart *v.* Gilchrist, 3 Stockt. 170. But the Court will in some cases interfere where, in addition to an inadequate price, there has been a mistake or accident, or surprise, by which the property has been sacrificed, beyond the control of the party complaining. Eberhart *v.* Gilchrist, *supra*; Campbell *v.* Gardner, 3 Stockt. 423; Griffith *v.* Hadley, 10 Bosw. 587; Sowle *v.* Champion, 16 Ind. 165. Where the sale is made of mortgaged premises by decree of the Court, upon an application of the mortgagee, and the mortgagee is the purchaser, the Court will regard an application for a resale with greater indulgence than when a stranger is the purchaser. Campbell *v.* Gardner, *supra*. See Knight *v.* Majoribanks, 2 M'N. & G. 10. But the Court will not generally interfere, where the surprise is owing to the negligence of the party complaining, and might have been avoided by ordinary prudence and attention on his part. Parkhurst *v.* Cory, 3 Stockt. 233. Upon these principles an order for resale was refused, where a party to the suit, who was entitled to the surplus money on a sale of mortgaged premises, was so far deprived of his eyesight as not to be able to read a newspaper, and alleged that on this account he did not see the advertisement of the sale, and that in consequence of his absence from the sale the property was sold at a sacrifice. *Ibid.*

A sale will not be opened for a party who has notice of a suit, on any ground which might have been interposed as a defence, unless the party was prevented making it by fraud or mistake. Hall *v.* Urquhart, 3 Stockt. 318.

[1] *Re* Carew, 26 Beav. 187; 4 Jur. N. S. 1290; and see Galton *v.* Emass, 1 Coll. 243.

[2] But where the application to set aside a sale was made on account of a fraudulent combination to suppress competition, it was held that it should be done by original bill setting forth the grounds, and not by mere suggestion or motion, especially after the sale had been confirmed. McMinn *v.* Phipps, 3 Sneed (Tenn.), 196. [See also, Spence *v.* Armour, 9 Heisk. 167.]

[3] 1 Sugd. V. & P. 66; Seton, 1204; and see Sherwood *v.* Beveredge, 3 De G. & S. 425, 432.

[4] Templar *v.* Sweat, 8 Beav. 464.

[5] See Waterhouse *v.* Wilkinson, 1 H. & M. 636. The proceedings upon the resale are usually the same as upon the original sale. If deemed expedient, the property may be allotted in a different manner. Watts *v.* Martin, 4 Bro. C. C. 113; Humphries *v.* Roberts, 6 Jur. 680, V. C. K. B.; Ward *v.* Cooke, 9 Sim. 87.

[6] Anon., 6 Ves. 512; Young *v.* Teague, 1 Bailey Ch. 13.

[7] Raymond *v.* Lakeman, M. R., 15 April, 1865; S. C. V. C. K., for M. R. in Chambers, Sept., 1864; see Watts *v.* Martin, 4 Bro. C. C., 113; Lord Thurlow's Case, cited Anon., 6 Ves. 513; Banks *v.* Banks, 16 Beav. 380; Anon., 2 Ves. J. 286; Manners *v.* Furze, 17 L. J. Ch. 485, V. C. E.; Seton, 1206, Colebrooke *v.* Clarke, 9 L. J. Ch. 130, V. C. E.; Gibbins *v.* Howell, 4 Mad. 52.

[1] 1 Sugd. V. & P. 66.

he must take back the stock, whether the funds have fallen or risen since the investment.[2] The applicant must also, if the estate has been sold in several lots, and he applies to have it resold in one lot, pay the original purchasers any charges and expenses they may have been put to, in having surveys made, &c., preparatory to the bidding.[3]

When biddings are opened and a resale takes place, the person at whose instance the biddings were opened will, if he is outbid at the resale, be discharged, and will be entitled to receive back his deposit;[4] but he will not be entitled to an allowance for his costs, as they are in the nature of a premium paid by him for the opportunity of bidding.[5] Where, however, the biddings have been opened for the express benefit of the family, or the persons interested in the estate, costs have been allowed.[6] If the applicant is outbid, he may apply to reopen again, on notice to the second purchaser, and the parties to the cause, and on payment of all the costs.[7] Where there was no bidding at a second sale, a third resale was directed, on application before the report or certificate became binding.[8]

Sales by Private Contract.

It has been stated, that where an estate is sold by order of the Court, the sale is generally effected by public auction; the Court will, however, where it is for the interest of the parties, depart from its usual course and allow of the property being disposed of by private contract; it is, however, to be observed, that where there has been a decree for sale before the Master in the ordinary form, the parties will not be at liberty to depart from that form, without an order to warrant it;[9] and, it seems, that if an estate directed to be sold before a Master, is sold by private contract, or in any other manner contrary to the order of the Court, and not actually conveyed to the purchaser, the Court will not take notice * of the sale, but will direct the estate to be sold *1293 before the Master according to the decree.[1]

The proper course for an individual to pursue who is desirous of purchasing, by private contract, an estate which has been directed to be sold before the Master to the best purchaser, is, to make a proposal to the vendor, or to the plaintiff in the cause, and to procure him, or some other party in the cause, to make an application to the Court, for an order to refer it to the Master to inquire, and state to the Court whether

2 *Ib.* 71; *ante*, p. 1285.

3 See *ante*, 1287, 1288.

4 Williams *v.* Attenborough, T. & R. 7; Seton, 1206.

5 Rigby *v* M'Namara, 6 Ves. 466; Earl of Macclesfield *v.* Blake, 8 Ves. 214; Trefusis *v.* Clinton, 1 V. & B. 361.

6 Earl of Macclesfield *v.* Blake, *supra*; Owen *v.* Foulks, 9 Ves. 348; West *v.* Vincent, 12 Ves. 6; Trefusis *v.* Clinton, 1 V. & B. 361; Chapman *v.* Fowler, 3 Hare, 577; Filder *v.* Bellingham, 1 Coll. 526; Gravenor *v.* Miles, 9 Jur. 838, V. C. K. B.; Banks *v.* Banks, 16 Beav. 380, n. And see form of order in Bates *v.* Bonner, 6 Sim. 382.

7 Preston *v.* Barker, 16 Ves. 140. [See Bradford *v.* Hamilton, 3 Tenn. Ch. 344.]

8 Ewings *v.* Waite, L. R. 1 Eq. 440; 12 Jur. N. S. 117, V. C. S.

9 See Annesley *v.* Ashurst, 3 P. Wms. 283.

1 1 Sugd. V. & P. 64. [But if the sale thus irregularly made be confirmed, it cannot afterwards be collaterally impeached, even by an infant party. McGavock *v.* Bell, 3 Coldw. 512.]

it will be for the benefit of the parties interested in the estate, that his proposal should be accepted. Sometimes, in cases of this nature, a contract is actually entered into by the parties, subject to the approbation of the Master, before any application is made to the Court,[2] the advantage of which course appears to be, that a definite arrangement is entered into, subject to the Master's approval, before any expense is incurred, either before the Court or before the Master.[3]

Where an estate has been put up for sale in lots, and either the whole or any of the lots are unsold, the practice is to move the Court for an order, that the plaintiff may be at liberty, with the approbation of the Master, to sell, by private contract, all or any part or parts of the premises which, by the decree, were directed to be sold, which had not then been sold or disposed of, subject to such terms and conditions as the Master shall think fit. The order is drawn up in the terms of the notice, and gives the Master liberty to approve of any such contract or contracts, and to settle the conveyances consequent thereon, in case the parties differ about the same. The plaintiff's solicitor then enters into a written contract, with any person willing to purchase, "subject to the approbation of the Master." When this has been done, a state of facts, stating the contract, is carried into the Master's office, and proceeded upon in the usual manner. This state of facts should be supported by an affidavit of a surveyor, or other competent person, that the terms of the contract are fair, and that it will be beneficial to the estate that the same shall be carried into effect.

If, upon such reference, as above pointed out, the Master reports in favor of the contract, a petition must be presented and served praying that the Master's report may be confirmed, and that the contract may be carried into effect.[4] The order made upon this petition usually directs all proper parties to join in and execute the necessary conveyance to the purchaser, or as he shall direct, such conveyance to be settled *1294 by the Master in case the * parties differ about the same.[1] The title is then investigated, the purchase completed, and the conveyance executed in the same manner as upon a purchase at a sale.[2]

Master's Report.

A report is "a Master's certificate to the Court how the facts or matters referred to him are or do, upon examination, appear to him, or of which it is his duty to inform the Court."[3]

Master's reports are either *general or separate*. General reports embrace the whole matter referred to the Master by a particular decree or

[2] 2 Smith, 233, 3d ed. And if the Court is satisfied that the contract ought to be adopted, it will be ordered to be carried into effect. Dowle *v.* Lucy, 4 Hare, 311; Pimm *v.* Insall, 10 Hare Ap. 74; Bousfield *v.* Hodges, 33 Beav. 90.

[3] 2 Smith (3d ed.), 233.

[4] *Ibid.*

[1] The deed of conveyance should be approved by the Court. Dickerson *v.* Talbot, 14 B. Mon. 60.

[2] 2 Smith, 233, 3d ed.

[3] Prac. Reg. 377; see Herrick *v.* Belknap, 27 Vt. 695, 696.

order; but a separate report embraces only one distinct object of the reference.

Separate reports are made in cases in which it may be inconvenient to the parties to wait till the general report for the opinion of the Master, upon a particular matter before him under the decree.[4]

By the 70th Order of 1828, it is provided, "That in all matters referred to him the Master shall be at liberty upon the application of any party interested, to make a separate report or reports, from time to time, as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court."

The form, manner of preparing, objecting, and excepting to,[5] and confirming separate reports, are nearly the same as upon general reports, the only difference being, that when it is intended to act upon them, the cause is not set down for hearing upon further directions, as it is upon a general report, but a petition must be presented to the Court, praying such directions as arise out of the separate report.

It is to be observed, that, in order to facilitate the progress of a suit instituted for the administration of the assets of a person deceased, if the Master makes a separate report of debts or legacies, he is at liberty to make such certificate as he thinks fit, with respect to the state of the assets, and every person having an interest is, thereupon, at liberty to apply to the Court as he shall be advised.[6]

The object of this order, is to enable the parties, when it shall appear that the funds are more than sufficient to satisfy debts and legacies, to make such applications, with regard to the residue of the property, as their interests in it may authorize them to make *without *1295 waiting till the general report. Thus, in a suit for the administration of assets, if the Master reports that there are debts due by the testator remaining unpaid, and that there is a fund available for the payment of them, application may be made to the Court, by petition, to direct the payment of the debts. So, if the Master reports that there are no debts, the individuals entitled to the residue, if they have been ascertained, may apply to the Court for a distribution of a part of the fund. It is, however, to be observed, that such a distribution ought not to be made without retaining a sufficient sum to defray the costs of the suit.

The Master having obtained all the necessary information to enable him to prepare his general report, which must comprise the conclusions, which he has come to upon all the matters referred to him by the decree,[1] a warrant is, upon his intimation, taken out by the solicitor

[4] See Kennedy *v.* Kennedy, 3 Ala. 434.

[5] Where a party to a suit objects to a separate report, he must except to it in the usual manner, and cannot proceed by petition. Drever *v.* Maudesley, 7 Sim. 240.

[6] 71st Ord. of 1828.

[1] Beames's Ord. [The taking and reporting an account by the Master involves the exercise of the judgment and discretion, and cannot be delegated by him, and it is not a proper exercise of his judgment and discretion to adopt an account stated by another, either in the same or another suit. Larkins *v.* Murphy, 68 N. C. 381.]

conducting the cause, underwritten thus: "To show cause why the Master should not proceed to prepare his report herein." This warrant is issued in conformity with the 67th Order of 1828, by which it directed,[2]

"That the Master shall not receive further evidence, as to any matter depending before him after issuing the warrant on preparing his report, but that he shall not issue such warrant without previously requiring the parties to show cause, why such warrant should not issue."[3]

After the warrant to show cause, has expired, the warrant "On preparing the report" must be issued and served, which operates, as we have seen, by way of bar, to further evidence.

By one of Lord Coventry's orders, after stating "that the Masters of the Court do sometimes, by way of inducement, fill a leaf or two of the beginning of their reports, and sometimes more, with a long and particular recital of the several points of the order of reference," it is ordered, "that they shall forbear such iterations, the same appearing sufficiently in the order, and without any other repetition than this, 'according to an order, or by the direction of an order, of such a date,' shall fall directly into the subject-matter of their report, setting down the same clearly, but as briefly as they can, for the ease both of the Court and parties."[4]

This order, however, so far at least as restricts the recitals of the points of the order, in the commencement of the decree, is gen-
*1296 erally observed; but it is the practice of the Masters, in their * reports, to specify the particular head of each direction contained in the order separately, and then to dispose of such direction before he proceeds to report upon another. This method of preparing reports is most useful, since it keeps all the separate subjects of reference distinct from each other, and enables the Master to give his conclusions upon each other in a clear and distinct form. And it is to be remarked, that great care is necessary in preparing a report to dispose of all the matters which have been referred, either by findings of the Master upon each section of the decree, or by pointing out what matters of reference have been waived;[1] and, where a separate report has been made, it will be necessary to allude to it in the general report, specifying the particulars of it; so that the Court may see that all the inquiries directed by the decree, have been, in some way or other, disposed of by the Master.[2]

[2] See Colding *v.* Badger, 3 Rich. Eq. 368.

[3] As a general rule, a Master should not hear further testimony, after the parties have seen the draft of his report. Tyler *v.* Simmons, 6 Paige, 127; Burgess *v.* Wilkinson, 7 R. I. 31. Still a Master may, at any time before the final settlement of his report, upon a reference, grant a rehearing upon the discovery of proof subsequently to the previous hearing. Rattison *v.* Hull, 9 Cowen, 747.

[4] Beames's Ord. 81.

[1] Bennett, 18.

[2] *Ibid.* By the present practice in England, the certificate, whether general or separate, is drawn up in paragraphs, each paragraph being numbered, so as to correspond with the numbered paragraphs of the decree or order. It should not, except the special circumstances of the case render it necessary, set out the decree or order, or any documents

The Master, however, must not go beyond the matters referred to him, and it is laid down, in one of Lord Bacon's orders,[3] that if a Master reports as to matter which is not referred to him, his report, so far as relates to that matter, is a nullity.[4] It has been decided, that in such a case the proper course is, not to except to the Master's report, but, before it is confirmed, to apply to the Court, that it may be referred back to the Master to review his report, but that, if no such application is made, and the report should be confirmed, the Court will pay no attention to it, except so far as it is warranted by the decree.[5]

It may be stated, with reference to this part of the subject, that no exceptions will lie to a Master's report, upon the ground that he has introduced irrelevant matter, and that, where exceptions * were *1297 taken, because a Master had set forth in his report certain parts of an affidavit, and had annexed to his report certain schedules and inventories which it was insisted upon were irrelevant, and occasioned great and unnecessary expense, Sir J. Leach M. R. would not permit the exceptions to be argued.[1]

In the report made by the Masters of the Court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination, or answer was so brought in and used.[2]

or evidence or reasons; but it should refer to the decree or order, documents and evidence, or particular paragraphs thereof; so that it may appear upon what the result stated in any such certificate is founded.

[3] Beames's Ord. 23.

[4] White *v.* Walker, 5 Florida, 478; Gordon *v.* Hobart, 2 Story, 243; Levert *v.* Redwood, 9 Porter, 79; Harris *v.* Fly, 7 Paige, 421. A Master, in stating an account, must conform to the directions of the decree. Updike *v.* Doyle, 7 R. I. 458. [And, therefore, upon a reference to compute damages, a report that complainants were not entitled to any damages was held to be inconsistent with the decree, and the cause was referred back with directions. Lonsdale *v.* Moies, 2 Cliff. 538. So if, upon a general reference for an account, the Master reports adversely to the complainant, recommending that the bill be dismissed. Blauvelt *v.* Ackerman, 5 C. E. Green, 141; Hays *v.* Hays, 64 N. C. 59.] He cannot hear evidence which, if it had been before the Court, would probably have changed the complexion of the decree; nor can such evidence be noticed on appeal. Maury *v.* Lewis, 10 Yerger, 115; Remsen *v.* Remsen, 2 John. Ch. 495; Kay *v.* Fowler, 7 Monroe, 593; Simmons *v.* Jacobs, 52 Maine, 147, 153; Rishton *v.* Grissell, L. R. 5 Eq. 326; *ante*, 1221, n. (2).

The Master should not hear evidence on matters not put in issue by the pleadings. Ward *v.* Jewett, Walk. Ch. 45; Gordon *v.* Lewis, 2 Story, 260, 261. The consent of the parties will not confer on the Master any authority to examine into matters *dehors* his commission; especially where those matters are not charged in the bill, and are not put in issue by the pleadings. Gordon *v.* Hobart, 2 Story, 261.

[The question whether there should have been a reference cannot be reviewed on the argument of exceptions to the report, nor can the validity of any of the previous proceedings be raised by exceptions. National Bank *v.* Sprague, 8 C. E. Green, 81; Morris *v.* Taylor, 8 C. E. Green, 131; Musgrove *v.* Lusk, 2 Tenn. Ch. 576. And see Drew *v.* Beard, 107 Mass. 64; Haywood *v.* Miner, 102 Mass. 466; Markham *v.* Townsend, 2 Tenn. Ch. 718; New Orleans *v.* Gaines, 15 Wall. 624.]

[5] Jenkins *v.* Briant, 6 Sim. 605. A reference to the Master will not authorize a report by him more extensive than the allegations and proofs warrant; and a report which is erroneous on its face may be inquired into without any exception taken. Levert *v.* Redwood, 9 Porter, 80; see Gordon *v.* Hobart, 2 Story, 243; Harris *v.* Fly, 7 Paige, 421.

[1] Rufford *v.* Bishop, 5 Russ. 347.

[2] 48th Order, August, 1841. This order has been adopted in the 76th Equity Rule of the United States Courts.

According to Sir J. Wigram V. C.,[3] there is nothing in the above order to prevent the Master from finding facts from the evidence before him, and stating those facts in his report, or from stating the reasons upon which he has proceeded in making his report; or from submitting any question to the Court upon which the powers with which he is armed do not enable him to come to a satisfactory conclusion; or, generally, from giving the Court an account of the effect produced upon his own mind by the proceedings before him.[4] There is nothing in the 48th Order to prevent the Master doing any of these things; the order only rejects the practice of stating and reciting in the report the documents mentioned in the order. According, also, to the V. C. of England,[5] the real object of the order was not to direct the Master to omit from his report the statement of the grounds on which he proceeded; but to leave that as it formerly was, and to make this additional circumstance necessary, that when the Master does state the grounds on which he came to the conclusion, he shall also state the evidence from whence he deduces these grounds.

It may also be observed, that the order does not prohibit the Master from stating or reciting wills, deeds, and many other documents. That, according to Sir J. Wigram V. C. was done advisedly, because wills, deeds, and many other documents, being the private property of parties which they have a right to keep in their private custody, do not remain in the office to be referred to after the report is made, whereas states of facts, charges, and the other matters specified in the 48th Order remain in the office.

Generally speaking, it is the duty of the Master to meet all the difficulties that may arise in the discharge of his office. In some *1298 * way or other, he must so provide as that all the accounts and inquiries, directed by the decree, shall be fully taken;[1] at least it is the Master's duty to go on with them, until he finds a difficulty arising from want of sufficient powers, and then an application must be made to the Court, either by the Master or by the parties, to do that which is necessary in order to supply the defect of his authority.[2] A motion, however, cannot be made for the purpose of getting the Court to point out to the Master the form in which he is to make his report.[3]

When the Master is directed to ascertain a fact, he must not content himself with stating these circumstances and leaving the Court to draw its own conclusion, but he must draw the conclusion himself,[4] and if he

[3] Meux *v.* Bell, 4 Hare, 93.

[4] But it is improper for a Master, in his report, to argue the case upon its merits. His province is to report facts for the information of the Court, not arguments. Jackson *v.* Jackson, 2 Green Ch. 96; [Evans *v.* Evans, 2 Coldw. 143; Green *v.* Lanier, 5 Heisk. 662; see Topliff *v.* Jackson, 12 Gray, 565, 569].

[5] *In re* Grave, 10 Sim. 574.

[1] See Paynter *v.* Houston, 3 Mer. 302.

[2] Paynter *v.* Houston, *supra;* Updike *v.* Doyle, 7 R. I. 446. On a bill filed for the settlement of partnership accounts, where the proofs and statements leave every thing in such doubt and uncertainty that it is impossible to do justice, the bill should be dismissed without costs. Vermillion *v.* Bailey, 27 Ill. 230; [Maupin *v.* Daniel, 3 Tenn. Ch. 223].

[3] Agar *v.* Gurney, 2 Mad. 389.

[4] See Pilkinton *v.* Cotten, 2 Jones Eq. 238; Colding *v.* Badger, 3 Rich. Eq. 368; Burroughs *v.* M'Neill, 2 Dev. & Bat. Ch. 297;

does not do so, either party is at liberty to except to the report for not having stated that conclusion for which the party objecting contends.[5]

It may be mentioned here, that, even when the evidence is such that it is impossible to arrive at any degree of certainty upon it, yet, if it is sufficient to afford a reasonable ground of presumption one way or the other, the Master is bound to find in favor of such * pre- *1299 sumption.[1] The Master, however, is not bound to state inferences of law arising from the facts before him; and where facts are so clearly stated in a report, as necessarily to involve a particular consequence, it is for the Court to act upon the facts so reported; and it would not be a proper ground of exception, that the Master had omitted to point out the consequence.[2]

It is not, indeed, the general practice, unless in particular cases, for the Master, upon references to inquire into facts, to state the special circumstances of the case in his report, unless he is expressly directed to do so.[3] By Lord Clarendon's orders,[4] the Masters are not, upon the

Herrick *v.* Belknap, 27 Vt. 694, 696. It is the duty of the Master to obey the instructions of the Court appointing him; and if he disregards the instructions of the Court, or does not furnish in his report the facts necessary to enable the Court to proceed to a final decree on the merits of the case, the report should be set aside, even if no objections are taken to it. Lang *v.* Brown, 21 Ala. 179.

[5] Winter *v.* Innes, 4 M. & C. 104; and see Lee *v.* Willock, 6 Ves. 605; Dixon *v.* Dixon, 3 Bro. C. C. ed. Belt. 510; Matter of Hemiup, 3 Paige, 305; Mott *v.* Harrington, 15 Vt. 185. But where a matter of fact, depending upon conflicting evidence, and the credibility of witnesses, has been referred to a Master, his decision will not be interfered with on his mere judgment of facts, unless it is a very plain case of error or mistake. Izard *v.* Bodine, 1 Stockt. 309; Simnickson *v* Bruere, 1 Stockt. 659; Merriam *v.* Baxter, 14 Vt. 514; see Sparhawk *v.* Wills, 5 Gray, 423; Adams *v.* Brown, 7 Cush. 222; Reed *v.* Reed, 10 Pick. 398, 400; Howe *v.* Russell, 36 Maine, 115; McKinney *v.* Pierce, 5 Ind. 422; State *v.* McIntire, 53 Maine, 214; Pierce *v.* Faunce, 53 Maine, 351; Stimpson *v.* Green, 13 Allen, 326; Mason *v.* York & Cumberland R. R. Co., 52 Maine, 82, 115; *ante*, 1247, 1248; Da Costa *v.* Da Costa, 3 P. Wms. 140, note; McDougald *v.* Dougherty, 11 Geo. 570; [McDaniels *v.* Harbour, 43 Vt. 460; Rowan *v.* State Bank, 45 Vt. 162; White *v.* Hampton, 10 Iowa, 238. And see Sproull's Appeal, 71 Pa. 137; Rowan *v.* State Bank, 45 Vt. 160, 195. *Infra*, 1321, n. 5. In Vermont, the finding of the Master seems to be as conclusive as the verdict of a jury. Howard *v.* Scott, 50 Vt. 48.] The report is not, nevertheless, entitled to the same weight as the verdict of a jury, upon a motion for a new trial in a Court of Law. Holmes *v.* Holmes, 3 C. E. Green, 141; *post*, 1300, note. [See Stevens *v.* Miner, 110 Mass. 57; Dean *v.* Emerson, 102 Mass. 480; Cary *v.* Herrin, 62 Me. 16; Commonwealth *v.* Ins. Co., 112 Mass. 194. And see where no objection is made, or exception filed, Hauser *v.* Roth, 37 Ind. 89.]

And in Connecticut, questions of fact decided by a committee in Chancery, which is treated as a mere arm of the Court, and as holding the place of a Master in Chancery, will not be reviewed by the Court upon a remonstrance detailing the whole evidence. And the finding of facts by such committee cannot be impeached, upon a remonstrance, by showing that the evidence on which it was made was procured by bribery and corruption; the remedy in such case being by an application to the committee for a further hearing, or to the Court for a new trial. Ashmead *v.* Colby, 36 Conn. 289, 312, 313. The Court, in this case, treated an objection, that the whole evidence before the committee was insufficient to justify their finding, as an evasion of the rule that the finding of a committee in Chancery is conclusive upon all matters of fact found by them. *Ibid.*; Holabird *v.* Burr, 17 Conn. 563.

[1] See Fenner *v.* Agutter, 1 M. & K. 120. The report of a Master upon the question of fact will not be overruled, although the evidence on which it is founded is vague, and not altogether satisfactory, if it does not appear that his conclusion was unwarranted by the evidence. Holmes *v.* Holmes, 3 C. E. Green, 141; [National Bank *v.* Sprague, 8 C. E. Green, 83].

[2] Per C. C. Pepys M. R., Bick *v.* Matley, 2 M. & K. 312; see Matter of Hemiup, 3 Paige, 305.

[3] *Post*, 1300, notes; Mott *v.* Harrington, 15 Vt. 185; see directions to Master in Pingree *v.* Coffin, 12 Gray, 311, 312; and in Marsh *v.* Railroad, 43 N. H. 534, 535. The report of a Master, "that it would be for the interest of the defendants to sell the estate in separate lots, if the premises can be conveniently divided," is not sufficiently definite to

[4] Beames's Ord.

importunity of counsel, how eminent soever, or their clients, to return special certificates, unless they are required by the Court to do so, or that their own judgment, in respect of difficulty, leadeth them to it, such kind of certificates, for the most part, occasioning a needless trouble rather than ease to the Court, and certain expense to the suitor. It is to be observed, however, that, under this order, considerable discretion is left to the Master, and that notwithstanding it, he may, and frequently does, state special circumstances in his report, without any specific order to warrant it.[5] It is, nevertheless, frequently the practice, where it is apprehended that particular circumstances may come out upon inquiries before the Master, which may influence the opinion of the Court, when the cause comes on upon further directions, to ask, at the hearing, for a specific direction in the decree or order, that the Master may be at liberty to state special circumstances :[6] under such a direction, however, the Master must not set forth the evidence with his opinion upon it, but he should state the matter of fact, for the judgment of the Court, in the same manner as in Courts of Law ; — they only state the facts allowed by both sides, in a special verdict, but never meddle with any part of the evidence on either side.[7]

*1300 * But although the Master does not, unless under special circumstances, detail the evidence upon which he proceeds in making his report, yet he generally refers to it, either in the body of his report, or in a schedule annexed to it.[1] When he reports upon accounts,

be the foundation of a decree for the sale of the mortgaged property. Walker *v.* Hallett, 1 Ala. 379. The report should have stated whether the property was susceptible of division; which portion it was for the interest of the defendants should be sold; and should also have contained the evidence on which the report was founded. *Ibid.;* Anon., 1 Clarke, 423.

[5] 2 Atk. 620; Champernowne *v.* Scott, 4 Mad. 209; but see Ganderton *v.* Ganderton, 13 Sim. 182.

[6] Seton on Decrees, 24; Jackson *v.* Jackson, 2 Green Ch. 96, 100.

[7] Duchess of Marlborough *v.* Wheat, 1 Atk. 454. Where it is referred to a Master to examine and report as to particular facts, or as to any other matter, it is his duty to draw the conclusions from the evidence before him, and report such conclusions only; and it is irregular and improper to set forth the evidence in his report without the special direction of the Court. Matter of Hemiup, 3 Paige, 305; Mott *v.* Harrington, 15 Vt. 185; Goodman *v.* Jones, 26 Conn. 264; see Johnston *v.* Reardon, 1 Moll. 54; Herrick *v.* Belknap, 27 Vt. 673; Gilmore *v.* Gilmore, 40 Maine, 53; Bailey *v.* Myrick, 52 Maine, 132.

In Simmons *v.* Jacobs, 52 Maine, 147, 153, Cutting J. said: "In this State we have no *Regula generalis* in relation to the duties of Masters in Chancery; but, in each case, where a Master is appointed, the rule for his guidance is the decretal order. He is not usually appointed to act merely as a commissioner to take testimony, which any ordinary magistrate might do, but as an officer of the Court to receive and adjudicate upon the force and effect of evidence produced before him, and thus to ascertain facts and form an opinion as to the law arising thereon, both of which constitute his findings, and are the only subject-matter to be inserted in his report to the Court. So that if his legal conclusions are not sustained by the facts found, the Court may interpose and correct the error." See Howe *v.* Russell, 36 Maine, 115; 1 Barb. Ch. Pr. 548; Mason *v.* York & Cumberland R. R. Co., 52 Maine, 82, 115; [Cary *v.* Herrin, 62 Me. 18;] Emerson *v.* Atwater, 12 Mich. 314. Where the Master incorporates the evidence into his report, without the special direction of the Court, although it is done upon the solicitation of counsel, he will not be allowed for it on the taxation of his costs. Matter of Hemiup, *supra;* [Evans *v.* Evans, 2 Coldw. 151]. But if the conclusion which he is to draw is a question of law, and not a mere legal presumption of a fact, he is permitted, in the exercise of a sound discretion, and without an order for that purpose, to make a special report submitting the legal question to the decision of the Court. Matter of Hemiup, *supra.* [See Lawson *v.* Drake, 105 Mass. 564.]

[1] Sometimes orders direct the Master to report the testimony; sometimes to report it if either party requires him to do so. In these cases the testimony should be annexed, certified by him, but not embodied in the

he generally states the results of the accounts in the body of the report,[2] and refers to schedules as to the particular items. These schedules must be annexed to the report and filed * with it, and it will *1301 not be sufficient that they should be entered in a book kept in the Master's office, in the same manner as the accounts of receivers.[1]

When the Master has prepared his report, an intimation of his having done so is given to the solicitor for the party conducting the cause (who has, generally, bespoken a copy of the draft report), that the draft report is ready. Any party, however, may apply to the Master to make his report,[2] and when the draft is prepared, a warrant must be taken out and served upon all parties, *active* in the suit, underwritten — "The Master has prepared the draft of his general [or separate] report."[3]

report. 1 Hoff. Ch. Pr. 545; Matter of Hemiup, 3 Paige, 305; Mott *v.* Harrington, 15 Vt. 185; see Anon., 1 Clarke, 423. But either party may apply to the Master for certified copies of the testimony to be used upon the argument of exceptions to the report. 1 Hoff. Ch. Pr. 545. A party should require the Master, or Auditor, to report specially such evidence as furnishes the ground of any exception. And the Court will not open the facts of the report, unless to correct some unquestionable error. Donnell *v.* Columbian Ins. Co., 2 Sumner, 366; Sparhawk *v.* Wills, 5 Gray, 423.

In Vermont, it is held, that the testimony given *viva voce* in taking an account, or a copy of it, should be returned into Court by the Master with his report. Herrick *v.* Belknap, 27 Vt. 673. And in Maine, in Gilmore *v.* Gilmore, 40 Maine, 53, the Master was directed by the Court to report in full the evidence produced before him and his decisions thereon. But without such order, the Master is not bound to report the evidence upon which his determination is founded. Howe *v.* Russell, 36 Maine, 115; see McKinney *v.* Pierce, 5 Ind. 422; Mott *v.* Harrington, 15 Vt. 185; Bailey *v.* Myrick, 52 Maine, 132; Simmons *v.* Jacobs, 52 Maine, 147; Mason *v.* York & Cumberland R. R. Co., 52 Maine, 82, 115; Rennell *v.* Kimball, 5 Allen, 356, 364, per Hoar J. In Jackson *v.* Jackson, 2 Green Ch. 96, the Master reported the evidence without any order to that effect, and upon the argument of the exceptions to the Master's report, the Court examined the evidence reported, and ordered the report to be corrected where it was found erroneous, without sending it back to the Master.

By rule of Chancery in New Jersey, 44, it is provided that, when, by a decretal order of the Court, any inquiry before a Master is directed to be made in a cause, and the examination of witnesses shall be necessary to obtain the proper information, such examination, if required by either party, shall, at the expense of the party requiring it, be reduced to writing by the Master, in the form of depositions, and returned and filed with the report. To determine whether a Master has arrived at a correct conclusion from the evidence, it is necessary to review and weigh the evidence. For this reason the Master's report is entitled to no special consideration beyond the soundness of his reasoning, and the advantage of seeing the demeanor of the witnesses while examined. Holmes *v.* Holmes, 3 C. E. Green, 141.

[2] The result of the account should be stated in such a manner as to afford to the Court the means of judging whether it is correct. Macintosh *v.* Great Western Railway Co., 1 De G., J. & S. 443; see S. C. 11 Jur. N. S. 681, V. C. S.; Reed *v.* Jones, 15 Wis. 40.

[1] Smith *v.* Smith, 2 Dick. 789. For the convenience, however, of suitors wishing to refer to accounts taken in the Master's office, it is provided, by the 62d Order of 1828, "That all such accounts, when passed and settled by the Master, shall be entered in a book, to be kept for that purpose in the Master's office, as is now the practice with respect to the receivers' accounts, and with proper indexes, in order to be referred to as occasion may require." When a report is made upon accounts exhibited to the Master, such accounts should accompany the report, that the Court may see the correctness of the Master's inferences. Jeffreys *v.* Yarborough, 2 Hawks, 307; see Mitchell *v.* Walker, 2 Ired. Ch. 621. The Master should state the account at length, and all the facts found by him, so that they will be intelligible without reference to the testimony. Herrick *v.* Belknap, 27 Vt. 673. He should state what items were allowed, and what disallowed. Reed *v.* Jones, 15 Wis. 40. His report should so present the items that exceptions may be taken to it. Ransom *v.* Davis, 18 How. U. S. 295. It should contain a succinct statement of all the points made by counsel, and the facts found by him upon such points. Herrick *v.* Belknap, *supra*. The report of a Master, stating the accounts of a mercantile firm, should show whether the partnership resulted in a profit or loss, and to what extent, and should also dispose of the uncollected dues. Zimmerman *v.* Hubner, 29 Ala. 379. [See Hicks *v.* Chadwell, 1 Tenn. Ch. 251.]

[2] 1 Turn. & V. 428.

[3] *Ibid.*; see Burgess *v.* Wilkinson, 7 R. I. 31, 32.

This is done for the purpose of informing the parties that the report is ready.

Upon attending the warrant, to settle the draft report, the solicitors for the several parties should suggest to the Master such alterations as in their judgment they may think proper.[4]

When all the alterations and suggestions of the parties have been submitted to the Master and disposed of, the Master finally settles the draft of his report, from which the Master's clerk makes a transcript or engrossment upon paper, which must be carefully examined by the solicitor for the party taking the same, and compared with the draft as settled by the Master.[5] After this has been done, another warrant must be taken out and served, underwritten — "at which time the Master will sign his general [or separate] report herein." This is called the warrant on signing the report, and must be served upon the parties so as to give them three clear days between the service and the day for attendance, that is, three days, of which neither the day of service nor the day of attendance is reckoned as one;[6] the object of this delay being to afford the parties time to bring in objections to the draft *1302 * report, if they shall be so advised. If, upon the return of this warrant, no objections are brought in, or time for bringing in objections applied for and allowed, the Master proceeds to sign the transcript, and then the report is in a complete state and ready for filing.[1]

The object of allowing the interval of three clear days between the service of the warrant on "signing the report," and the time appointed for the attendance upon such warrant, is, as has been stated, to allow parties who are dissatisfied with the Master's judgment an opportunity of stating their objections to it in writing. The reason for the adoption of this proceeding, is thus stated by Lord Chief Baron Gilbert:[2] "The ancient rule was, that the party should never except, but where he had first objected to the draft of the report before the Master; and, where there was no objection brought in, it was allowed as good cause to discharge the exception; and it were to be wished that this good rule was strictly followed, since, if the party had objected, he might have showed the Master his error, and the report would have been altered in that particular, and never troubled the Court. Whereas it often happens, that the party will conceal some material objection and keep it in *petto* from the Master; and when this comes on by way of exception, it makes a variance in the report."

The rule mentioned by the Lord Chief Baron, was promulgated by Lord Keeper North, in 1683,[3] and is in fact, with little variation, the rule of the Court at the present time; the practice of the Court requir-

[4] See Remsen *v.* Remsen, 2 John. Ch. 495.

[5] 1 Turn. & V. 429.

[6] *Ante*, p. 1170. This is sometimes termed a four-day warrant, reckoning the day of attendance as one of the days.

[1] 1 Turn. & V. 428.

[2] For. Rom. 167.

[3] Beames's Ord. 259.

ing that, as to all references to a Master, of such a nature that his report thereupon is to be made the foundation of a further decree or decretal order, no party is at liberty, without a special order, to except to the report, or present a petition in the nature of an exception thereto, unless he has previously to the Master signing the report, carried in objections, in writing, to the draft report, specifying the points in which he considers the report to be wrong.[4]

Objections to a draft report are generally, though not necessarily, * drawn by counsel, but are not signed by him; and as *1303 they are to serve as the foundation of future exceptions, they are generally the same in form and substance as the exceptions proposed to be taken.

Although the objections ought, in strictness, to be taken in the period between the service of the warrant upon the signing the draft report and the return of such warrant, yet the Master will, upon a proper case being submitted to him, allow further time for bringing in the objections.[1]

To obtain such further time, a warrant should be taken out and served before the return of the warrant to sign the report, and, on the attendance upon such warrant, a reasonable time, commensurate with the specialties of the case, will be given by the Master, to prepare and bring in the objections.[2]

If a person interested in the report, though not a party to the suit, is dissatisfied with it, he must leave objections to the draft as a preliminary step to putting himself in a situation to take exceptions; thus, creditors and other persons coming in under decrees, and who have had their claims allowed, must, if they mean to except to the report, carry in their objections to the draft in the same manner as parties to the record.

So, also, persons who have carried in claims as creditors or next of kin, under decrees, but have had their claims disallowed, ought also, if they intend to dispute the Master's finding, to be prepared with objections to the draft report in order to gain a right to except to it.[3]

[4] Pennington *v.* Lord Muncaster, 1 Mad. 555; Ottey *v.* Pensam, 1 Hare, 322. Exceptions are always to be confined to objections allowed or overruled by the Master. Copeland *v.* Crane, 9 Pick. 73, 78; Byington *v.* Wood, 1 Paige, 45; Iaege *v.* Bossieux, 15 Grattan, 83; Gordon *v.* Lewis, 2 Sumner, 143; see Method. Epis. Church *v.* Jaques, 3 John. Ch. 81; Lewis *v.* Lewis, 1 Ala. 35; Story *v.* Livingston, 13 Peters, 359; Frith *v.* Lawrence, 1 Paige, 434; Beckwith *v.* Butler, 1 Wash. (Va.) 224; White *v.* Johnson, 2 Munf. 235; [McMicken *v.* Perin, 18 How. 510; Gaines *v.* New Orleans, 1 Woods, 104. And see, for the practice in Tennessee, Gleaves *v.* Ferguson, 2 Tenn. Ch. 589]. "Exceptions are to be regarded so far only as they are supported by the special statements of the Master, or by evidence which ought to be brought before the Court, by reference to the particular testimony on which the party excepting relies." Rice J. in Miller *v.* Whittier, 36 Maine, 585. Objections to the admission of evidence should be made at the time, or the objection cannot be raised by excepting to the allowance of the item proved by that evidence. Taylor *v.* Kilgore, 33 Ala. 214. [Exceptions not taken in the Court below, cannot be made in the Appellate Court. Hudgins *v.* Kemp, 20 How. 45, 54; New Orleans *v.* Gaines, 15 Wall. 624.]

[1] 1 Turn. & V. 430; see Byington *v.* Wood, 1 Paige, 145.

[2] *Ibid.*

[3] See Walker *v.* Wingfield, Reg. Lib. 1809, fo. 10; and Ker *v.* Cloberry, Reg. Lib. 1812, A. 734.

The object of requiring a party to deliver objections before he can except to the report, is that the Master may have an opportunity of reconsidering his opinion,[4] and that, when they are left, the usual warrants "on leaving" and "to proceed" should be served on the parties.

If, after considering the objections, the Master maintains his original opinion, he signs the report as it stands. If he changes his opinion, he alters the draft of his report accordingly, after which a fresh warrant "on signing" must be served, in order to afford the other party an opportunity of carrying in fresh objections to the altered draft.[5]

The Master's report having been signed, it should be forthwith filed in the Report office, and an office copy thereof taken by the party *1304 filing it.[6] By an old order,[7] this should be done within four * days after the signature, but it is considered sufficient if it be filed at any time before any proceedings are taken or order made thereon.[1]

After the report has been filed, the question arises whether it is one of such a nature as to require confirmation by the Court, or whether it is final and complete without such confirmation; according to Sir J. Wigram V. C. the answer to this question depends upon the terms of the order, or the nature and subject of the reference, and not upon the proceeding on which the reference is made.[2] So that, on the one hand, there are some reports made under decrees which do not require confirmation; and on the other hand, there are some reports made upon motions or petitions, which must be regularly confirmed. In the case of *Empringham* v. *Short*,[3] the V. C. of England stated, that he had had a conversation with the Registrar on the subject; and that he found that it was difficult to determine by any general rule which are the reports which this Court requires to be confirmed, and what are those which are taken to be sufficient for the Court to act upon, though they be not confirmed. In the case before him, on a motion to commit a defendant for contempt, the defendant undertook to make reparation for the act complained of. Whereupon the Master was directed to inquire what reparation the defendant ought to make, and he was ordered to make such reparation accordingly. The V. C. of England thought the report made upon the order was one that required confirmation before the Court could act upon it. But Lord Cottenham held other-

[4] Bowker *v.* Nickson, 3 Mad. 439.
[5] Richardson *v.* Horton, 5 Beav. 87.
[6] Bennett, 22.
[7] Beames's Ord. 292.

[1] See *ante*, p. 1178, note. In the United States Courts, the Master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the Order Book. Equity Rule, 83. The compensation to be allowed to every Master in Chancery for his services in any particular case, shall be fixed by the Circuit Court in their discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and be borne by such of the parties in the cause as the Court shall direct. The Master shall not retain his report as security for his compensation; but when the compensation is allowed by the Court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the Court. Equity Rule, 82.

[2] Ottey *v.* Pensam, 1 Hare, 235.
[3] 11 Sim. 78.

wise, considering the order of the Court final, as it directed the defendant to make the reparation, when the amount should be ascertained by the Master.

It would seem, therefore, that wherever the discretion of the Court is exercised upon the first order, and where the Master is only called upon to perform some act, or make some inquiry necessary for carrying out the order which the Court has made, the report of the Master will not require confirmation.

Thus, all reports made by the Master, confined to such facts as of his having appointed trustees, approved a conveyance, or settled interrogatories for the examination of parties, or of his having * ordered the production of documents pursuant to a decree, and *1305 that the documents ordered to be produced, were either produced or not produced before him, do not require confirmation. So the Master's report upon exceptions for scandal or insufficiency, does not require confirmation.[1]

There is, however, one report of the nature last mentioned, which is an exception to the rule, as it does require confirmation by the Court; namely, a report of a person being the purchaser of a lot at a sale, before the Master, with respect to which it is to be observed, that the object of requiring this report to be confirmed is not to enable the parties to bring the decision of the Master under the review of the Court, but to afford time between the service of the order *nisi*, and the absolute confirmation of the report, to others to come in and open the bidding, so as to secure the sale of the estate to the best possible advantage. This exception, therefore, depends upon a particular reason, and does not interfere with the rule, which renders the confirmation of such reports as are not intended to be made the foundation of any future discretionary act of the Court generally unnecessary.

On the other hand, where the report is required for the purpose of enabling the Court to make some discretionary order or decree, whether the order directing the reference be made upon decree, or upon any interlocutory application, the report requires confirmation before it is adopted as the foundation of such future order or decree.

Although, in determining the question, whether a report of the Master does or does not require confirmation, it is immaterial whether the order of reference was made by decree or upon an interlocutory application, yet supposing it to be such a report, as from its nature requires confirmation, there is a difference in the mode in which, in the two different cases, the confirmation of the Court is obtained.

If a reference is made at the hearing of a cause, or upon further directions, the proceedings to confirm the report are by a motion *nisi*,[2] upon which an order is made that the report, and all the matters and

[1] A Master's certificate as to the insufficiency of an examination of a party on interrogatories, also, does not require an order of confirmation. Case *v.* Abeel, 1 Paige, 650.

[2] Ottey *v.* Pensam, 1 Hare, 324.

things therein contained, do stand satisfied and confirmed, &c.; unless the defendant having notice thereof, shall within eight days after having such notice, show unto the Court good cause to the contrary.[3]

*1306 * This order may be obtained, by motion of course, or by petition at the Rolls,[1] by any of the parties, though it is usually taken by the plaintiff or party taking the report. When, however, a party, who does not take the report, proceeds to confirm it, he should give the party, taking the report, notice, that, unless such party moves to confirm the report within a given time, he shall do it.[2] It is said, also, that, where a Master makes a separate report of a creditor's claim, the creditor may obtain the order to confirm the report.[3]

The circumstance of obtaining an order to confirm a Master's report *nisi*, does not preclude the party taking it from afterwards excepting to the report; and the time within which this may be done is unlimited till the order to confirm absolute is made; but it may be limited by an order *nisi*, to be obtained by any other party, on the neglect of the party having the carriage of the report.[4]

In a recent case,[5] after the Master had made his report, the plaintiff excepted to so much of it as allowed certain payments made by the defendant, but neglected to obtain the usual order to confirm the report *nisi*, before filing his exceptions. The exceptions came on to be argued and were allowed, and it was referred back to the Master to review his report, upon which the Master made his further report, and the plaintiff obtained an order *nisi* to confirm it. As no order *nisi* to confirm the first report had been obtained, it was considered necessary also to confirm so much of the original report as had not been excepted to, and the plaintiff applied, as of course, for an order *nisi* for that purpose, which the Registrar declined to draw up without the sanction of the Court; whereupon the plaintiff made a motion, at the Rolls, for an order *nisi* to confirm so much of the Master's report as the plaintiff had not excepted to, and the order was made in those terms.

It may be mentioned here, that although creditors who have come in before the Master, and have had their claims allowed, are frequently most materially interested in the report, it is not usual to serve them with the order for confirming it *nisi*; and that, of course, where persons have come in as creditors, but have not succeeded in establishing their claims, they are never served with such order. In no case is personal service requisite.[6]

A copy of the order *nisi* having been served upon the solicitors for

[3] Hand, 169. It is the practice upon filing a report on exceptions to an answer, to take an order that the same shall be confirmed unless cause be shown in eight days after the service of the same. Weber *v.* Weitling, 3 C. E. Green, 39. Filing exceptions to a report is a sufficient and the usual showing cause against its confirmation. Weber *v.* Weitling, *ubi supra.*

[1] 21st Order, 1828.

[2] 2 Smith, 383, 3d ed.; Shirley *v.* Earl Ferrers, MS. cited *ibid.*

[3] Gibbons *v.* Caunt, MS., cited *ibid.*

[4] Richardson *v.* Horton, 5 Beav. 87.

[5] Robinson *v.* Wood, Rolls, 16th Dec. 1839, *ex relatione* Faber.

[6] 21st and 44th Orders of 1828.

the different parties, an affidavit of such service must be made and filed, and then, if no cause is shown within eight days, the
* party is entitled to move as of course, after the expiration of *1307
those eight days, to make the order *nisi* absolute.[1]

It appears that now the order for confirming the report absolutely, may be obtained on any day, as well in term as out of term.[2]

The usual cause shown against making the order *nisi* for confirming the Master's report absolute, is the filing of exceptions to the report,[3] and the setting of them down to be argued;[4] but it is to be observed, that there must be an order for setting the exceptions down for argument actually entered and served, and that the mere filing of exceptions and paying the deposit will not be sufficient.[5]

An order to review the report, which is sometimes, though very rarely, granted upon application after the order *nisi*, may, also, be shown, as cause against confirming it absolute.

If, for any reason, a party is desirous of enlarging the time for confirming the report, absolutely, he should make a special application to the Court by motion.[6]

The application for the order to confirm the Master's report absolute must be by motion, and cannot be by petition at the Rolls, the 21st Order of 1828, which authorizes the granting the order *nisi* upon petition, not extending to the order absolute. It must be supported by an affidavit of service of the order *nisi*, and by the Registrar's certificate of no cause having been shown. The order confirming a report absolute requires no service.[7]

If the plaintiff after obtaining the order *nisi* to confirm the Master's report does not proceed to make it absolute, the defendant may move to confirm the report; and for that purpose the certificate of no cause shown will be ordered to be entered on his office copy of the order *nisi*.[8]

It has before been stated, that there is a distinction between the manner of confirming some reports, and that of confirming others. Those reports which are founded on decrees or decretal orders, must be confirmed by orders *nisi* absolute, made upon motion, in manner last stated; whilst those reports, which are the consequence of orders made upon a motion or petition, are confirmed by motion or petition absolutely.[9]

Of this description are reports as to the propriety of granting leases of property under the control of the Court, or as to the approval
* of contracts for the purchase of property with funds in Court. *1308

[1] For the manner of computing the period, see *ante*, pp. 353, 354.

[2] Lord Harborough *v.* Wartnaby, 1 Ph. 364.

[3] See Mechanics' Bank of Phil. *v.* Bank of N. Brunswick, 2 Green Ch. 439; Brundage *v.* Goodfellow, 4 Halst. Ch. (N. J.) 513; [Morris *v.* Taylor, 8 C. E. Green, 131.]

[4] Gildart *v.* Moss, 4 Ves. 617.

[5] *Ibid.*; see also Hall *v.* Mulliner, 2 Dick. 604; Abel *v.* Nodes, *ib.* 730; Mole *v.* Smith, 1 J. & W. 670.

[6] See Hand. 169.

[7] 2 Smith, 386, 3d ed.

[8] Roberts *v.* Williams, 2 Hare, 151.

[9] Ottey *v.* Pensam, 1 Hare, 324.

Of the same nature, also, are reports of the allowance of maintenance or guardians for infants, where the application for the maintenance or guardians has been made to the Court in the form of a summary petition, though the form of confirming such report would be different, if the order for the approval of the maintenance, &c., should be made upon decree.[1]

Reports of this description must, as has been stated, be confirmed by petition, which generally prays, besides the confirmation of the report, such consequential directions as arise out of it. On hearing these petitions, the Court will take into consideration any objections which may arise upon the report, provided they are sufficiently raised by it to enable the Court to dispose of them. In cases, however, where the objection is not on the face of the report it is necessary to present a petition to raise the point, praying that the Master may review his report, and this, it seems, is the correct mode of exceptions to this class of reports.[2]

It may be observed, that Mr. Smith, in the last edition of his Treatise, remarks, with respect to these reports made upon interlocutory applications, that "the present practice of combining in the same petition a prayer to confirm a Master's report (which ought to be confirmed by order *nisi* and absolute), and for directions consequential upon it, is not only contrary to the practice, but is attended with a great increase of trouble and expense, and may, if title is involved, lead to dangerous results." The practice is, however, recognized by Sir J. Wigram V. C., in *Ottey* v. *Pensam*, and is consistent with the manner in which reports of this nature are objected to.

It may be mentioned, in this place, that it seems to be irregular to confirm a report of this nature by petition of course, even with the consent of all parties. Such a report ought to be confirmed by a special petition.[3] With respect, however, to a report that is confirmed by orders *nisi* and absolute, the adverse party may give an authority to his counsel to consent that it be absolutely confirmed in the first instance.

*1309 * *Exceptions to the Report.*

It having been stated, that there are some reports which do not require any confirmation, and others to which it is necessary, and moreover, that of those which do require confirmation, some are confirmed by orders *nisi* and absolute, and others are confirmed usually (if not necessarily) by motion or petition absolutely. It remains to be stated,

[1] See Cavendish *v.* Mercer, 5 Ves. 195, *notis*. It is to be observed, that in the principal case, Greenwell *v.* Greenwell, *ib.* 194, Lord Loughborough is reported to have noticed, that in Cavendish *v.* Mercer, the report was confirmed upon motion, and to have observed, that the practice of confirming these reports, upon motion, is irregular. Perhaps his Lordship did not advert to the distinction above pointed out, and to the fact that, in Cavendish *v.* Mercer, the direction for the inquiry as to the maintenance was made by decree, whereas, in general, applications for maintenance, &c., are made by petition in a summary way.

[2] Ottey *v.* Pensam, *supra*; and see Hodge *v.* Rexworthy, 6 Jur. 701; S. C. 7 Jur. 292.

[3] Bailey *v.* Todd, 1 Beav. 95.

what is the proper course of excepting or objecting to these different reports.[1]

In the first place, with respect to those reports which do not require confirmation, it is clear that this peculiarity does not in itself preclude a party dissatisfied with them from excepting to the Master's finding.[2] In some cases, however, the only mode of obtaining the opinion of the Court upon such proceedings, is by petition praying either that the conclusion of the Master may be reviewed by the Court, or for leave to except to the report.[3]

Wherever the Master is required to make a certificate or report, which does not require any exercise of discretion or judgment, as in the case of certificate to the Court of the proceedings in his office, or of the fact of documents not having been deposited pursuant to an order, no objection or exception will be entertained by the Court.[4] In fact, certificates of this description are of the same nature as the certificates of any other officer of the Court, who certifies as to a mere matter of fact belonging to his department, such as the certificate of the Accountant-General as to money not having been paid into Court, or of the Clerk of Records and Writs, of documents not having been deposited with him,
* pursuant to an order of the Court, which certificate, if wrong *1310
in point of fact, must be quashed upon motion, not excepted to.

The certificate of the Taxing Master of the taxation of costs may be classed under this head, for as a general rule it cannot be excepted to without the special leave of the Court. This special leave is to be obtained by means of a petition setting forth the grounds of complaint, and also stating the particular charges which are alleged to be erroneous.

[1] Exceptions to a Master's report are proper only in those cases in which he has come to a wrong conclusion upon the matters which were referred to him to ascertain or decide. Where he proceeds irregularly, or neglects to report upon the matters referred to him, the proper course for the aggrieved party is to apply to the Court to set aside the report, or to refer it back to the Master, to perfect the same. Tyler *v.* Simmons, 6 Paige, 127; see Herrick *v.* Belknap, 27 Vt. 695, 696; [Douglass *v.* Merceles, 9 C. E. Green, 25. A report can only be made in pursuance of authority and upon notice. A report without notice is a nullity, and will be so treated, on appeal, although no exceptions are filed. State *v.* Hyde, 4 Baxt. 464. But see, where exceptions were filed, but not for want of notice. Galloway *v.* Perry, 2 Baxt. 328.] Where the Master takes the accounts or performs the duty assigned him by the decree appointing him, no exception can be taken to his report on the ground that the proceedings ordered by the decree have been uselessly expensive. If the decree is wrong, it must be reformed by the Court; but as long as it stands it is imperative on the Master. Updike *v.* Doyle, 7 R. I. 446, 458. [*Ante*, 1296, n. 4.] A Master's report cannot be excepted to for irrelevancy or impertinence. Tyler *v.* Simmons, *supra*. Exceptions should not be prolix or argumentative, but should state concisely the fault imputed to the report. Booth *v.* Penser, 1 Irish Eq. 34; see Vereker *v.* Gort, *ib.* 175. An exception to a Master's report need not be as full and specific as a special demurrer. Foster *v.* Goddard, 1 Black U. S. 506. It is enough that it distinctly points out the finding and conclusion which it seeks to reverse; that being done, it brings up for examination all questions of fact and law on the report relative to that subject. *Ibid.* [*Infra*, 1316, n. 4.]

[2] Empringham *v.* Short, 11 Sim. 78.

[3] Ottey *v.* Pensam, 1 Hare, 322; Russell *v.* Buchanan, 9 Sim. 167. Exceptions may, however, be taken to the Master's report of the sufficiency of an answer. The report of a Master upon the accounts of receivers requires confirmation, and may be excepted to. Richards *v.* The Morris Canal, &c. Co., 3 Green Ch. 428. [But see, as to exceptions to the Master's report of the accounts of a receiver, Cowdrey *v.* Railroad Co., 1 Woods, 331.]

[4] Kemp *v.* Wade, 2 Keen, 687; Jones *v.* Powell, 1 Sim. 387; and see Beavan *v.* Burgess, 10 Jur. 63, V. C. E.

When the petition comes before the Court, if the grounds of complaint appear to be sufficient, it is usual for the Court itself to examine and decide upon the items, but this is not an universal course of proceeding, it being quite open to the Court to give the leave which is asked to file exceptions, and to leave those exceptions to the ordinary course of inquiry and determination.[1]

Again, with respect to those reports which are made in consequence of interlocutory applications, and confirmed absolutely by motion or petition, they can only be objected to at the hearing of the petition to confirm them, or upon a petition presented for the express purpose of having it referred back to the Master to review his report. Such a petition is in the nature of exceptions to the report, and Sir J. Wigram V. C., in the case of *Ottey* v. *Pensam*,[2] has decided that the same rule prevails with respect to such a petition as prevails in the case of ordinary exceptions to the Master's report; namely, that no party can present such a petition unless he has previously carried in objections to the draft of the report.

Lastly, as to all reports made under decrees, and which are confirmed by orders *nisi* and absolute, any party who is interested in the motion, and who has previously carried objections into the Master's office, may file exceptions to them, and thereby subject them to the review of the Court.[3]

Where the Master, by his report, states all the facts correctly, but is mistaken as to the legal consequences of those facts, it is not necessary for the party dissatisfied with the Master's finding, to except to the report, as the question decided by the Master may be opened upon further directions without exceptions.[4] So where facts are so clearly stated in a report as necessarily to involve a particular conse-
*1311 quence, it is for the Court to act upon the * facts so reported, and it will not be a proper ground of exception that the Master has omitted to point out the consequence.[1]

With respect to the class of reports which require confirmation, it is to be observed, that though the rule is generally very strictly adhered to, of not permitting exceptions to be filed where there have been no previous objections;[2] there are, nevertheless, cases in which the Court

[1] *In re* Congreve, 4 Beav. 88; Pitt *v.* Mackreth, 3 Bro. C. C. 321; and see Lucas *v.* Temple, 9 Ves. 399; overruling a distinction taken in Holbecke *v.* Sylvester, 6 Ves. 417; see also, Purcell *v.* M'Namara, 12 Ves. 170; Fenton *v.* Crickett, 3 Mad. 496. — N. B. The petition usually prays that the party presenting it may be at liberty to except, Pitt *v.* Mackreth, *ubi supra*; and the Court, upon hearing the petition, usually refers it to the Master to review his report, without imposing upon the applicant the necessity of filing exceptions. See Richards *v.* The Morris Canal, &c. Co., 3 Green Ch. 428.

[2] 1 Hare, 322.

[3] [Hauser *v.* Roth, 37 Ind. 89.]

[4] Adams *v.* Claxton, 6 Ves. 226; *post*, 1314, note; see Branger *v.* Chevalier, 9 Cal. 353.

[1] Bick *v.* Motly, 2 M. & K. 312.

[2] By the English practice, exceptions to the accounts of a Receiver as stated by a Master, should be taken before the Master while the account is in his possession, and before he makes his report. This practice has been generally acted on in New Jersey; and it is said to be beneficial, and one that might be safely pursued in all ordinary cases. But there has been no actual recognition of the rule, except in cases where a draft of the account was served, and the party omitted to make any exceptions or suggest any alterations to the Master. Mechanics' Bank of Phil. *v.* Bank of New Brunswick, 2 Green Ch. 437.

will permit a departure from it. Thus, if it has been owing to accident or surprise that the objections have not been carried in, as where the clerk in Court omitted to give the solicitor notice of the warrant to sign the report, the Court permitted exceptions to be filed.[3] So where the solicitor swore, by his affidavit, that he had neglected to carry in objections, because he was not aware that it was necessary to take objections to the report in the draft, in order to enable him, on behalf of his clients, to file exceptions, an order to permit his filing exceptions was made, although the Master's report had been confirmed *nisi*.[4] In *Vallence* v. *Weldon*,[5] upon an application to take exceptions to a report, although no objections had been carried in to the draft, Sir Thomas Clarke M. R. referred it to the Master to review his report, in order that the parties might have an opportunity of taking exceptions to it.[6]

All parties to the record who are interested in the matter in question may take exceptions to the report, and where there are several sets of parties, appearing by different solicitors, they may, if they are not disposed to join, each take exceptions, although their grounds of exception are the same.[7] Creditors, too, who have established their claims before the Master, are permitted to except to the report, although not parties to the suit;[8] so, also, are creditors who have preferred their claims, but have been rejected by the Master;[9] it is necessary, however, before they do so, that they should obtain the permission of the Court, which they may do upon motion of course, or petition at the Rolls.[10]

* The same thing may be done by persons claiming as next of *1312 kin, whose claims have been disallowed by the Master,[1] or by a purchaser under a decree for sale in the Master's office.[2]

But although in the case of persons claiming as creditors, or as next of kin, or of purchasers, liberty to except to the Master's report may be granted, upon petition or motion of course, the case is not so with respect to persons who, whether parties to the suit or claimants under the decree, have omitted to carry in objections to the draft;[3] such per-

[3] Bowker *v.* Nickson, 3 Mad. 439; see Foote *v.* Van Ranst, 1 Hill Ch. 185; Potts *v.* Trotter, 2 Dev. Ch. 281.

[4] Pennington *v.* Lord Muncaster, 1 Mad. 155.

[5] 1 Dick. 290; 1 Mad. 340, *notis*, S. C.; see also Wood *v.* Lambirth, 9 Sim. 195.

[6] Exceptions to a report upon reference to take an account are unnecessary when the Master assigns unsatisfactory reasons for his conclusions. Hooks *v.* Sellers, Dev. Eq. 61.

[7] Trezevant *v.* Fraser, MS., 11th Jan. 1836. [An exception may be taken by the party upon whose statement the item was allowed, even where the statement was on oath, but only on the clearest evidence of mistake. Marlatt *v.* Smith, 8 C. E. Green, 56.]

[8] Wilson *v.* Wilson, 2 Moll. 328.

[9] See Mechanics' Bank of Phil. *v.* Bank of New Brunswick, 2 Green Ch. 437.

[10] Notice should be given of an application on behalf of the creditors for leave to file exceptions to the Master's report. An order for leave to file exceptions, made without notice, was discharged, in Richards *v.* The Morris Canal, &c. Co., 3 Green Ch. (N. J.) 428; see Mechanics' Bank of Phil. *v.* Bank of New Brunswick, *supra*.

[1] Walker *v.* Wingfield, Reg. Lib., 1809, B. fo. 10, cited *ibid.*

[2] Ker *v.* Cloberry, Reg. Lib., 1812, A., 734, cited *ibid.*

[3] Under the present English practice of proceedings in the Judges' Chambers, after the certificate of the Chief Clerk has been signed and adopted by the Judge, and filed, it is, unless discharged or varied, binding on all the parties to the proceedings; and it cannot be objected to by any person who has not duly applied to have it varied or discharged. 15 & 16 Vic. c. 80, § 34; Smith *v.* Armstrong,

sons, if they wish for the indulgence of the Court, must obtain it by means of a special application, supported by affidavit, accounting for their omission in not complying with the rules of the Court;[4] and, from what occurred in *Vallence* v. *Weldon*,[5] it may be collected, that such application should be made by motion and not by petition.

It may be mentioned here, that in *Taylor* v. *D'Egville*,[6] it was held by the V. C. of England that persons who were not parties to the suit, but who had obtained leave to attend the proceedings in the Master's office, could not except to the report, unless they presented their petition stating their objections, and praying for leave to except.

Exceptions to a Master's report should not be taken till the report has been filed;[7] afterwards, where the report is one which does not require confirmation, no time should be lost in filing them, and serving the order to set them down, before any step is taken upon the report; otherwise the excepting party may be precluded from the benefit of his exceptions; thus, in cases of exceptions to reports on the insufficiency of answers, care should be taken to file the exceptions to the Master's report and to get the exceptions set down with the usual formalities, before a *subpœna* has been issued for costs, or before the defendant puts in a further answer.[8]

*1313 * In the case of *Holmes* v. *The Corporation of Arundel*,[1] it was decided that by taking proceedings in the Master's office to expunge matters reported by the Master to be impertinent, a party adopts the report altogether, and cannot afterwards, unless by the special leave of the Court, except to it.

In the case of exceptions to a Master's report on impertinence, the exceptions ought to be filed, and the order to set them down served, before the impertinent matter has been expunged. In like manner, in all cases where the report of the Master is to serve as the foundation for a Sergeant-at-arms, or for a commitment, or other process of contempt, the exceptions to the Master's report should be filed, and the order for setting them down served, before the order *nisi* for issuing the process, has been made absolute; as, after an order *nisi* for a Sergeant-at-arms, or for a commitment or other process, has been made absolute, the party against whom it has been issued being in contempt, will not be in a situation to obtain an order for setting down the exceptions; or,

6 De G., M. & G. 150, 153, 154; Howell *v.* Keightley, 8 De G., M. & G. 325; 2 Jur. N. S. 455; Jaquet *v.* Jaquet, 7 W. R. 543, M. R.; Lambe *v.* Orton, 6 Jur. N. S. 61; S. C. *nom.* Lamb *v.* Orton, 8 W. R. 111, V. C. K.; Aspinwall *v.* Bourne, 29 Beav. 462; Leigh *v.* Turner, 14 W. R. 361, M. R.

4 See Potts *v.* Trotter, 2 Dev. Ch. 281.

5 1 Dick. 290; Amb. 126, S. C.

6 7 Sim. 445. [See *infra*, 1517.]

7 2 Smith, 390, 3d ed. In the United States Courts the parties have one month from the time of filing the report, to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the Court, if the Court is then in session, or if not, then at the next sitting of the Court which shall be held thereafter by adjournment or otherwise. Equity Rule, 83.

8 There is no precise time for filing exceptions to the report of a Master on the insufficiency of the answer, as it does not require confirmation. Myers *v.* Bradford, 4 John. Ch. 434.

1 3 Beav. 303.

if he does obtain such an order, will be liable to have it discharged. It is to be recollected that the rule which has been before laid down,[2] with regard to those exceptions to a Master's report which requires confirmation, applies equally to exceptions to reports which do not require it; and that the only effectual way, in the latter case, as well as in the former, to render exceptions available to suspend further proceedings upon the report, is, not only to file the exceptions and pay the deposit, but to obtain an order to set them down, and serve such order upon the other party, it being by means of such service only that the fact of the exceptions having been filed, is regularly brought to the knowledge of the party procuring the report.[3]

With respect to exceptions to reports that require confirmation, the proper time for filing exceptions to them, is after service of the order for confirming them *nisi*, and before such order is made absolute; and it is to be recollected, that, even where the party who intends to except, is the person taking the report and having the conduct of the cause, it is right that he should, before filing his exceptions, obtain and serve the order for confirming the report *nisi*, and that his right to except will not be thereby prejudiced.[4]

But although the Court is, in general, very strict in requiring that parties intending to except to the Master's report should file their exceptions, and serve the order for setting them down, before * the *1314 report is made absolute,[1] and will even order exceptions filed afterwards to be taken off the file,[2] there are cases in which, under particular circumstances, it will relax from its rule, and permit exceptions to be filed after the report has been absolutely confirmed.[3]

The cases, however, where this has been done, are very rare, and the granting or not granting liberty to except after the report has been confirmed, is entirely discretionary in the Court.[4]

It may be mentioned here, that, in *Hawkins* v. *Day*,[5] an application was made to Lord Hardwicke, for liberty to the party to take exceptions to the Master's report notwithstanding another set of exceptions had been taken and disposed of upon argument, and the report confirmed. It appeared that there had been great neglect of the interest of the petitioners, who were the representatives of an accounting party and resided at Bristol, and employed a solicitor at Bristol, who again employed an agent in London to defend their cause, and that it was not

[2] *Ante*, p. 1309.

[3] See Stafford *v.* Rogers, 1 Hopk. 98.

[4] *Ante*, p. 1309.

[1] Plunkett *v.* Lewis, 12 Sim. 279.

[2] Sterling *v.* Thompson, Coop. 271.

[3] See Allen *v.* Allen, 1 Dick. 362; 1 Swanst. 157, n. S. C.; Hawkins *v.* Day, 1 Ves. 189; 1 Swanst. 158, S. C.; and Belt's Sup. to Ves. 106, S. C.; see also Montara *v.* Hall, L. J., Vol. IV. N. S. 53.

[4] See Earl of Bath *v.* Earl of Bradford, 2 Ves. 587; see Smith *v.* Smith, 4 John. Ch. 445; Slee *v.* Bloom, 7 John. Ch. 137. The Court has power to open the report of a Master after confirmation, to correct any manifest error therein: Cochran *v.* Lynch, 1 Bailey Ch. 514; although no objection was taken to it: Levert *v.* Redwood, 9 Porter (Ala.), 79; Hooks *v.* Sellers, 1 Dev. Ch. 61. A report which is objectionable on its face, may be objected to at the hearing, although no objection had previously been taken. White *v.* Johnson, 2 Munf. 235; [Morris *v.* Taylor, 8 C. E. Green, 132;] *ante*, 1310.

[5] 1 Ves. 189; see the report of the same case in 1 Swanst. 158, n.

until after the first exceptions had been heard and disposed of, that the applicants got a sight of the Master's report, and of such schedules thereto as related to the claim against them, and then found, to their very great surprise, many plain mistakes therein to their prejudice, which were not discovered or excepted to; under these circumstances, the Lord Chancellor was of opinion that it was reasonable that the petitioners should, upon certain conditions, which he prescribed, have liberty to re-argue the exceptions formerly taken to the Master's report, and to take new exceptions relating to the matters complained of in their petition, to come on to be argued at the same time. The result of this decision, however, was that, upon the counsel for the plaintiffs desiring, for the sake of despatch, to avoid such circuity and the delay and expense which would be occasioned thereby, his Lordship ordered that, upon the applicants giving their own recognizance, within a fortnight from that time, in the penalty of 2000*l.*, with a condition to pay such sum of money, if any, as should be found due from them, upon the balance of the account directed by the decree, to such parties to whom the same should be found due, together with interest for the same *1315 from that day, and paying to the plaintiffs such costs as * they had been put to by taking out the Master's last report, so far as the same related to the account of the personal estate, and the administration thereof, and the costs subsequent thereto, so far as related, &c., and the costs of that application to the Court, and within a week after the taxation or settling thereof; that the confirmation of the said report should be so far opened as related to the account of the said personal estate and administration thereof, and that it should be referred back to the Master to review that part of the said report.[1]

The form of exceptions to a Master's report is in all cases nearly the same; the nature of them in cases of insufficiency or impertinence, has been already pointed out, and the same rules are generally applicable to all exceptions to reports. It has been held that where one general exception is taken to a report including several distinct matters, and the report appears right in any one instance, the exception will be overruled.[2] But in *Hoare* v. *Johnstone*,[3] Lord Cottenham laid it down as clear, that an exception may be allowed in part, unless it was so specially framed as to prevent it.[4]

[1] See Belt's Sup. to Ves. 106, S. C.

[2] Hodges *v.* Salomons, 1 Cox, 249; and see Pearson *v.* Knapp, 1 M. & K. 312; Franklin *v.* Keeler, 4 Paige, 382; Noble *v.* Wilson, 1 Paige, 164; Chandler *v.* Pettit, 1 Paige, 427; O'Reilly *v.* Brady, 28 Ala. 530; Brantley *v.* Gunn, 29 Ala. 389; Ashmead *v.* Colby, 26 Conn. 287. The Court will not notice any exceptions to a Master's report, except those that point to the particular item or matter objected to. Foster *v.* Gressett, 29 Ala. 393; Royall *v.* McKenzie, 25 Ala. 363. So, where there is a general objection to the admission of evidence, a part of which is, and a part of which is not, admissible, but the inadmissible part is not pointed out, the report is not objectionable which shows that the whole was admitted. Ashmead *v.* Colby, 26 Conn. 287, 308, 309. [*Ante*, 1309, n. 1.]

[3] 4 M. & C. 127.

[4] Brantley *v.* Gunn, 29 Ala. 387. In exceptions to a Master's report, a general assignment of errors is insufficient, unless specific errors are shown. Dexter *v.* Arnold, 2 Sumner, 108; White *v.* Hampton, 10 Iowa, 238. Where a party excepts to an account which contains a number of items of charges, he must specify the specific charges of which he complains. He cannot, by a general exception, impose the burden upon the Court

It seems that formerly, the method of taking exceptions to the Master's report, upon a reference as to title, was generally "for that the Master had certified that the plaintiff could make a good title, whereas he ought to have certified that he could not make a good title," but that the present course is, to state the ground of objection to the title, in the exceptions. Such course, however, has only been adopted for convenience, so that if there is any substantial objection to the title which is not stated in the exception, * the party is not precluded *1316 from arguing it.[1] Where, however, an exception to a report not only states that the Master ought not to have reported as he has done, but suggests what he ought to have found, the Court, in allowing the exception, and referring it back to the Master, does not adopt the conclusion suggested in the exception, but leaves the whole subject of the reference to be considered by the Master, either upon the old evidence, or upon further evidence which may be brought before him.[2]

When the exceptions are taken, after objections have been carried in to the draft report and disallowed, the exceptions should be in conformity with the objections, and though different in form, they must be substantially the same.[3] The practice, generally, is to prepare the objections in the form of the intended exceptions, and to convert them afterwards into exceptions.[4]

Exceptions are usually prepared and must be signed by counsel.

It is to be recollected, that in order to render exceptions available to suspend the confirmation of the report,[5] or any proceeding upon a certificate,[6] the order for setting them down should be entered and served.

Every exception or set of exceptions taken to any report, made by a Master, in pursuance of a decree or order of reference (not being an

of examining every item in the account to detect the error. Halcomb *v.* Halcomb, 3 Stockt. 281. Regularly, when either party intends to object to the allowance of any item in the account taken and returned by the Master, he should file his exceptions to the Master's report, specifying the items objected to, and the grounds of objection. On hearing, it is not the duty of the Chancellor, to examine items not thus excepted to. Smalley *v.* Corliss, 37 Vt. 486, 492. "In this case," Poland C. J. observed, "no written exceptions were filed, but at the hearing before the Chancellor, each party excepted orally to such allowances as the Master had made which he was dissatisfied with, and all these exceptions were stated in the Chancellor's decree. The Chancellor was not bound to examine any items that were not thus excepted to, and on appeal from his decree, the hearing must have the same limitation." *Ibid.*; see Reed *v.* Jones, 15 Wis. 40.

[1] Abell *v.* Heathcote, 4 Bro. C. C. 278–283.

[2] Livesey *v.* Livesey, 10 Sim. 331; and see Twyford *v.* Traill, 3 M. & C. 645.

[3] Ballard *v.* White, 2 Hare, 158; *ante*, 1305, note.

[4] Exceptions are in the nature of special demurrers, and the party objecting must point out the error; otherwise the part not excepted to will be taken as admitted. Wilkes *v.* Rogers, 6 John. 566; Story *v.* Livingston, 13 Peters, 359; O'Reilly *v.* Brady, 28 Ala. 530; Smalley *v.* Corliss, 37 Vt. 486, 492; Foster *v.* Goddard, 1 Black U. S. 506; [Ridley *v.* Ridley, 1 Coldw. 323, 332; Goddard *v.* Cox, 1 Lea, 112; Stanton *v.* Ala. & Chat. R. Co., 2 Woods, 506. The report will be taken to be correct until error be shown. National Bank *v.* Sprague, 8 C. E. Green, 81.] Where several exceptions to an answer are allowed by the Master, and the defendant takes one general exception to the report, that exception will be overruled, if any of the exceptions to the answer are well taken. Candler *v.* Pettit, 1 Paige, 427; Franklin *v.* Keeler, 4 Paige, 382; Noble *v.* Wilson, 1 Paige, 164; Higbee *v.* Brown, 1 Barb. Ch. 320.

[5] *Ib.* 1310.

[6] *Ib.* 1314

order obtained as of course), made by the Lord Chancellor or a Vice-Chancellor, must be set down to be heard before the Lord Chancellor,[7] and shall not without special order of the Lord Chancellor, be set down to be heard before the Master of the Rolls;[8] and every exception, &c., taken to any report, made pursuant to a decree or order of reference (not being an order obtained as of course), made by the Master of the Rolls, must be set down to be heard before the Master of the Rolls, and shall not otherwise than for the purpose of rehearing, be set down to be heard before the Lord Chancellor.[9]

A plaintiff may set down exceptions to the report at the same time that he sets down the cause to be heard upon further directions.[10]

*1317 * When exceptions to a report have been set down, they are argued and disposed of in the manner already described;[1] it may be mentioned, however, that the counsel of all parties interested in the report, are allowed to be heard in support of the report, and against the allowance of the exceptions: but only the exceptant's counsel can be heard in support of the exceptions.[2] It may also be mentioned, that, upon hearing exceptions to a Master's report, you cannot read affidavits made subsequent to it,[3] or any evidence which was not before the Master when he made the report.[4] In *Ridifer* v.

7 5th Order of November, 1841.

8 6th Order of the 5th of May, 1837.

9 10th Order of the 5th of May, 1837.

10 Yeo *v.* Frere, 5 Ves. 424.

1 Upon the hearing of exceptions to the report, the party excepting must confine himself to the exceptions, and will not be allowed to go into a new case. The Court acting merely in revision of the report, cannot entertain an objection raised on an extrinsic ground. Kilbee *v.* Sneyd, 2 Molloy, 239; Pingree *v.* Coffin, 12 Gray, 288, 315.

2 2 Smith, 376; Jaquet *v.* Jaquet, 7 W. R. 543, M. R.

3 Davis *v.* Davis, 2 Atk. 21.

4 Fleming *v.* East, Kay Ap. 52; *Re* Hooper, Baylis *v.* Watkins, 9 Jur. N. S. 570, V. C. S.; and see Dawkins *v.* Morton, 10 W. R. 339, V. C. W.; *Re* Read, Pierce *v.* Hammond, 10 L. T. N. S. 261, V. C. S.; see White *v.* The Okisco Co., 3 Md. Ch. Dec. 214. Exceptions to the Master's report must be founded on the facts stated in the report, or in the accompanying documents and proofs. Dexter *v.* Arnold, 2 Sumner, 108; Harding *v.* Handy, 11 Wheat. 103; Rennell *v.* Kimball, 5 Allen, 356; White *v.* Hampton, 10 Iowa, 238, 243; [Dunnell *v.* Henderson, 8 C. E. Green, 175; Miller *v.* Howard, 11 C. E. Green, 166; Goddard *v.* Cox, 1 Lea, 112; Musgrove *v.* Lusk, 2 Tenn. Ch. 576].

Upon exceptions to the report of a Master, in which the evidence is not reported in detail, the Court will not revise his conclusions in matters of fact, nor recommit his report for the purpose of having the evidence reported upon which such conclusions were based, if no request to that effect was made before the Master. Sparhawk *v.* Wills, 5 Gray, 423. [See Dean *v.* Emerson, 102 Mass. 480; Drew *v.* Beard, 107 Mass. 64; Mason *v.* Daly, 117 Mass. 403. See also, as to the amendment by the Master of his report, Heywood *v.* Miner, 102 Mass. 466.] See Ashmead *v.* Colby, 26 Conn. 287; Holabird *v.* Burr, 17 Conn. 563. Where a matter of fact is urged against the acceptance of the report of a Master, but no evidence of it is presented to the Court, the decision of the presiding Judge in accepting the report, is not subject to exceptions; as that the Master had expressed feelings of hostility to the party objecting; or that he had made certain mistakes in estimating the damages. State *v.* McIntyre, 53 Maine, 214.

If the evidence is reported by the Master, it is competent for the Court to find the facts and make a decree thereon. McHenry *v.* Moore, 5 Cal. 90; Taylor *v.* Read, 4 Paige, 561; see Knapp *v.* White, 23 Conn. 529; Jackson *v.* Jackson, 2 Green Ch. 96.

Where numerous exceptions were taken to a Master's report, and the party excepting applied for an order on the Master to furnish *certified copies of the minutes and testimony* taken in the case before a former Master, since deceased, and before himself, as the same were in his possession, and of *all notes and memorandums* made upon the testimony by the Master, and all the vouchers produced in evidence before him, relative to the matters of charge and discharge in taking the account, the Court, on account of the difficulty of specifying the particular parts of the testimony wanted, granted the motion, with the condition, which was considered essential and sufficient to prevent abuse, that the expense of returning such parts of the testimony as should not be found necessary to support the

O'Brien,[5] where it was admitted, on the argument of the exceptions, that there was no sufficient evidence before the Master to warrant a different finding by the Master, but it was contended, that additional evidence, which had been since procured, was admissible to show that the report was incorrect; Sir J. Leach V. C. would not permit any argument upon the evidence which was not before the Master, and, on overruling the exception, refused to direct the Master to receive the additional evidence, but allowed the matter to go back to the Master, with an intimation, that, if he refused to receive the additional evidence,
* the exceptant might make a distinct motion that he should be *1318
ordered to receive it.[1]

Where it appears upon the hearing of the exceptions, that the excepting party did not lay a material piece of evidence before the Master, which he had then in his power, and that the error in the Master's report was owing to such omission, the Court will not direct the Master to review his report upon any other terms than the exceptant's giving up his deposit.[2]

The rule which precludes the reading of any evidence which was not before the Master, also precludes the reading of any parts of a defendant's answer, which were not read in the Master's office.[3]

It may be mentioned, that if a Master improperly rejects evidence which has been tendered to him, it should form a specific subject of exception to his report.[4]

It is to be observed, that it is not competent to the Court upon exceptions, to make an order which is not quite consistent with the original decree; from the time of the pronunciation of the decree, all the subsequent proceedings should be consistent with it, and if, upon argument of exceptions, it appears, that the justice of the case cannot be got at without an alteration of the decree, it must be reheard.[5]

If, upon argument, or upon default of the plaintiff,[6] the exceptions are overruled, the overruling of them has all the effect of confirming the report absolutely, and if the cause has been set down to be heard upon further directions, to come on at the same time with the hearing of the exceptions, the Court proceeds at once to hear the cause upon further directions.[7] So also, if the exceptions, or any of them, are allowed, but it is not necessary to refer the report back to the Master to be reviewed, the hearing of the cause upon further directions may be

exceptions, should, in any event, be paid by the party at whose request they were returned. Jacques *v.* Methodist Epis. Church, 2 John. Ch. 543.

[5] 3 Mad. 44.

[1] On an application to open a Master's report for the introduction of additional evidence, the party must show good reason why it was not offered before the Master. Whiteside *v.* Pulliam, 25 Ill. 285.

[2] Hedges *v.* Cardonnell, 2 Atk. 408; see Mitford *v.* Reynolds, 1 Phil. 706; Andrew *v.* Andrew, 13 Jur. 400, V. C. K. B.

[3] Rands *v.* Pushman, 6 Sim. 46.

[4] But see Ward *v.* Jewett, Walk. Ch. 45, where it was held that an improper rejection of testimony is to be corrected by a motion to the Court for an order compelling the Master to receive the evidence, and not by excepting to his report.

[5] Per Lord Eldon, in Brown *v.* De Tastet, Jac. 263; see also E. I. Company *v.* Keighley, 4 Mad. 16. [*Ante*, 1296, n. 4.]

[6] Rookes *v.* Rookes, 7 Jur. 1104.

[7] 2 Smith, 400, 3d ed.; [White *v.* Hampton, 10 Iowa, 238].

proceeded with, in the same manner as if the exceptions had been overruled.[8]

If the allowance of the exceptions, or any of them, renders it necessary to refer it back to the Master, an order is made referring
*1319 * it back to the Master to review his report, and the reservation of further directions and of the costs of the suit is continued until after the Master shall have made his report.[1]

The same rules which have already been laid down with regard to the deposit on and the costs of exceptions to Master's reports upon the insufficiency of answers, apply to the deposit on and costs of exceptions to the reports of Masters in general;[2] and it may be mentioned, that where there are several parties appearing by different solicitors, and each takes exceptions to the report, and the exceptions are allowed, the costs of all the excepting parties will in general be given to them, although the exceptions are in each case the same.[3] It should be recollected, that if the costs of exceptions to a report are not ordered to be costs in the cause, they cannot be allowed as such.[4]

It may be mentioned, in this place, that sometimes, upon the argument of exceptions, the Court will think it right, before it comes to a decision, upon the subject-matter of the exception, to send it back to the Master to supply some defect in his report,[5] or to make inquiry into some facts which may be necessary to enable the Court to come to a proper conclusion; in such cases, the Court usually adjourns the consideration of the exceptions, or of the particular exception in question, till after the Master shall have made the supplemental report. So, also, when the subject-matter of the exception is a fact depending upon conflicting evidence, the Court will frequently, before it decides upon the exception, direct an issue at law to try the disputed fact, reserving the decision upon the exception till after the trial.[6] In all such cases, the course of the Court is to postpone the consideration of the disposal of the deposit paid, upon filing the exceptions, and of the costs till the ultimate decision upon the exception.

[8] 2 Smith, 400, 3d ed. When a decree directing an account to be taken is a final decree, with no equity reserved, and where no further directions need be given consequent upon the Master's report, an error made by the Master can be corrected by the Court, without referring the account back to him for a restatement, or setting down the cause for a further hearing. Huston *v.* Cassidy, 1 McCarter (N. J.), 320.

[1] 2 Smith, 400, 3d ed.; and see Daubeney *v.* Coghlan, 12 Sim. 507. Upon the allowance of an exception to the Master's report, as to the amount of damages sustained, the Court can modify the report and settle the amount, without referring it back to the Master. Taylor *v.* Reed, 4 Paige, 561.

[2] As to the cost of persons excepting, who seek to establish claims, but are not parties to the suit, see *ante*, p. 1210; Stafford *v.* Rogers, 1 Hopk. 98.

[3] Trezevant *v.* Fraser, MSS., 12th Jan., 1836.

[4] 2 Smith, 383, and see Wilkins *v.* Stevens, 1 Y. & C. 436. In the United States Courts, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party, whose exceptions are overruled, shall for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs, — the costs to be fixed in each case by the Court, by a standing rule of the Circuit Court. Equity Rule, 84.

[5] See *Ex parte* Charter, 2 Cox, 168.

[6] Wilson *v.* Metcalfe, 3 Mad. 45; see also Gregg *v.* Taylor, 4 Russ. 279.

Review of Report.

Although the usual course by which a review of the Master's report is to be procured, is by taking exceptions to it, there are many cases in which the Court will direct the Master to review * his *1320 report without requiring exceptions to be taken;[1] or, if they are taken, will direct it to be reviewed upon grounds independent of those laid by the exceptions; and sometimes, as we have seen, the Court will direct a Master to review his report, in order to afford a party an opportunity for taking in objections to the draft, as a foundation for exceptions.[2]

A reference back to the Master, to review a report which has not been excepted to, may be made upon the hearing for further directions; and is frequently so made when the Court is not satisfied with the Master's finding, as where the Master has not found sufficient facts for the Court to found its judgment upon.[3] So, also, if the Master has exceeded his authority, it will either direct him to review his report or take no notice of his finding.

We have seen before, that where the report is the consequence of an order pronounced upon petition, or is upon the taxation of costs, the Court will, if the objections to the report are not apparent upon the face of it, entertain a petition to refer it to the Master to review his report.[4]

In some cases, also, the Court will direct a review of the Master's report, upon application by motion; thus, where there has been some omission or error in the report, which would prevent the matter being properly raised by exceptions, the Court has, upon motion, ordered the Master to review his report, as where, upon a reference of an examination for impertinence, the Master certified, generally, that the examination was impertinent, the Vice-Chancellor, on motion, referred it back to the Master to review his certificate, and state in what respects he considered the same impertinent.[5]

And, even where exceptions to the report have been heard and disposed of, the Court has, at the instance of a vendor, directed the Master to review his report, in order to give him an opportunity of

[1] Gibson *v.* Broadfoot, 3 Desaus. 586; Quintz *v.* Quintz, 2 Hayw. 182; Dutch Church at Freehold *v.* Smock, 1 Saxton (N. J.), 148; Honore *v.* Colmeshil, 1 J. J. Marsh. 510; White *v.* Johnson, 2 Munf. 285.

[2] Vallence *v.* Weldon, 1 Dick. 299. Where the order for confirming the Master's report is regular, the order will not afterwards be vacated, so as to allow the defendant to except to the report, when he purposely kept back his objections at the time, and did not state them before the Master, though he had full knowledge of all the facts which formed the grounds of his exception. Slee *v.* Bloom, 7 John. Ch. 137; see Pickett *v.* Hewlings, Halst. Dig. 174. Should the Master, however, make his report without giving the parties an opportunity to object to it, if they see proper, the Court would, immediately on an application for the purpose, order the report back to the Master to hear the objections. Pickett *v.* Hewlings, Halst. Dig. 174.

[3] Turner *v.* Turner, 1 Dick. 313; 1 Swanst. 156, n. S. C.

[4] *Ante*, p. 1308.

[5] Anon., 3 Mad. 246.

completing his title.[6] The Court has, also, as we have seen,[7] re-
*1321 ferred a report, as to title, back to the Master to be * reviewed, upon application, by motion, even after the report has been confirmed.[1]

In general, however, the Court is very cautious in admitting applications to review a Master's report after it has been confirmed; and it is only in cases of fraud, surprise, or mistake, that it will be permitted;[2] and, even then, it will not be allowed unless a very strong case is made.[3] And, it seems, that it is not competent to the Lord Chancellor to order the Master to review a report confirmed and followed by a decree of the Master of the Rolls, containing consequential directions, whilst that decree stands.[4] The proper course, in such case, would be to have the cause reheard; but, even then, the Court will not permit the report to be even discussed, unless a very strong case is made out to induce the Court to allow it.[5]

Amendment of Report.

It is to be noticed, that the proper course for correcting errors or supplying deficiencies in a report which has been confirmed, is by bill of review, yet errors, apparent in the schedules, have been corrected, even after enrolment, on a summary application, without a rehearing;[6] thus where, in taking an account in the Master's office, a mistake was made in the casting up of the schedules, and, upon the cause coming on upon further directions, the defendant was decreed to pay a sum, appearing by the schedules so cast up, to be due from him, and the plaintiff enrolled the decree, after which the mistake was discovered, Lord Eldon, upon an application to correct the error, said, that all errors apparent on the face of the schedules might be corrected, even after enrolment, but that there could be no correction except of such apparent errors. His Lordship accordingly permitted the mistakes in the schedules, which were apparent, to be corrected, but refused a subsequent

6 As to the cases in which the Court will send it back to the Master to review his report as to a title, see *ante*, p. 1218.

7 *Ibid.*

1 The commissioner's report on matters of account may be opened after confirmation, where the fund is still in the power of the Court, for the purpose of correcting an error originating in mistake or fraud. Cockran *v.* Lynch, 1 Bailey Eq. 514.

2 Drought *v.* Redford, 1 Moll. 573.

3 Turner *v.* Turner, 1 J. & W. 39; see Earl of Bath *v.* Earl of Bradford, 2 Ves. S. 587, 591; Jowett *v.* Broad, 16 Sim. 352. Where it appeared that the delay had been occasioned by accidental neglect, the Court gave leave to make the application to vary the certificate, though the time had expired. Ashton *v.* Wood, 8 De G., M. & G. 698; 3 Jur. N. S. 146.

4 Turner *v.* Turner, 1 Swanst. 154.

5 Turner *v.* Turner, 1 J. & W. 42. Where a matter of fact, depending on conflicting testimony, and the credibility of witnesses, has been referred to a Master, his decision will not be interfered with, on his mere judgment of facts, unless it is a very plain case of error or mistake. Izard *v.* Bodine, 1 Stockt. (N. J.) 309; Sinnickson *v.* Bruere, 1 Stockt. (N. J.) 659; [Haulenbeck *v.* Cronkright, 8 C. E. Green, 408. *Ante*, 1298, n. 5.] Or unless there be some abuse of authority on the part of the Master; and the burden is on the excepting party to establish the mistake or misconduct alleged. Howe *v.* Russell, 36 Maine, 115, 127; Da Costa *v.* Da Costa, 3 P. Wms. 140 note; McDougald *v.* Dougherty, 11 Geo. 570. [So of the report of a special commissioner. Dean *v.* Emerson, 102 Mass. 480.]

6 Weston *v.* Haggerston, 9 Coop. 134; Cradock *v.* Owen, 1 Sm. & G. 241; and see Richardson *v.* Ward, 13 Beav. 110; Ellis *v.* Maxwell, *ib.* 287.

* application by the plaintiff, in the same case, to have some *1322 further sums, which he claimed, inserted in the schedules.[1]

Section II. — *Proceedings in the Judges' Chambers.*

General Course of Proceeding at Chambers.

Formerly, it was the practice, in every suit of any degree of complication, to refer to one of the Masters in Ordinary of the Court, either inquiries to be investigated, or directions to be carried into effect. The form of these references, and the circumstances under which they were made, constituted a most material part of the general practice of the Court. The Masters exercised an almost independent jurisdiction in carrying out the references. No communication took place between the Master prosecuting a reference and the Judge who directed it; but the Master completed the duty delegated to him, and then drew up a report: stating the result of his inquiries, and what he had done in obedience to the decree.[2] After this report was made, the cause came again before the Court for a final settlement; and a decree was made, based upon the decisions and investigations of the Master. The parties might, however, by excepting to the report, appeal to the Court against the decision of the Master, and re-open all the questions that had been decided.[3]

The office of Master in Ordinary is now abolished;[4] and all or any of the powers, authorities, and jurisdiction given to the Masters in Ordinary by any Act or Acts in force on the first day of Michaelmas Term, 1852, may be exercised by the Master of the Rolls and Vice-Chancellors respectively;[5] and all powers and authorities which, on the 30th June, 1852,[6] were exercisable by the Masters in Ordinary, under or by virtue of any general order or orders of the Court, may be exercised by those Judges respectively in Chambers.[7]

The Master of the Rolls and the Vice-Chancellors for the time being are empowered and required to sit at Chambers, at such times as may be fixed by them respectively, for the despatch of such part of the business of the Court as can, without detriment to the public advantage, arising from the discussion of questions * in open Court, *1323 be heard in Chambers;[1] and the Chamber business of each Judge is to be carried on in conjunction with his Court business.[2]

[1] See White *v.* Johnson, 2 Munf. 284; Hatchett *v.* Cremorne, Sausse & S. 675; Miller *v.* Rushforth, 3 Green Ch. 174; Howe *v.* Russell, 36 Maine, 115, 127; 2 Mad. Ch. Pr. 507; Mason *v.* Crosby, 3 Wood. & M. 258; [Cary *v.* Herrin, 62 Me. 19; Gardner *v.* Field, 5 Gray, 600; 15 Gray, 351.]

[2] As to the duties of the Masters in Ordinary, see 1st Rep. Chan. Com. (1852) p. 26 *et seq.* As to the Masters Extraordinary, see 16 & 17 Vic. c. 78, § 1.

[3] [The right of the Court to supervise and control the conduct of the Master is conceded, while the Court declined to depart from the usual course, in Union Sugar Ref. *v.* Mathiesson, 3 Cliff. 146, where Mr. Justice Clifford discusses the proper practice.]

[4] 15 & 16 Vic. c. 80, § 1; Ord. 23 Aug., 1860; 23 & 24 Vic. c. 149, § 1.

[5] 15 & 16 Vic. c. 80, § 36.

[6] The date when the 15 & 16 Vic. c. 80 was passed.

[7] See Ord. XXXV. 61.

[1] 16 & 17 Vic. c. 80, § 11.

[2] *Ib.* § 12.

The Judges when sitting in Chambers, have the same power and jurisdiction, in respect of the business to be brought before them, as if they were respectively sitting in open Court;[3] and may, as we have just seen, exercise all the powers, authorities, and jurisdiction given to or formerly exercisable by the Master in Ordinary;[4] and the power of the Court, and of the Judge in Chambers, to enlarge or abridge the time for doing any act or taking any proceeding and to give any special direction as to the course or proceeding in any cause or matter, is not affected by the general order;[5] by which the procedure in Chambers is principally regulated.[6]

The Judge may also, when sitting in open Court, adjourn for consideration in Chambers any matter which, in his opinion, may be more conveniently disposed of in Chambers: or, when sitting in Chambers, may direct any matter to be heard in open Court, which he may think ought to be so heard.[7]

All orders made by the Judge at Chambers have the force and effect of orders of the Court of Chancery, and may be signed and enrolled in like manner.[8]

The business to be disposed of by the Judges at Chambers is directed, by the Act of Parliament which abolishes the office of Master in Ordinary, to consist of such of the following matters as the Judge shall from time to time think may be more conveniently disposed of in Chambers than in open Court, namely: Applications for time to plead, answer, or demur; for leave to amend bill; for enlarging the time for closing evidence; for the production of documents; relating to the conduct of suits or matters; and as to the guardianship and maintenance of infants; matters connected with the management of property; and such other matters as each such Judge may from time to time see fit, or as may from time to time be directed by any general order of the Lord Chancellor.[9]

These directions were held not to authorize applications to be made at Chambers in cases where the Court is empowered by statute to make orders, in respect of the disposition of trust funds, and other matters under its jurisdiction, upon petition presented, on a motion made in a *1324 summary way without bill;[10] and it was * subsequently enacted, that the business to be disposed of by the Master of the Rolls and the Vice-Chancellors, respectively, while sitting at Chambers, should comprise such of the matters in respect of which the Court was so empowered to make orders in a summary way as the Lord Chancel-

[3] *Ib.* § 13.
[4] *Ante*, p. 1060.
[5] Ord. XXXV.
[6] Ord. XXXV. 62.
[7] 15 & 16 Vic. c. 80, § 27.
[8] *Ib.* § 15. For the practice as to enrolling decrees and orders, see *ante*, p. 1018 *et seq.* [For a definition of "at Chambers" see Commonwealth *v.* McLaughlin, 122 Mass. 449.]
[9] 15 & 16 Vic. c. 80, § 26.
[10] *Re* Hodges, 4 De G., M. & G. 491, 493; *Re* Rye, 1 Jur. N. S. 222, V. C. K.; and see 9 Hare Ap. 83; Harrison *v.* Masselin, 15 Jur. 1073, V. C. P.; *Ex parte* Incumbent of Guilden Sutton, 8 De G., M. & G. 380; 2 Jur. N. S. 793.

lor, with the advice and assistance of those Judges, or any two of them, might by general order direct.[1] Under the authority of the last-mentioned enactment, and of the statute 15 & 16 Vic. c. 80, it is provided by general order,[2] that the business to be disposed of by the Judges, while sitting in Chambers, shall comprise the following additional matters, that is to say: (1.) Applications for payment to any person of the dividends or interest of any stocks, funds, or securities standing to the credit of any cause or matter depending to the separate account of such person; (2.) Applications under section 32 of the Legacy Duty Act,[3] in all cases where the sum paid into the bank, or the stock transferred into the name of the Accountant-General, under such section, does not exceed 300*l.* cash, or 300*l.* stock; (3) Applications under the Trustee Relief Acts,[4] in all cases where the trust fund does not exceed 300*l.* cash, or 300*l.* stock; (4.) Applications under the Trustee Acts,[5] in all cases where any decree or order has been made by the Court for the sale or conveyance of any lands, manors, messuages, tenements, or hereditaments, corporeal or incorporeal, of any tenure or description, whatever may be the estate or interest therein; (5.) Applications on behalf of infants, under sections 12, 16, and 17 of the Property Law Amendment Act,[6] in all cases where the infant is a ward of the Court, or the administration of the estate of the infant, or the maintenance of the infant, is under the direction of the Court.

By various statutes, passed since 1852, express jurisdiction has been conferred on the Judges at Chambers in several other matters; and the Judges, acting on the general authority given to them by the Masters' Abolition Act,[7] have from time to time enlarged the class of matters to be dealt with at Chambers. Many of these matters have already been referred to; others will be noticed in future pages; and in the Appendices to this volume will be found a list of matters entertained at Chambers, according to the present practice; and also lists of applications which may be made by motion of course, or by petition of course at the Rolls.[8] It is hoped * that, by the aid of these lists, the *1325 practitioner will be able readily to ascertain in what manner any given application must be made.

The business transacted consists of: Interlocutory applications; Proceedings originating in Chambers; Proceedings under decrees and orders; and Proceedings on adjournments to Chambers. The proceedings on interlocutory applications are described in the various parts of this work where such applications are specially treated of; it is not

[1] 18 & 19 Vic. c. 134, § 16.

[2] Ord. XXXV. 1; and see Ord. 12 Nov., 1856, 2 Jur. N. S. Pt. 2, pp. 475, 476, abrogated by Prel. Ord. 1.

[3] 36 Geo. III. c. 52: see *post*, Chap. XLV., *Statutory Jurisdiction* (*Legacy Duty Act*).

[4] 10 & 11 Vic. c. 96; 12 & 13 Vic. c. 74; see *post*, Chap. XLV., *Statutory Jurisdiction* (*Trustee Relief Acts*).

[5] 13 & 14 Vic. c. 60; 15 & 16 Vic. c. 55; see *post*, § 3; and Chap. XLV., *Statutory Jurisdiction* (*Trustee Acts*).

[6] 11 Geo. IV. & 1 Will. IV. c. 65; and see *post*, Chap. XLV., *Statutory Jurisdiction* (*Property Law Amendment Act*).

[7] 15 & 16 Vic. c. 80, § 26.

[8] See *post*, Appendices I., II., III.

therefore intended to describe them in this chapter: in which will be considered: 1. The general course of proceeding at Chambers; 2. Proceedings originating at Chambers, except those which will be subsequently mentioned in the chapter on the statutory jurisdiction of the Court;[1] 3. Proceedings under decrees and orders; 4. Proceedings on adjournments to Chambers; 5. Proceedings relating to infants; and 6. The Chief Clerk's certificate of the result of the proceedings.

The Master of the Rolls and each of the Vice-Chancellors has two Chief Clerks attached to his Court for the purpose of assisting in the general business of his Court, and the causes and matters belonging thereto; and on any vacancy in such office of Chief Clerk, the Judge may supply such vacancy;[2] but no person can be appointed a Chief Clerk unless he has been Chief Clerk to one of the Masters in Ordinary, or has been admitted on the roll of solicitors or attorneys in one of the Courts at Westminster Hall, and practised as such solicitor or attorney for the period of ten years at least immediately preceding his appointment.[3] Every Chief Clerk holds his office during his good behavior, and so long as he personally gives his attendance upon his duties, and conducts himself honestly and faithfully in the execution of the duties of his office; but he may be removed by the Lord Chancellor, with the concurrence of the Master of the Rolls and the Vice-Chancellors, or any two of them, for any cause which they may think sufficient.[4]

Each Judge has also attached to his Chambers four Junior Clerks,[5] two to each Chief Clerk; and he may, on any vacancy in such office, supply the same; and every Junior Clerk holds his office at the pleasure of the Judge to whose Court he is attached.[6]

*1326 * There are also attached to the Chambers of each Judge, two assistant clerks, appointed by the Lord Chancellor,[1] one to each Chief Clerk.

Every solicitor or attorney who may be appointed to and accept the office of Chief or Junior Clerk, ceases to be an attorney or solicitor, and must forthwith procure himself to be struck off the roll.[2]

The Chief Clerks and Junior Clerks are under the control of the Judge to whose Court they are attached: and must attend at such

[1] See *post*, Chap. XLV., *Statutory Jurisdiction*.

[2] 15 & 16 Vic. c. 80, § 16. There is a third Chief Clerk at present attached to the Chambers of the Master of the Rolls, by 27 & 28 Vic. c. 15, § 1; but the Lord Chancellor, with the concurrence of the Judge to whom he may for the time being be attached, may transfer from time to time such Chief Clerk and his Junior and Assistant Clerks to any other Judge of the Court, during such time as he thinks fit: *ib.* § 2; and in case a new Judge is appointed, they are to be transferred to and become his clerks. § 3.

[3] 15 & 16 Vic. c. 80, § 17.

[4] 15 & 16 Vic. c. 80, §§ 21, 25. [The Chief Clerk does not have the power of former Master, 3 De G. F. & J. 199.]

[5] The Master of the Rolls has two extra Junior Clerks. See 27 & 28 Vic. c. 15, § 1.

[6] 15 & 16 Vic. c. 80, §§ 18, 22; 18 & 19 Vic. c. 134, § 1. As to the salaries and pensions of the Chief and Junior Clerks, see 15 & 16 Vic. c. 80, §§ 44, 45; 15 & 16 Vic. c. 87, §§ 46–48; 18 & 19 Vic. c. 134, §§ 2–4, 14; 23 & 24 Vic. c. 149, §§ 12, 14; 27 & 28 Vic. c. 15, § 4.

[1] Under 3 & 4 Vic. c. 94, § 2; as to their salaries, see *ib.* § 3. A third assistant clerk, appointed under the 27 & 28 Vic. c. 15, § 1, is at present attached to the Chambers of the Master of the Rolls; but may be transferred as before mentioned. *Ante*, p. 1063, n. (*b*); as to his salary, see *ib.* § 5.

[2] 15 & 16 Vic. c. 80, § 20; 18 & 19 Vic. c. 134, § 2; 27 & 28 Vic. c. 15, § 4.

places, during such times, and for such hours in each day, and perform such duties as such Judge shall from time to time direct.[3]

The Chief Clerks are required, from time to time to meet, and consider such orders, rules, or regulations as may appear to them, or the majority of them, calculated to expedite and facilitate the satisfactory transaction of the business of the suitors in the Judges' Chambers, and report such orders, rules, or regulations to the Judges: to the intent that, if they approve the same, they may authorize the Chief Clerks to submit the same to the Lord Chancellor: to the end that, if the same be approved by him, proper steps may be taken for such orders, rules, or regulations being adopted and duly made general orders, rules, or regulations of the Court.[4]

Each Judge has the sole power (subject to any rules which may be made by the Lord Chancellor, with the advice and assistance of the Judges or any two of them), to order what matters and things shall be investigated by and before his Chief Clerks, either with or without his direction, during their progress, and what matters and things shall be heard and investigated by himself; and particularly, if so directed by the Judge, the Chief Clerks are to take accounts, and make such inquiries as were usually prosecuted before the Chief Clerks of the Masters; and in every or any such account or inquiry, the Judge is to give such aid and directions as he may think proper.[5]

Each Chief Clerk has, for the purpose of any proceedings directed to be taken before him, full power to issue advertisements, to summon parties and witnesses, to administer oaths, to take affidavits and acknowledgments, other than acknowledgments by married women, to receive affirmations, and, when so directed by the Judge, to examine parties and witnesses either upon interrogatories * or *1327 *viva voce*, as the Judge shall direct.[1] Parties and witnesses so summoned are bound to attend in pursuance of any such summons, and are liable to process of contempt, in like manner as parties or witnesses are liable thereto in case of disobedience to any order of the Court, or in case of default in attendance, in pursuance of any order of the Court, or of any writ of *subpœna ad testificandum*; and all persons swearing or affirming before any such Chief Clerk are liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing or affirming contained therein, as if the matters sworn or affirmed had been sworn and affirmed before any person by law authorized to administer oaths, to take affidavits, and to receive affirmations.[2] The Chief Clerk has not, however, power to commit any per-

[3] 15 & 16 Vic. c. 80, § 23; 18 & 19 Vic. c. 134, § 2; 27 & 28 Vic. c. 15, § 4; as to the assistant clerk at the Rolls, see *ib.* § 5.

[4] Ord. I. 34.

[5] 15 & 16 Vic. c. 80, § 29; as to the duties of the Chief Clerks of the Masters, see 1st Rep. Chan. Com. (1852) p. 28.

[1] 15 & 16 Vic. c. 80, § 30. A fee of 20*s.* in a higher scale cause is payable, by a fee-fund stamp, for each advertisement, but no fee if on the lower scale; and 1*s.* and 6*d.*, by each scale, for every oath, affirmation, declaration, or attestation upon honor. Regul. to Ord. Sched. 4; and *post*, Vol. III.

[2] 15 & 16 Vic. c. 80, § 31.

son; and, therefore, where a witness answers in an unsatisfactory manner before the Chief Clerk, the proper course is to apply to the Judge to examine him: as he may order the witness to be committed at once.[3]

In practice, the Judges have ordered that all their chamber business, with very few exceptions, shall be, in the first instance, heard before their Chief Clerks. The Chief Clerk is, however, merely the deputy of the Judge, and every suitor is entitled to have his case heard before the Judge in person, if he so determines.[4] He is also at liberty, either during the proceedings before the Chief Clerk, or within the time limited by the General Orders after their conclusion, and before his certificate has been signed and adopted, to take the opinion of the Judge upon any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceeding, when it is brought by the Chief Clerk to a conclusion.[5] Where the proceeding is pending before the Chief Clerk, the hearing before the Judge, whether in Court or in Chambers, is merely a continuation of the hearing begun before the Chief Clerk;[6] and the costs of an adjournment from Chambers to the Court follow the costs in Chambers.[7]

*1328 * It is in the discretion of the Judge to hear matters in Chambers, or adjourn them into Court.[1]

The directions of the Judge, for or touching any proceedings before his Chief Clerk, do not require any particular form; but the result is stated in the shape of a short certificate to the Judge, and not embodied in a formal report: unless in any case the Judge sees fit so to direct; and when the Judge approves of such certificate or report, he signs the same in testimony of his adopting the same.[2]

When the certificate or report of the Chief Clerk has been signed and adopted by the Judge, it is filed in the Report office; and is thenceforth binding on all parties to the proceedings, unless it is discharged or varied in the manner subsequently stated.[3]

The opinion of any of the conveyancing counsel of the Court[4] may be received and acted upon by the Court, or by the Judge at Chambers, in all cases where, formerly, it was usual for a Master in Ordinary to

[3] Hayward *v.* Hayward, Kay Ap. 31; S. C. *nom.* Hayward *v.* Price, 2 Eq. Rep. 436.

[4] *Re* Agriculturist Cattle Insurance Company, 3 De G., F. & J. 194; 7 Jur. N. S. 590; Wadham *v.* Rigg, 2 Dr. & S. 78, 80; 8 Jur. N. S. 206; *Re* London and County Assurance Company, 5 W. R. 794, V. C. K.; Dawkins *v.* Morton, 10 W. R. 339, V. C. W.; see also Saunders *v.* Walter, 9 Hare Ap. 5; 16 Jur. 1008; Hayward *v.* Hayward, Kay Ap. 31; S. C. *nom.* Hayward *v.* Price, 2 Eq. Rep. 436; Leeds *v.* Lewis, 3 Jur. N. S. 1290, V. C. K.; *Re* Mitchell, 9 Jur. N. S. 1272; 12 W. R. 39, V. C. K.

[5] 15 & 16 Vic. c. 80, § 33; and see *ib* § 29. As to an appeal in such case, see Rhodes *v.* Rhodes, L. R. 1 Ch. Ap. 483, L. JJ.

[6] Leeds *v.* Lewis, and *Re* Mitchell, *ubi sup.*

[7] *Re* Mitchell, *ubi sup.*

[1] *Re* Agriculturist Cattle Insurance Company, 11 W. R. 330, L. JJ.; *ib.* 386, L. C.

[2] 15 & 16 Vic. c. 80, § 32; see *post*, § 6, *The Certificate.*

[3] 15 & 16 Vic. c. 80, § 34; see *post*, § 6, *The Certificate.*

[4] These counsel, who are not to be less than six in number, are nominated by the Lord Chancellor, and must have practised as conveyancing counsel for ten years at least. 15 & 16 Vic. c. 80, § 41.

require or receive the opinion of conveyancing counsel for his aid and assistance in the investigation of the title to an estate, with a view to an investment of money in the purchase or on mortgage thereof, or with a view to a sale thereof, or in the settlement of a draft of a conveyance, mortgage, settlement, or other instrument, or otherwise, and in such other cases as the Lord Chancellor may direct by a general order.[5]

Any party may object to the opinion of any such counsel, if he deems it open to objection; and thereupon the point in dispute will be disposed of by the Court, or by the Judge at Chambers, according to the nature of the case.[6]

The Court or Judge at Chambers may, where it appears expedient, direct or transfer a reference to any one in particular of the conveyancing counsel.[7] Where no such special direction is given, the business to be referred to them is distributed among them, in rotation, by the first clerk to the Registrars for the time being, and, during his occasional or necessary absence, by the second clerk to the Registrars for the time being, and during the occasional or necessary absence of both such clerks, by one of the other clerks to the Registrars, nominated for that purpose by the Senior Registrar.[8] *The clerk making *1329 the distribution is responsible for the business being distributed according to a regular and just rotation, and in such manner as to keep the rotation or succession secret; and it is his duty to keep a record of the references, with proper indices, and to enter therein all the references, with the dates when they were made.[1]

When the Court, or a Judge at Chambers, directs any business to be referred to a conveyancing counsel, a short memorandum or minute of such direction is prepared and signed by the Registrar, if the same has been given in Court, or by the Judge's Chief Clerk if given in Chambers;[2] and the party prosecuting such direction, or his solicitor, must take such memorandum or minute to the Registrar's clerk whose duty it is to make the distribution; and the clerk adds at the foot thereof a note specifying the name of the conveyancing counsel in rotation to whom such business is to be referred; and the memorandum or minute must be left by the party prosecuting such direction or his solicitor with such conveyancing counsel, and is a sufficient authority for him to proceed with the business so referred.[3]

If the conveyancing counsel in rotation is, from illness or any other cause, unable, or declines, to accept the reference, it must be offered to

[5] 15 & 16 Vic. c. 80, § 40. The Court may, in its discretion, require the assistance of the conveyancing counsel, or act without it. Gibson *v.* Wollard, 5 De G., M. & G. 835; *Re* Jones, 1 Jur. N. S. 817; 3 W. R. 564, V. C. S.; Chamberlain *v.* Chamberlain, 1 Sm. & G. App. 28; and see Blaxland *v.* Blaxland, 9 Hare App. 68; and for a case where the opinion was required for the satisfaction of the Judge, see Yates *v.* Plumbe, 2 Sm. & G. 174.

[6] 15 & 16 Vic. c. 80, § 40.

[7] Ord. II. 5.

[8] Ord. II. 1.

[1] Ord. II. 2.

[2] For forms of memoranda, see Vol. III.

[3] Ord. II. 3. Where a reference is directed to a particular counsel, the minute need not be taken to the Registrar's clerk.

the other conveyancing counsel successively, according to their seniority at the bar, until accepted by some one of them.[4]

The allowances in respect of fees to the conveyancing counsel are regulated by the Taxing Master, subject to any appeal to the Judge to whose Court the cause or matter is attached: whose decision is final;[5] and where, in pursuance of any direction of the Court or a Judge in Chambers, drafts are settled by any of the conveyancing counsel of the Court, the expense of procuring such drafts to be previously or subsequently settled by other counsel, on behalf of the same parties on whose behalf such drafts are settled by the conveyancing counsel of the Court, will not be allowed on taxation, as between party and party, or as between solicitor and client: unless the Court or the Judge in Chambers otherwise directs.[6]

The Court, or any Judge thereof may, in such way as they may think fit, obtain the assistance of accountants, merchants, en-
*1330 gineers, *actuaries, or other scientific persons, the better to enable them to determine any matter at issue in any cause or proceeding, and may act upon the certificate of such persons;[1] and the allowances in respect to fees to such accountants, merchants, engineers, actuaries, and other scientific persons, are to be regulated by the Taxing Master of the Court, subject to an appeal to the Judge to whose Court the cause or matter is attached: whose decision is final.[2] Where the assistance of an accountant or other scientific person is desired, written instructions on which he is to act are usually prepared and transmitted to him by the Chief Clerk, with directions to furnish his report thereon to the latter; and such report is frequently required to be verified by the affidavit of the person employed.[3]

The report of an expert to whom a reference is made by the Court, although entitled to great weight as affording independent testimony, cannot be considered as an award, or in any other light than as furnishing materials for the information and guidance of the Court; and affidavits in opposition to such report may well be received.[4] It is irregular for the Chief Clerk to refer all the questions in the suit to an accountant, and to adopt his report as part of the certificate.[5]

[4] Ord. II. 4.

[5] 15 & 16 Vic. c. 80, § 43; Rumsey *v.* Rumsey, 21 Beav. 40; Morgan & Davey, 351.

[6] Ord. XL. 30. For a case where a portion of the fees of the other counsel was allowed, see *Re* Jones's Settled Estates, 4 Jur. N. S. 887. L. JJ.; and see Nicholson *v.* Jeyes, 1 Eq. Rep. 34, L. JJ., where the costs of settlement by a mortgagee's own counsel were allowed, overruling S. C. 1 Sm. & G. Ap. 13.

[1] 15 & 16 Vic. c. 80, § 42; *ante*, p. 983. The assistance of an expert cannot be obtained until an issue has been raised between the parties. Stokes *v.* City Offices Company, 13 W. R. 537, V. C. W.; 11 Jur. N. S. 560.

[2] 15 & 16 Vic. c. 80, § 43. In the absence of special arrangements, the scale of fees allowed accountants by the Court of Bankruptcy will be adopted. Meymott *v.* Meymott, 10 Jur. N. S. 715; 12 W. R. 996, M. R.; 3 Beav. 590.

[3] For forms of instruction and affidavit, see Vol. III.

[4] Per L. J. Turner, in Ford *v.* Tynte, 2 De G., J. & S. 127, 131; 10 Jur. N. S. 429, 430.

[5] Hill *v.* King, 9 Jur. N. S. 527, L. C.; and see *Re* Agriculturist Cattle Insurance Company, 3 De G., F. & J. 194, 200; 7 Jur. N. S. 590.

In case any proceeding pending at a Judge's Chambers is not prosecuted with due diligence, the parties, or any of them, may be required to attend at Chambers at a time to be appointed for that purpose, to show cause why such proceeding has not been prosecuted; and thereupon such directions may be given at Chambers, or by adjournment in open Court, as may be proper to insure the prosecution thereof by some person interested therein, and for payment of the costs incurred by any neglect or default; or a certificate by the Chief Clerk of such neglect or default, or of any abandonment or abatement of the proceedings or otherwise, according to the facts, may be made and filed, without any fee being payable thereon; and after such certificate has been so made, unless the same is discharged, none of the parties are to be at liberty to further prosecute the proceeding at Chambers, unless and until the Court or Judge, upon application, makes an order directing the same to be prosecuted; and upon such certificate becoming * bind- *1331 ing, any party may apply to the Court, and the Court may make such order relative to costs, and to relieve any party from the effect of any decree or order before made, or proceeding taken, which has not been duly prosecuted, or otherwise, as may be thought proper. And for the purposes aforesaid, any party, or the solicitor of the suitors' fund, may be directed to summon the persons whose attendance is required, and to conduct any proceedings, and carry out any directions which may be given; and the costs of the solicitor of the suitors' fund are to be paid by such parties, or out of such funds as the Court or Judge may direct; and if any costs of the solicitor of the suitors' fund be not otherwise paid, the same are to be paid out of the suitors' fund.[1]

A register is kept of all proceedings in the Judge's Chambers, with proper dates, so that all the proceedings in each cause or matter may appear consecutively, and in chronological order, with a short statement of the questions or points decided or ruled at every hearing.[2]

A "Summons and Appointment Book" is also kept at the Chambers, in which, at the time any summons or appointment is obtained, an entry thereof is made, stating the date on which the summons is issued or the appointment made, the name of the cause or matter, and by what party, and, shortly, for what purpose such summons or appointment is obtained, and at what time such summons is returnable, and for what time such appointment is made.[3] Lists of the matters appointed for each day are made and affixed outside of the doors of the Cham-

[1] Ord. XXXV. 23. This rule practically supersedes 15 & 16 Vic. c. 80, §§ 7, 8, 9, 37. For cases under those sections, see Ridley *v.* Tiplady, 20 Beav. 44; James *v.* Gwynne, 2 Jur. N. S. 436, V. C. S.; Parkinson *v.* Lucas, 28 Beav. 627. As to defaults by Receivers, see *post*, Chap. XXXIX.

[2] Ord. XXXV. 57. An annual return of the proceedings at Chambers, made up to the 1st of November, is furnished by the Chief Clerks of each Judge to the Home Secretary; and is embodied in the volume of "Judicial Statistics" laid by him before Parliament, and subsequently published.

[3] Ord. XXXV. 24. A register is also kept at Chambers of the names of all testators and intestates, in administration suits formerly or still prosecuted there.

bers of the respective Judges; and, subject to any special directions, such matters are heard in the order in which they appear in such lists.[4]

The mode of proceeding before the Judge at Chambers is by summons.[5] The summons is intituled in the cause or matter; it directs the parties concerned to attend at the Chambers, at the time therein *1332 specified; and states the precise object of the application, * and on whose behalf it is made.[1] Every summons should be addressed to the parties themselves, and not to their solicitors; and it must be underwritten with the name and place of business of the solicitor issuing it, and of his agent, if any, or with the name and place of residence of the applicant, where he acts in person, and, in either case, with the address for service, if any.[2] If the summons originates a proceeding, it must also be underwritten with a note, addressed to the person summoned, warning him that if he does not attend, either in person or by his solicitor, at the time and place mentioned in the summons, such order will be made, and proceedings taken, as the Judge may think just and expedient.[3]

The summons is prepared by the party issuing it, or his solicitor, and is sealed by one of the clerks at the Chambers of the Judge from which it is issued, with a seal provided by those Chambers; and a copy must be left at the Judge's Chambers by the party obtaining the summons.[4] The summons must not be altered after it has been sealed, except upon application at the Chambers, and any alterations then made will be marked with the seal of the Chambers.[5]

In the case of applications originating proceedings, a duplicate of the summons must be filed at the Record and Writ Clerks' office; and where service is required, the copy to be served must be stamped with a stamp of that office, indicating the filing thereof.[6] The duplicate of the summons must be written on paper, of the same description and size as that on which bills are printed.[7]

Subject to what is subsequently stated, the general rules as to the

[4] Ord. XXXV. 25.

[5] 15 & 16 Vic. c. 80, § 28. In practice, summonses are distributed into: I. Summonses issued in the name of the Judge; II. Summonses issued in the name of the Chief Clerk. The first class is subdivided into: 1. Summonses to administer estates, or Administration Summonses; 2. Summonses to originate other proceedings; and, 3. Ordinary Summonses. Nos. 1 and 2 are also called Originating Summonses; and Nos. 2 and 3 are likewise designated General Summonses; see Ord. XXXV. 2. The second class is issued for the attendance of parties and witnesses to be examined at Chambers. *Ante*, p. 1326.

[1] Ord. XXXV. 2, 3; and Sched. K. Nos. 1, 2. For forms, see *ibid.*; and Vol. III.

[2] Ord. III. 2, 5, *ante*, pp. 454, 455. For a form, see Vol. III.

[3] If no person is to be served, this note is of course unnecessary, and should be omitted. For form of note, see Sched. to Ord. K., Nos. 1, 2; and Vol. III.

[4] Ord. XXXV. 5. The following fees, on issuing summonses, are payable in fee-fund stamps — in the Judges' Chambers; for every original summons, 5*s.* by each scale; for every duplicate thereof, 5*s.* higher scale, and 1*s.* lower scale; for every other summons, 3*s.* higher scale, and 1*s.* lower scale. In the Record and Writ Clerks' office; for marking every copy of a summons to be served, 5*s.* higher scale, and 1*s.* lower scale. Regul. to Ord. Sched. 4; and Vol. III.

[5] Regul. 8 August, 1857, r. 1; Bloxam, 37.

[6] Ord. XXXV. 6; 15 & 16 Vic. c. 80, § 46. A *præcipe* must be left, when the copy is presented for sealing. For a form, see Vol. III.

[7] Ord. 6 March, 1860, r. 16; as to such paper, see Ord. IX. 3, *ante*, p. 396.

persons by [8] and against [9] whom a suit may be instituted, the parties to a suit,[10] the authority to institute proceedings,[11] including the authority of a next friend to use his name,[12] and the names and addresses of plaintiffs and next friends,[13] apply to proceedings commenced by summons, as well as to proceedings commenced by bill. * Where, *1333 however, a summons originating a proceeding is filed without authority, an application to take it off the file, or to stay proceedings as regards the applicant, should be made by summons, and not by motion.[1]

In the case of an ordinary summons, if the applicant is a plaintiff or defendant, or has obtained an order for leave to attend the proceedings, his address need not be given; but it should be stated in the summons that he is a plaintiff or defendant, or has obtained such order.[2]

Where proceedings originate in Chambers, the original summons must be served seven clear days before the return thereof.[3] Summonses issued by the Chief Clerk for the attendance of parties or witnesses for examination must be served a reasonable time: such as will fairly enable the persons served to attend for the purpose of being examined.[4] All other summonses must be served two clear days before the return thereof.[5]

Where proceedings originate in Chambers, if from any cause the summons is not served upon any party seven clear days before the return thereof, an indorsement may be made upon the summons, and upon a copy thereof stamped for service, appointing a new time for the parties not before served to attend at the Chambers of the Judge; such indorsements must be sealed at the Judge's Chambers; and the service of the copy so indorsed and sealed has the same force and effect as the service of an original summons; and where any party has been served before such indorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed.[6] The note at the foot of the summons is, in such case, varied, by requiring the parties not served to attend at the time mentioned in the indorse-

[8] *Ante*, Chap. II. pp. 5-45: Chap. III. pp. 46-128.

[9] *Ante*, Chap. IV. pp. 129-189.

[10] *Ante*, Chap. V. pp. 190-304.

[11] *Ante*, Chap. VI. § 2, pp. 306-311.

[12] *Ante*, pp. 68, 110, 111, 307; and see 15 & 16 Vic. c. 86, § 11. A summons originating proceedings is not within the letter of § 11, but in practice is treated as being within its spirit. See Braithwaite's Pr. 26, n. 108. For form of authority, see Vol. III.

[13] *Ante*, pp. 357-360.

[1] *Ante*, p. 307. For forms of summons and affidavit in support, see Vol. III.

[2] For directions as to the mode of describing applicants by summons, see Vol. III.

[3] Ord. XXXV. 7.

[4] See *Re* North Wheal Exmouth Mining Company, 31 Beav. 628.

[5] Ord. XXXV. 7. It is the practice at some of the Chambers, on a case for indulgence being shown at the time any such summons is applied for, to shorten the return, so as to allow of only one clear day, or even less, instead of two, between the service and return. In such a case, it should appear on the face of the summons that it is made returnable "by special leave," or "by special appointment." In practice, Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week, are not usually reckoned in the computation of the two clear days. Ord. XXXVII. 11.

[6] Ord. XXXV. 8. The solicitor's fee for indorsing the original summons and the copies thereof, and attending to get the same sealed, is 6*s.* 8*d.* on each scale. Regul. to Ord. Sched. 2. For form of indorsement, see Vol. III.

ment, instead of at the time stated in the summons.[7] If, however, the summons has not been served on any of the parties, no indorsement need be made, as the return day will be altered in the original summons, and the alteration authenticated, on application at the Judge's Chambers; and upon production at the Record and Writ Clerks'
*1334 * office of the summons so altered, the duplicate will be amended to accord therewith, and the copies may be altered and restamped, without an order to amend.[1]

Where an ordinary summons has been issued, but cannot be served on the parties in time to allow two clear days between such service and the return day,[2] an application should be made at Chambers to enlarge the return: in such case, the day named in the summons should be altered and authenticated by the seal of the Judge's Chambers. If, however, any of the parties have been served before the application to enlarge the return, the summons ought not to be altered, but an adjourned appointment should be obtained at Chambers, and a note written in the margin of, or indorsed on, the original summons, to the effect that the adjourned time has been appointed for the parties not before served to attend at Chambers. Such note is usually authenticated by the signature of the Chief Clerk. The copy for service of the summons should bear thereon a copy of the note; and where an affidavit of service is made, it should distinctly appear thereby that a copy of the note was served.[3] At the time first appointed by the summons, the hearing will be adjourned, as to parties served before the enlargement, to the new time appointed.

Where, after a summons originating a proceeding has been served on any party, it is desired to amend it, an order for that purpose must be obtained at Chambers, upon an *ex parte* application by summons.[4] The order is drawn up at Chambers; and is entered in the usual way. The alterations must be made in the original summons, and authenticated by the seal of the Chambers; and upon the order and amended summons being produced to the Record and Writ Clerk, he will amend the duplicate, and mark thereon, and in his cause book, the dates of the amendment and order to amend, as in the case of bills.[5] If the summons has not been served on any party, an order to amend will not, in general, be necessary; but the alterations must first be made in the original summons, and authenticated by the seal of the Chambers; and upon production to the Record and Writ Clerk of the summons so amended and authenticated, with a note thereon, signed by the Chief Clerk, directing the duplicate to be amended,[6] it will be amended accordingly.[7] Every copy stamped for service, but not served, before

[7] See form in Vol. III.

[1] Braithwaite's Pr. 110. No further fee is payable.

[2] See *ante*, p. 1333, n. (5), as to obtaining a shorter return.

[3] For forms of note and affidavit of service, see Vol. III.

[4] For forms of summons and order thereon, see Vol. III.

[5] Braithwaite's Pr. 317, 318; *ante*, p. 422.

[6] The form ordinarily used is, "Let the duplicate be amended. G. H., Chief Clerk."

[7] Braithwaite's Pr. 317, 318

an amendment of the original, whether under an * order or not, *1335 may, after such amendment, be altered, and will be resealed without further fee.[1]

Where a proceeding originates in Chambers, the parties served must, before they are heard in Chambers, enter appearances in the Record and Writ Clerks' office, and give notice thereof.[2] The appearance is entered in like manner as an appearance to a bill.[3]

Where the summons originates a proceeding, service is effected by serving the defendant or respondent personally with a stamped copy, or by leaving such copy with his servant or some member of his family, at his dwelling-house or usual place of abode: unless the Court directs some other mode of service.[4] The original summons, under the seal of the Judge's Chambers, must, at the time of such service, be produced and shown to the person to whom the copy is delivered.[5]

In all other cases, service of the summons, unless it be a Chief Clerk's summons, is effected by delivering a true copy thereof personally to, and leaving the same with, the solicitor of the party to be served, where he acts by a solicitor, or to such party, where he acts in person; or by delivering such copy to, and leaving the same with, the clerk or servant of such solicitor at his place of business, or with the servant or some member of the family of such party at his dwelling-house or usual place of abode, where he acts in person, or with some person authorized to receive the same at any address for service which may have been given by such solicitor or party.[6] At the time such service is effected, the original summons, under the seal of the Chambers, must be produced to the person served.[7] The plaintiff is, without special leave of the Court, at liberty to serve any summons personally, or at the dwelling-house or office of any defendant, who, having been duly served with a copy of the bill, has not caused an appearance to be entered within the time limited for that purpose;[8] but such service must be made within the jurisdiction.[9]

Service of every summons, not requiring personal service upon the person to be affected thereby, must be made before two o'clock in the afternoon on Saturday, and before seven o'clock in the evening * on other days; and if not made before such times, it will be *1336 deemed as made on the following Monday, or the next day, as the case may be.[1]

[1] Braithwaite's Pr. 317.

[2] Ord. XXXV. 9.

[3] See *ante*, p. 536. The like fees are also payable and allowed. Regul. to Ord. Sched. 2, 4; and Vol. III. It is presumed that, in a proper case, a conditional appearance will be allowed to be entered, on the like terms as a conditional appearance is allowed to a bill; as to which, see *ante*, p. 537. For forms of *præcipe* for an ordinary appearance, and notice of appearance, see Vol. III.

[4] See Ord. X. 1, *ante*, p. 442; which, though in terms confined to the service of a bill, is in practice applied to the service of an originating summons.

[5] See form of affidavit of service, Regul. 8 Aug., 1857, Sched. No. 1; and Vol. III.

[6] See Ord. III. 2, 4–7, *ante*, pp. 454, 455. But service out of the jurisdiction, in any of the above cases, will be invalid, unless authorized by a special order. See Green *v.* Pledger, 3 Hare, 165.

[7] See form of affidavit of service, Regul. 8 Aug., 1857, Sched. No. 2; and Vol. III.

[8] Ord. III. 8.

[9] Green *v.* Pledger, 3 Hare, 165.

[1] Ord. XXXVII. 2; *ante*, p. 456.

In a proper case, an order will be made in Chambers, on an *ex parte* application by summons, authorizing substituted service of the summons, or service thereof out of the jurisdiction.[2]

The Chief Clerk's summons, for the attendance of a party or witness, for examination, must be served personally on such party or witness, in the same manner as a *subpœna ad testificandum*.[3]

Upon the return of the summons, the parties attend at the Chambers at the time named; and the matter is then either disposed of or adjourned; but where the matter is not disposed of upon the return of the summons, the parties must attend from time to time, without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter.[4]

Where the matter is not adjourned to any specified time, the party having the conduct of the proceeding, or any party interested in pressing it on, may afterwards obtain at Chambers an appointment for the further consideration of the matter: notice whereof must be given to the other parties entitled to attend.[5] Where, however, a witness had attended in Chambers on the return of a Chief Clerk's summons, and his examination was then adjourned to a stated day, but his attendance at that day was afterwards countermanded, without a new time being named, it was held that the witness was not bound to attend again until a fresh summons was taken out and served on him: a mere notice of the appointment being insufficient.[6]

If a party abandons a summons which he has taken out, he may be ordered to pay to the other parties their costs occasioned thereby.[7]

Where any of the parties summoned to attend the Judge in Chambers fail so to attend, whether upon the return of the summons or at any time appointed for the consideration or further consideration of the matter, the Judge may proceed *ex parte*, if, considering the nature *1337 of the case, he thinks it expedient so to do.[8] * If the failure to attend happens on the return of the summons, the parties attending may be required to produce affidavits of service of the summons, or of having been served therewith.[1]

Where the Judge has proceeded *ex parte*, such proceeding will not in any manner be reconsidered in the Judge's Chambers, unless the Judge, upon a special application made to him for that purpose by a party who

[2] As to substituted service generally, see *ante*, pp. 445–449; and as to service abroad, see *ante*, pp. 444–453. For forms of summons and affidavits in support, see Vol. III.

[3] See *ante*, p. 907.

[4] Ord. XXXV. 14. Where any of the parties do not attend at the return of the summons, care should be taken that the matter is adjourned from time to time to specified days, until the proceeding is concluded; otherwise, if a break occurs, it will often be necessary to serve the absent party again, and file an affidavit of such service, before the matter can be renewed at Chambers.

[5] As to the costs of obtaining and serving notice of a new appointment, see *Re* Catlin, 18 Beav. 512. For form of notice, see Vol. III.

[6] Lawson *v.* Stoddart, 10 Jur. N. S. 33; 12 W. R. 286, V. C. K.

[7] Lister *v.* Bell, 5 Jur. N. S. 115, 116, V. C. S.

[8] Ord. XXXV. 10.

[1] For forms of affidavit of service, see Regul. 8 Aug., 1857, Sched. Nos. 1, 2; and Vol. III.

was absent, is satisfied that he was not guilty of wilful delay or negligence; and in such case, the costs occasioned by his non-attendance are in the discretion of the Judge: who may fix the same at the time, and direct them to be paid by the party or his solicitor before he is permitted to have such proceeding reconsidered, or may make such other order as to such costs as to such Judge may seem meet.[2]

Where a proceeding in Chambers fails by reason of the non-attendance of any party, and the Judge does not think it expedient to proceed *ex parte*, he may order such an amount of costs (if any) as he shall think reasonable, to be paid to the party attending, by the absent party, or by his solicitor personally.[3]

Parties attending any proceeding in Chambers, without having obtained the previous leave of the Judge to attend the same, will not be allowed any costs of such attendance, unless by special order of the Court or Judge.[4]

Whenever, in any proceeding before a Judge in Chambers, the same solicitor is employed for two or more parties, the Judge may, at his discretion, require that any of such parties shall be represented before him by a distinct solicitor, and may adjourn such proceedings until such party is so represented.[5]

Counsel do not attend before the Chief Clerk; and therefore, if any party desires to be heard by his counsel in Chambers, an appointment before the Judge must be procured for that purpose. As a general rule, if counsel appear on both sides, the matter will be adjourned into Court.[6]

An adjournment into Court from Chambers is deemed to be part of the proceedings in Chambers; the costs of such adjournment follow the same rule as the costs in Chambers; and the party obtaining the adjournment into Court will not be ordered to pay the costs thereof, even if the question appears to be unarguable: unless there was, in the opinion of the Court, misconduct in requiring the opinion of the Judge on the question.[7]

* The costs of counsel attending the Judge in Chambers will *1338 not in any case be allowed, unless the Judge certifies it to be a proper case for counsel to attend.[1] Where, however, the matter has been adjourned from Chambers into Court, it appears that the Judges will always certify for counsel, unless they state to the contrary.[2]

Where an application is adjourned into Court from Chambers, the Chief

2 Ord. XXXV. 11.
3 Ord. XL. 31.
4 Ord. XL. 28.
5 Ord. XXXV. 21.
6 Rumbold *v.* Forteath, 3 K. & J. 44; Seton, 55. In the Chambers of the Master of the Rolls, counsel on both sides may be heard. In V. C. Stuart's Chambers, counsel will not be heard at all; and therefore, where the attendance of counsel is desired, the matter will be adjourned into Court. Seton, 55.
7 *Re* Mitchell, 9 Jur. N. S. 1272; 12 W. R. 39, V. C. K.
1 Ord. XL. 29. Where either party intends to be represented by counsel at Chambers, it is usual for him to give the adverse party notice thereof.
2 Greville *v.* Greville (No. 2), 27 Beav. 596; 5 Jur. N. S. 1237; Graham *v.* Graham, John. 624.

Clerk sends a note of such adjournment to the Registrar in attendance in Court; and, under directions given by him, it will be put into the Court paper for hearing on one of the days appointed for such applications.[3] Previously to the application coming on to be heard, the Chief Clerk, if required by the Judge, furnishes him with a statement of the matter adjourned into Court; and sometimes both sides agree upon a statement of the facts, and of the points to be argued in Court, and furnish a copy thereof to the Judge, through the Chief Clerk.

Where, upon the hearing of any matter adjourned into Court from Chambers, any directions are given in Court to be acted upon at Chambers, it is not, in general, necessary to draw up a formal order;[4] but a note signed by the Registrar, stating the directions given by the Court, must be procured from him, and left at the Chambers.[5]

The course of proceeding in Chambers is ordinarily the same as the course of proceeding in Court upon motions;[6] no states of facts, charges, or discharges are brought in; but when directed, copies, abstracts, or extracts, of or from accounts, deeds, or other documents, and pedigrees and concise statements, must be supplied for the use of the Judge and his Chief Clerks, and, where so directed, copies must be handed over to the other parties: no copies, however, are to be made of deeds or documents where the originals can be brought in, unless the Judge otherwise directs.[7] All accounts, copies, and papers, left at Chambers, are to be written upon foolscap paper bookwise: unless the nature of the document renders it impracticable to do so.[8]

The evidence made use of at Chambers is ordinarily adduced by affidavit. All affidavits which have been previously made and read in Court, upon any proceeding in a cause or matter, may be *1339 * used in Chambers;[1] and all evidence taken at the hearing of any cause may be used in any subsequent proceeding in the same cause.[2] If affidavits in the cause are subsequently made use of at Chambers, the witnesses may be cross-examined thereon.[3] Under the former practice, the pleadings could only be used as admissions by the party on whose behalf they were filed, and could not be used as evidence for or against any other party;[4] but it seems that, under the present practice, the answer of one defendant may be read against his co-defendant.[5]

[3] If the adjournment into Court has been directed in the absence of any party entitled to be heard in Court, it is usual in practice to give him notice thereof. As a general rule, V. C. Stuart will not, in contested cases, hear in person applications arising out of proceedings under decrees and orders in prosecution at Chambers, until the Chief Clerk's certificate has been made. See Seton, 55.

[4] See Morgan *v.* Hatchell, 19 Beav. 86.

[5] Regul. 8 Aug., 1857, r. 3. The note should be written on a detached sheet of paper, for filing at Chambers.

[6] See *post*, Chap. XXXV., *Interlocutory Applications.*

[7] Ord. XXXV. 26.

[8] Regul. 8 Aug., 1857, r. 17.

[1] Ord. XXXV. 28.

[2] Ord. 5 Feb., 1861, r. 15.

[3] Spittle *v.* Hughes, 11 Jur. N. S. 151, V. C. K.; S. C. *nom.* Hughes *v.* Spittal, 13 W. R. 251; and see Jenner *v.* Morris, 10 W. R. 640, V. C. K.

[4] Hoare *v.* Johnstone, 2 Keen, 553; Kemp *v.* Wade, *ib.* 686, 688; Meyer *v.* Montriou, 9 Beav. 521; *ante*, p. 841 *et seq.*

[5] Ashmall *v.* Wood, 3 Jur. N. S. 232, V. C. S.

Investments in the Purchase, or on Mortgage, of an Estate.

Before a fund under the control of the Court will be ordered to be laid out in the purchase, or advanced upon the security, of an estate, the Court must be satisfied that the estate is a fit and proper purchase or security, and that a good title can be made to it.[6] Under the present practice, a conditional contract for the purchase or advance is usually entered into;[7] and the contract, and evidence of the fitness of the purchase or security, are produced at the time of making the application. If the Court or Judge is satisfied therewith, the investment is approved at once,[8] and an order made for an inquiry whether a good title can be made to the estate;[9] and directing that, in case a good title can be made, a proper conveyance be settled by the Judge; and that upon the due examination thereof being certified by the Chief Clerk,[10] the purchase or mortgage money be paid over to the persons * named in the Chief Clerk's certificate as en- *1340 titled thereto. If the Court or Judge is not satisfied with the evidence in support of the application, an inquiry as to the propriety of the proposed investment will be directed: in which case, consequential directions, in the event of such investment being approved, will be given by the order.[1]

The order is usually made upon a petition, stating the particulars of the proposed purchase or security; it has, however, been sometimes made on summons at Chambers.[2] The petition or summons must be supported by the affidavits of surveyors or other qualified persons, stating the size, value, rental, and outgoings of the estate, and any circumstances rendering the proposed purchase or security desirable.[3]

The investment having been approved, the abstract of title is ex-

[6] As to investments by the Court, and by trustees under or without its sanction, see 2 L. C. Eq. 743–750, 972, 973; Lewin, 232–251, 699–700, 748–750; Seton, 64, 65, 490–492, 527, 775–778; 2 Spence Eq. Jur. 925–927; 4 & 5 Will. IV. c. 21; 22 & 23 Vic. c. 35, § 32; 23 & 24 Vic. c. 38, §§ 10–12, and Ord. 1 Feb., 1861; 23 & 24 Vic. c. 145, § 25; Sugd. Stat. 323, 324; 28 & 29 Vic. c. 78, § 40; and for forms of orders in such cases, see Seton, 490, 491, 525, 776. As to investments under the Lands Clauses and other special Acts, see *post*, Chap. XLV., *Statutory Jurisdiction*. A fund will not be invested in the purchase of freehold home property, however eligible it may be. Moore *v.* Walter, 11 W. R. 713, V. C. K.

[7] As to agreements relating to land, see Sugd. V. & P. xii.–xix. 820; Add. Cont. 65–117; 1 Prideaux Conv. 43–52; and for the stamp duties thereon, *ib.* 52. As to contracts by agents, see Add. Cont. 586–634; Sugd. V. & P. 820; and for forms of agreements for the sale and purchase of land, see 2 Davidson Conv. 3–14, 29, 63; 1 Prideaux Conv. xv., xvi. 53–74; and for a loan of money on mortgage, *ib.* 74. For circumstances under which costs of proposed mortgagee were allowed, although the mortgage was not completed, see Craggs *v.* Gray, 1 W. N. 4, M. R.

[8] Seton, 492.

[9] The title is sometimes approved by the order sanctioning the investment. See Seton, 491, No. 2. The inquiry will not be directed subject to the conditions of sale; the Judge at Chambers will consider whether any defect in the title can be waived. Meyrick *v.* Laws, 34 Beav. 58; and see *Ex parte* Christ's Hospital, 2 H. & M. 166.

[10] Where the fund is not in Court, a certificate of execution is not required. See Seton, 492.

[1] See Seton, 492. For form of order, see *ib.* 490.

[2] Seton, 492.

[3] Seton, 492; *Re* Kinsey, 1 N. R. 303, M. R. For forms of petition and summons, and affidavit in support, see Vol. III.

amined with the title-deeds, by the solicitor having the carriage of the proceeding, or by some other qualified person employed by him;[4] and an affidavit of such examination and that the abstract is true and correct, is carried, with the abstract, into the Judge's Chambers.[5] Where it is not made to appear by the affidavit that the examination is made by a solicitor, the solicitor concerned should join in the affidavit, and state that it was made by a person competent so to do.[6] The Chief Clerk prepares a memorandum or minute that the opinion, either of the conveyancing counsel in rotation, or of the particular counsel therein named, has been directed by the Judge to be procured on the title; and directing such counsel to settle the draft conveyance or mortgage, in case he is of opinion that a good title is shown.[7] This memorandum is signed by the Chief Clerk: who also identifies, by his initials, the abstract of title. If the reference is made to the conveyancing counsel in rotation, the Registrar's Clerk will insert his name in the memorandum, in the manner previously stated.[8] If the conveyancing counsel makes any requisitions on the title, they are dealt with in like manner as on a purchase out of Court; and if any difficulty arises on the title, the matter may be brought under the notice of the Chief Clerk, or of the Judge in Chambers, at an appointment obtained for that purpose.[9]

*1341 * It may be mentioned here that, where the conveyancing counsel certified that, though a good title of sixty years was not shown, yet the title was a safe holding one, the proposed purchase was sanctioned by the Court; it appearing, in other respects, to be desirable, and for the benefit of the person entitled: who was an infant.[1]

When the title is approved by the conveyancing counsel, and the draft conveyance or mortgage settled by him, such draft, or a fair copy thereof, is left at Chambers,[2] and an appointment obtained and served to proceed thereon. At this appointment, the final opinion of counsel on the title should be produced; and if the opinion is satisfactory, the draft conveyance or mortgage will be settled and marked for engrossment.[3] An affidavit must be made that the engrossment is a correct

[4] As to the verification of the abstract, examination of the deeds, and investigation of the title, see Dart, 204–274, 275–297, 761; 1 Davidson Conv. 485–493, 507; 1 Prideaux Conv. 93–103; Sugd. V. & P. 405–432; and as to the penalty for concealing deeds, see 22 & 23 Vic. c. 35, § 24; 23 & 24 Vic. c. 38, § 8.

[5] For form of affidavit, see Regul. 8 Aug., 1857, Sched. No. 18; and Vol. III.

[6] For form of affidavit in such case, see Vol. III.

[7] For form of memorandum, see Vol. III.

[8] *Ante*, p. 1329.

[9] *Ex parte* Christ's Hospital, 2 H. & M. 166, 168.

[1] *Re* Sheffield and Rotherham Railway Company, 1 Sm. & G. Ap. 4; Meyrick *v.* Laws, 34 Beav. 58; but see *Ex parte* Christ's Hospital, *ubi sup.*

[2] If a copy is left, a certificate, signed by the solicitor, that it is a true copy, is usually required. For form of certificate, see Vol. III.

[3] As to conveyances, see Sugd. V. & P. 557–565; 2 Davidson Conv. 169–205; 1 Prideaux Conv. 122–145; as to the stamp duties thereon, 28 & 29 Vic. c. 96; Sugd. V. & P. 565–572; 1 Prideaux, 145–151; as to covenants for title, Sugd. V. & P. 572–615; Dart, 350–364: 1 Davidson, 100–145, 188–203; 1 Prideaux, 138–140; and for forms of conveyances, 2 Davidson, 465; 1 Prideaux, xvii.–xxi. 152–295; as to mortgage deeds, see 2 Davidson. 497–726; 1 Prideaux, 309–354; as to the stamp duties thereon, *ib.* 354–358; 28 & 29 Vic. c. 96; and for forms, *ib.* xxii.–xxvi. 359–514; 2 Davidson, 998. For the ordinary conveyancing charges in common cases, see Morgan & Davey, 500 *et seq.*

transcript of the draft settled at Chambers;[4] and on production of an office copy of the affidavit, with the engrossment and draft, the Chief Clerk will sign a memorandum of allowance in the margin of the first skin of the engrossment,[5] and will write his initials on each of the other skins. The draft of his certificate that a good title has been made, and that the conveyance has been settled, will then be issued, and an appointment given to settle the draft.[6] On attending such appointment, the solicitor having the conduct of the proceeding should produce an affidavit showing that the searches directed to be made by the conveyancing counsel for judgments, *lites pendentes*, crown debts, or other incumbrances have been made accordingly, and that none have been found, or as the case may be.[7] This affidavit should, in strictness, bring down the searches to the date of the Chief Clerk's certificate approving the title, and should be sworn on that day. The certificate, when settled, is completed in the usual way.

The engrossment of the conveyance or mortgage having been * allowed as above explained, is then executed by the necessary *1342 parties; and if the order directs the Chief Clerk to certify such execution, an affidavit of the execution is thereupon filed,[1] and an office copy procured and left at Chambers with the deed, and with an office copy of the certificate approving the title. From these documents, the Chief Clerk will prepare and issue his certificate of execution, and certify to whom the purchase or mortgage money is to be paid.[2] On production of an office copy of such certificate, and of the order directing the payment to be made, the Accountant-General will pay the money to the person named in the certificate. If, however, a sale of stock is necessary to raise the money, a direction for such sale is bespoken of the Order of Course Clerk, in the Registrar's office; and such sale is effected in the manner hereafter explained.[3]

Management of Property.

The institution of a suit against trustees, for the administration of the trust estate under the direction of the Court, does not preclude the

[4] For form of affidavit, see Regul. 8 Aug., 1857, Sched. No. 19; and Vol. III.

[5] For form of memorandum, see Vol. III.

[6] For form of certificate, see Vol. III.

[7] As to searches for incumbrances, see Dart, 302–324, 768; 1 Prideaux Conv. 103–121; Sugd. V. & P. 516–548, 847; 25 & 26 Vic. cc. 53, 67; 28 & 29 Vic. c. 78; and as to relief from incumbrances, Sugd. V. & P. 458, 556; and see *ante*, pp. 398–401, 1041, 1042. The conveyancing counsel should always specify, in his opinion on the title, what searches are to be made, and against whom. For form of affidavit of searches, see Vol. III.

[1] For form of affidavit, see Vol. III.

[2] In some of the Chambers it is the practice not to issue any certificate till the deed has been executed. In such case, one certificate is made to embrace all the objects of the two certificates mentioned in the text. For forms of certificates, see Vol. III.

[3] *Post*, Chap. XLI., *Payment out of Court*. As to the enrolment of the conveyance, under the Mortmain Act, see *Ex parte* Christ's Hospital, 12 W. R. 669, V. C. W. Where enrolment is required, the certificate of execution should not be issued till the conveyance has been left at the Enrolment Office, and the receipt of the Clerk of Enrolment is produced.

exercise of the discretion given to the trustees, by the instrument creating the trust, as to the appointment of new trustees, or the management of the trust estate; but the trustees are required, after the institution of the suit, to act under the control of the Court.[4]

After a decree has been made, the powers of the trustees are thenceforth so far paralyzed, that the authority of the Court must sanction every subsequent proceeding; thus, the trustees cannot commence or defend any action or suit,[5] or interfere in any other legal proceeding, without first consulting the Court as to the propriety of so doing; a trustee for sale cannot sell; and an executor cannot pay debts, or deal with the assets for the purpose of investment.[6] Applications for *1343 the sanction of the * Court in such cases are usually made by summons, supported by affidavit or other evidence of the facts.[1]

Where the object is to commence or defend any action, suit, or other legal proceeding, the opinion of counsel, in actual practice, is usually required that there is a good ground of suit or defence.[2]

Where the outstanding estate of a testator or intestate is directed to be got in with the approbation of the Judge,[3] applications may be made by summons for leave to sell or convert the same, or to take proceedings or accept a composition in respect thereof.[4]

Among other subjects of application at Chambers, relating to the management of property under the direction or control of the Court, may be mentioned: drainage;[5] investments in the purchase, or on mortgage, of land;[6] repairs;[7] renewing leases, and admission to copyholds;[8] and cutting and selling timber.[9]

Where the sanction of the Court or Judge is necessary to the letting of property on lease,[10] the terms thereof are reduced into writing, in the form of an agreement conditional on the approval thereof by the Court or Judge.[11] A summons for an order to carry such an agreement into

[4] Cafe *v.* Bent, 3 Hare, 245; Costabadie *v.* Costabadie, 6 Hare, 410; Webb *v.* Earl of Shaftesbury, 7 Ves. 480; Attorney-General *v.* Clack, 1 Beav. 467; Graham *v.* Graham, 16 Beav. 550; Peatfield *v.* Benn, 17 Beav. 522; Lewin, 389; Hill on Trustees, 567; Haddan, 32. By the 28 & 29 Vic. c. 99, § 1, the County Courts have all the power and authority of the High Court of Chancery, in all suits for the execution of trusts in which the trust estate or fund does not exceed in amount or value 500*l.*; but see §§ 3, 9, as to transferring any suit or matter to the Court of Chancery; and §§ 18, 19, as to appeals; see also *post*, Chap. XLV., *Statutory Jurisdiction*.

[5] See *ante*, p. 309. As to the conduct of the proceedings, see Harrison *v.* Richards, L. R. 1 Ch. Ap. 473; 12 Jur. N. S. 871, L. JJ.

[6] Lewin, 389, and cases there cited; Hill, 567. That a trustee or executor is not, after decree, absolved from the duties imposed by his office, see Lewin, 389; Garner *v.* Moore, 3 Drew. 277.

[1] For form of summons, see Vol. III.

[2] See *ante*, p. 310.

[3] As to the duties of trustees and executors, in respect of outstanding property, see 2 L. C. Eq. 733–739; 2 Spence Eq. Jur. 923–924; and see 23 & 24 Vic. c. 145, § 30.

[4] For various forms of orders relating to outstanding estate or securities, see Seton, 189–191. For form of summons, see Vol. III.

[5] Seton, 527.

[6] *Ante*, p. 1339 *et seq.*

[7] Seton, 506, 510, 513.

[8] *Ib.* 513–521.

[9] *Ib.* 505–513; and *post*.

[10] As to powers of leasing, see Sugd. Pow. 711–835; 22 & 23 Vic. c. 35, §§ 1–9; 23 & 24 Vic. c. 38, § 6; Sugd. Stat. 310–313; Shelford R. P. Acts, 683–686, 695; and *post*, Chap. XLV., *Statutory Jurisdiction* (*Settled Estates*). As to contracts between landlord and tenant; the rights and liabilities of the parties; and judicial procedure, see Woodfall, ix.–xii. 1, 320, 632, 936; see also Add. Cont. 314–375; Dixon, xiii.–xv.; L. C. Conv. 240–273; 1 Platt, xi.–xxvii.; 2 *id.* 82–154; Smith's Comp. 660–676; Williams R. P. 352–381.

[11] As to agreements relating to land, see

effect is thereupon taken out and served; and the application is supported by the production of the agreement, and by the affidavit of a land agent, or other competent person, stating the grounds on which, in his judgment, the agreement should be adopted.[12] The power to demise on the terms of the agreement must also be shown, by the production of the probate of the testator's will, the settlement, or other evidence thereof. If the agreement is approved, an order is made directing it to be carried into effect, and that the lease to be granted pursuant thereto be settled by the Judge, either absolutely or in case the parties differ. Where it is necessary for the Judge to settle the lease, a certified copy of the order, if drawn up, is left at Chambers, * and *1344 a summons to settle the lease is taken out and served;[1] the draft is brought in and settled, either by the Judge or his Chief Clerk, with the assistance, if necessary, of one of the conveyancing counsel;[2] the draft is then engrossed: an affidavit verifying the engrossment of the lease, and of the counterpart, if any, is brought in;[3] the Chief Clerk signs a memorandum of allowance in the margin of each engrossment:[4] and thereupon ordinarily issues his certificate of the result of the proceeding: which is completed in the usual manner.[5] Where, however, as often happens, the draft lease is settled at Chambers before the order approving the contract is drawn up, the order may combine the approval of the engrossments, and thereby save the expense of a certificate.[6]

Raising Money by Sale or Mortgage.

Where an order directs money to be raised by a sale or mortgage of an estate,[7] upon the return of the summons to proceed[8] on the order, or at an adjournment thereof, the proximate sum required is ascertained, and the mode of raising it determined upon.

Where the amount is to be raised by sale, the sale is conducted and the purchase-money paid into Court, and subsequently dealt with, in the manner heretofore stated.[9]

Where the amount is to be raised by mortgage, and a person willing to advance the money has been found by the parties, an abstract of the title to the estate proposed to be mortgaged is furnished to his solicitor:

ante, p. 1339, note (7); as to agreements for leases, see 5 Davidson Conv. 1-18; and for forms of agreements for leases, and of leases, see *ib.* 19-82, and 96-472; Woodfall, 966-997; and for the stamp duties thereon, *ib.* 955-965; 5 Davidson Conv. 18, 86-95. As to agricultural customs, see Dixon, 1-37, 489. As to leases of the property of infants, see *post*, Chap. XLV., *Statutory Jurisdiction*; and under the Settled Estates Acts. *Ibid.*

[12] For form of summons and affidavit, see Vol. III.

[1] Ord. XXXV. 15, 16, *ante*, p. 1103. For form of summons, see Vol. III.

[2] *Ante*, pp. 1327-1330.

[3] For forms of affidavit, see Vol. III.

[4] For form of memorandum, see Vol. III.

[5] The certificate is sometimes dispensed with; the allowance in the margin of the lease being deemed sufficient evidence of the lease having been settled by the Judge. For forms of certificate, see Vol. III.

[6] For form of minute of order in such case, see Vol. III.

[7] For forms of orders, see Seton, 244, 245.

[8] Ord. XXXV. 15, 16.

[9] *Ante*, p. 1264 *et seq.*

by whom, or whose counsel, the title is investigated, and the draft of the mortgage prepared.[10] A copy of the draft is then left at Chambers, and is settled there, in the same manner as other deeds.[11] At this point, the precise sum required is usually ascertained: for which purpose, subsequent interest will be computed; and the costs, including the costs of the mortgage, will be taxed by anticipation, and certified by the Taxing Master.[12] The total amount to be raised having *1345 been *ascertained, the draft is engrossed, and verified by affidavit, as in other cases. An order will then be made, on summons, approving the mortgage; giving leave to the mortgagee to pay the money into Court; and directing that, upon such payment, the mortgage be executed by the proper parties: who will be named in the order.[1] Upon production at Chambers of an office copy of the Accountant-General's certificate of the payment having been made, and an affidavit of the due execution of the mortgage, a certificate will be made of the manner in which, or the persons to whom, the amount raised by the mortgage is to be applied or paid; and on production of an office copy of such certificate, the Accountant-General will pay the money accordingly.[2]

Where the estates of any deceased person have been ordered to be sold or mortgaged[3] for the payment of his debts, the Court may direct, and, if necessary, compel, any infant heir or devisee to convey such estate, in such manner as the Court shall direct; and such conveyance is to be as effectual as if the infant was of full age;[4] and where an estate[5] devised in settlement has been ordered to be sold or mortgaged[6] for the payment of the debts of the testator, the Court may direct any tenant for life or other person having a limited interest, to convey the whole interest in the estate so to be sold or mortgaged, in such way as the Court thinks proper; and such conveyance is to be as effectual as if the person executing it was seised of the whole estate.[7]

[10] As to inserting a power of sale, see Russell *v.* Plaice, 18 Beav. 21; and as to the mortgagee's counsel, see Nicholson *v.* Jeyes, 1 Eq. Rep. 34, L. JJ., *ante*, p. 1329, n. (*i*); 1 Sm. & G. Ap. 13.

[11] See *post*, p. 1478.

[12] Seton, 246. The costs of the mortgagee should be included in the costs of the plaintiff, or other party having the conduct of the cause. *Ibid.*

[1] For form of order, see Seton, 245, No. 13; and for forms of summons, see Vol. III.

[2] See *post*, Chap. XLI., *Payment out of Court.*

[3] 2 & 3 Vic. c. 60, § 1; Shelford R. P. Acts, 485; Seton, 688.

[4] 11 Geo. IV. & 1 Will. IV. c. 47, § 11; Shelford, 483.

[5] Including copyholds, since 3 & 4 Will. IV. c. 104; Branch *v.* Browne, 2 De G. & S. 299; 12 Jur. 768; and extended by 11 & 12 Vic. c. 87, to estates which are by descent, or otherwise than by devise, vested in the heir or co-heirs of the debtor, subject to an executory devise over to a non-existing or unascertained person. Shelford, 486.

[6] 2 & 3 Vic. c. 60, § 1; Shelford, 485; Seton, 688.

[7] 11 Geo. IV. & 1 Will. IV. c. 47, § 12; see Brook *v.* Smith, 2 R. & M. 73; Scholefield *v.* Heafield, 8 Sim. 470; Penny *v.* Pretor, 9 Sim. 135; Radcliffe *v.* Eccles, 1 Keen, 130. For the mode of enforcing the execution of deeds, see *ante*, pp. 1042 *et seq.*, 956. The execution of the conveyance may still be enforced under the above Acts: Sugd. Stat. 411–412, 417, n., 419; Headlam, 2, n.; but the usual practice now is for the decree or order directing the sale or mortgage to declare that the infant, heir, devisee, or tenant for life, is a trustee within the meaning of the Trustee Act, 1850, see *post*, Chap. XLV., *Statutory Jurisdiction* (*Trustee Acts*), and then to obtain a vesting order; Seton, 688. For cases under the above Acts, see *ibid.*; Shelford, R. P. Acts, 483–486; Sugd. Stat. 418, 419; and for forms of orders, see Seton, 825–827.

The surplus of the money raised by the sale or mortgage, which remains after answering the purposes for which it was raised, and defraying all reasonable costs and expenses, is to be considered in all respects of the same nature, and descend or devolve in the same manner, as the estate or the lands so sold or mortgaged, and to belong to the same persons, be subject to the same limitations and *provisions, *1346 and be applicable to the same purposes, as such estate or lands would have belonged and been subject and applicable to, in case no such sale or mortgage had been made.[1]

Apportionment of Deficient Fund.

Where, from a deficiency in the assets or any other cause, a fund has to be apportioned amongst a class,[2] the fund, if small, is usually directed to be apportioned in amounts to be verified by affidavit.[3] In other cases the apportionment is directed to be made at Chambers: in which case, upon the return of the summons to proceed[4] on the order directing the apportionment, a concise statement is directed to be brought in, showing the fund to be apportioned, the charges upon it, and the persons amongst whom, and in what amounts, it is divisible.[5] If any costs are payable out of the fund, they will be taxed by anticipation. A certificate of the apportionment, showing in a schedule the amount payable to each person, and the debt or sum in respect of which it is an apportionment, is then made and filed,[6] and upon production of an office copy thereof to the Accountant-General, he will pay the apportioned amounts accordingly.[7]

Appointment and Removal of Guardians of Infants.

The power of appointing guardians,[8] and making orders for maintenance, constitutes a part of the general and important jurisdiction

[1] 2 & 3 Vic. c. 60, § 2; and see Jermy *v.* Preston, 13 Sim. 356, 366; Cooke *v.* Dealey, 22 Beav. 196; Shelford R. P. Acts, 485.

[2] As to the distinction between real and personal, and legal and equitable assets, see Haddan, 66–79; 2 L. C. Eq. 88–104; Ram on Assets, 181–203; Smith's Comp. 500; Trower, 268–275; Williams's Real Assets, 1–14; and for the principles on which assets are applied and distributed in Equity, see Haddan, 90–139; Ram, xix.–xxvii.; Smith's Comp. 502–514; Trower, 295–306; Williams's Real Assets, 95–118.

[3] See forms of orders in Seton, 141, 142, 243. For form of affidavit, see Vol. III.

[4] Ord. XXV. 15, 16.

[5] For form of statement, see Vol. III.

[6] For form of schedule, see Regul. 8 Aug., 1857, Sched. No. 12; and Vol. III.; and for form of certificate, see Vol. III.

[7] See *post*, Chap. XLI., *Payment out of Court*.

[8] As to the various kinds of guardianship of infants, see Macpherson on Infants, 2–114, liii.–lxii.; Chambers on Infants, 54–80, 861; 2 L. C. Eq. 563–570. As to the appointment of guardians by the Court of Chancery, and its control over guardians, see Macpherson, 95–151, lx.–lxii.; Chambers, 81–105, 158–200, 862–864; 2 L. C. Eq. 570–588; Seton, 702. As to the custody of infants, under 2 & 3 Vic. c. 54, and guardianship of infant felons, under 3 & 4 Vic. c. 90, see *post*, Chap. XLV., *Statutory Jurisdiction*. See as to interference on appeal with discretion of Judge in making appointment, *Re* Kaye, L. R. 1 Ch. Ap. 387, L. JJ. As to the respect shown to guardian appointed by a foreign Court, see Nugent *v.* Vetzera, L. R. 2 Eq. 704; 12 Jur. N. S. 781, V. C. W.

which the Court of Chancery exercises for the protection of the property of infants, and the safe custody of their persons, during their *1347 minorities;[9] and this jurisdiction has long been exercised * in a summary way: formerly on petition, and now by summons,[1] without requiring a bill to be filed.[2]

Where a suit is instituted for the direction of the Court in relation to the estate or person of an infant and for his benefit, or for the administration of property in which he is interested, the infant, whether plaintiff or defendant, becomes a ward of Court the instant that the suit is commenced. In this character, he is considered to be under the particular care of the Court; and he is equally entitled to its protection, whether he is under the immediate tutelage of a father, of a statutory or common-law guardian, or of a guardian appointed by the Court: but the Court does not assume to itself the actual guardianship of infants.[4] Where a fund, in which a female infant was interested, had been paid into Court under the Trustee Relief Act,[5] and an order made for maintenance thereout, it was held that she thereby became a ward of Court.[6] But payment into Court under the Legacy Duty Act,[7] of a legacy to which an infant is entitled,[8] or under the Lands Clauses Act,[9] of the purchase-money of land belonging to an infant taken for public purposes,[10] does not constitute the infant a ward of Court.

In order that the benefit arising from the protection of the Court may be extended to all cases in which interference is desirable, it is permitted to any person to commence proceedings on behalf of infants; subject, however, to the risk of incurring the censure of the Court, and of being

[9] For the origin and history of this jurisdiction, see Co. Litt. 89, a, Hargrave's note (70), § 16; 2 Fonb. Eq. 226, n.; F. N. B. 232; Story Eq. Jur. § 1327 *et seq.*; Macpherson on Infants, 95, 1 Spence Eq. Jur. 611 *et seq*; Wellesley *v.* Duke of Beaufort, 2 Russ. 120; S. C. *nom.* Wellesley *v.* Wellesley, 2 Bligh N. S. 124; *Ex parte* Birchel, 3 Atk. 813; *Re* Bond, 11 Jur. 114, V. C. K. B.; Jones *v.* Powell, 9 Beav. 345; *Re* Neale, 15 Beav. 250; Carr *v.* Living, 28 Beav. 644; 2 Kent, 226, 227; Townsend *v.* Kendall, 4 Min. 412.

[1] 15 & 16 Vic. c. 80, § 26, *ante*, p. 1323.

[2] It is stated, that the earliest case upon record of the exercise of this power of appointing a guardian upon petition, without suit, "occurred in the year 1696, in the case of Hampden;" Co. Litt. 89 a, Hargrave's note (170), § 16. It appears, however, upon reference to the Registrar's books, that cases of a similar kind occurred at an earlier period. *Ex relatione*, Mr. Monro.

[3] Macpherson, 103; Hughes *v.* Science, *ib.* Ap. 1; Ambl. 302, ed. Blunt, n.; 2 Eq. Ca. Abr. 756, pl. 14.

[4] Macpherson, 103; and see Story Eq. Jur. § 1352; Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 118; Goodall *v.* Harris, *ib.* 560, 562; Butler *v.* Freeman, Amb. 302; Hughes *v.* Science, *ubi sup.*; Wright *v.* Naylor, 5 Mad. 77; Wellesley *v.* Wellesley, and S. C. *nom.* Wellesley *v.* Duke of Beaufort, *ubi sup.*; Gynn *v.* Gilbard, 1 Dr. & S. 356; 7 Jur. N. S. 91; Stuart *v.* Moore, 4 Macq. H. L. 1; 7 Jur. N. S. 1129; 9 H. L. C. 440; S. C. *nom.* Marquis of Bute *v.* Stuart, 2 Giff. 582; 7 Jur. N. S. 355. It seems, also, that if no suit is pending, an infant may be made a ward of Court, on a petition presented for that purpose. *Re* M'Cullochs, Dru. 276; see also *Re* Bishop, Macpherson Ap. 5; Stuart *v.* Moore, *ubi supra*; and *ib.* 4 Macq. 36 n.

[5] 10 & 11 Vic. c. 96.

[6] *Re* Hodges, 3 K. & J. 213; 3 Jur. N. S. 860; and see *Re* Hoare, 4 Giff. 254; *Re* Tweedale, John. 109; and *post*, Chap. XLV., *Statutory Jurisdiction* (*Trustee Relief Acts*).

[7] 36 Geo. III. c. 52, § 32, see *post*, Chap. XLV., *Statutory Jurisdiction* (*Legacy Duty Acts*).

[8] *Re* Hilary, 13 W. R. 959, V. C. K.; 2 Dr. & Sm. 461.

[9] 8 & 9 Vic. c. 18; see *post*, Chap. XLV., *Statutory Jurisdiction* (*Lands Clauses Act*).

[10] *Re* Wilts Railway Company, *Ex parte* Brewer, 13 W. R. 959, V. C. K.

compelled to pay the costs of the suit, in the event of its subsequently appearing that the proceedings were improperly instituted.[11]

*So far as the jurisdiction of the Court relates to the appoint- *1348
ment of guardians and the protection of the persons of infants, it does not seem absolutely necessary to allege, as a foundation for the interference of the Court, that the infant is possessed of property;[1] but there can scarcely occur a case where the Court can be called upon to interfere, unless the infant is possessed of some property. According to Lord Eldon, in *Wellesley* v. *The Duke of Beaufort*,[2] the Court is not in the habit of exercising jurisdiction over the persons of infants, except in cases where the existence of property has brought them within the power of the Court; but it is not from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction: because the Court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically, only where it has the means of doing so: that is to say, by its having the means of applying property for the use and maintenance of the infants. Where, however, the infant was the child of an English father, who had been naturalized in America, the Court appointed guardians for her: although her property was real estate situate in America, and she had been clandestinely removed thence by her paternal relatives, in breach of an injunction from an American Court restraining her removal, and guardians had been appointed in America.[3]

Where a suit had been instituted by bill relating to property in which infants are interested, and guardians or maintenance are required, it is usual for the decree to give leave to the infant to make such application in Chambers for the appointment of a guardian, and for an allowance for maintenance, as he may be advised:[4] in which case, the decree is prosecuted in the usual manner.

An application in a suit, whether commenced by bill or administration summons, may also be made at Chambers, at any time, for the appointment of a guardian, an allowance for maintenance, or matters connected therewith.[5] If the infant is a party to the suit, the application is made by an ordinary summons. If he is not a party, the first application is made by a summons in the form used for proceedings originating at Chambers: which is intituled * in the matter of the infant by *1349
his next friend, and in the suit;[1] but subsequent applications in

[11] Startea *v.* Bartholomew, 6 Beav. 143; Sale *v.* Sale, 1 Beav. 586; Fox *v.* Suwerkrop, *ib.* 583; Raven *v.* Kerl, 2 Phil. 692; *ante*, pp. 74, 75, 79.

[1] *Re* Spence, 2 Phil. 247, 252; *Re* Fynn, 2 De G. & S. 457, 481; and see Hope *v.* Hope, 4 De G., M. & G. 328, 343.

[2] 2 Russ. 20, 21.

[3] *Re* Dawson, Dawson *v.* Jay, 2 Sm. & G. 199; S. C. *nom.* Dawson *v.* Jay, *Re* Dawson, 1 Jur. N. S. 37; 3 De G., M. & G. 764; and see Johnstone *v.* Beattie, 10 Cl. & F. 42; S. C. *nom.* Beattie *v.* Johnstone, 1 Phil. 17, 30; 5 Jur. 671; Stuart *v.* Moore, 4 Macq. H. L. 1; 7 Jur. N. S. 1129; 9 H. L. C. 440; S. C. *nom.* Marquis of Bute *v.* Stuart, *ib.* 355; 2 Giff. 582; but see Nugent *v.* Vetzera, L. R. 2 Eq. 704; 12 Jur. N. S. 781, V. C. W.

[4] Seton, 702; and form, *ib.* 699, No. 1.

[5] 15 & 16 Vic. c. 80, § 26, *ante*, p. 1061. As to maintenance, see *post*, p. 1356 *et seq.*

[1] *Ante*, p. 1331 *et seq.* The written authority of the next friend must be filed with the duplicate summons. 15 & 16 Vic. c. 86, § 11, *ante*, p. 1332, n. (12). For form of authority, see Vol. III.

the same matter and suit are made by an ordinary summons.[2] The summons, in either case, is prepared, issued, and served, where service is necessary, in the manner before explained.[3]

Where no suit is pending, the application should be made by summons, under the summary jurisdiction of the Court.[4] The summons must be in the form used for proceedings originating at Chambers;[5] and it is prepared, issued, and served, where service is necessary, in the manner before described.[6] The summons is intituled in the matter of the infant by his next friend: whose written authority to commence proceedings must be filed with the duplicate summons.[7]

Where the only object is the appointment of a guardian of the person, the appointment may be made under the summary jurisdiction of the Court, however large the property may be; and there is no necessity for filing a bill.[8] The fact of the father of an infant being alive, is not in itself a sufficient reason to prevent the Court interfering: for, if a sufficiently strong case is made, a person will be appointed, without suit, to act as guardian during the lifetime of the father. In *Ex parte* Mountfort, Lord Eldon said, "I have no doubt that, in certain cases, the Court will, upon petition, without a bill, appoint, not a guardian, which cannot be during the father's life, but a person to act as guardian: though in modern times the Court has professed to be very cau-
*1350 tious upon that."[9] *Nor will the Court decline to appoint a guardian because the infant, being fourteen years old, and entitled to real estate, has by deed appointed a guardian for himself.[1]

[2] *Ante*, p. 1331 *et seq.*

[3] *Ibid.* For form of summons, see Vol. III.

[4] *Ante*, p. 1323. It may be observed that, in such cases, ordinary jurisdiction by bill is not excluded except by express enactment: Hyde *v.* Edwards, 12 Beav. 160; though the party refusing to avail himself of the summary jurisdiction may have to pay the costs: Thomas *v.* Walker, 18 Beav. 521.

[5] 15 & 16 Vic. c. 80, § 26, *ante*, p. 1323. Subsequent applications, in the same matter, are made by ordinary summons. *Ante*, p. 1331 *et seq.* Guardians are also appointed at Chambers for special purposes: such as, presenting, or consenting to the presentation, to a living, or to protect the infant's interest on a bill in Parliament. For forms of orders in such cases, see Seton, 692, 693, 706; and for forms of summons, see Vol. III.

[6] *Ante*, p. 1331 *et seq.*

[7] 15 & 16 Vic. c. 86, § 11, *ante*, p. 1332, n. (5). For forms of summons and authority, see Vol. III.

[8] *Re* Duke of Newcastle, 15 Ves. 447, n. (*b*); and see *Ex parte* Mountfort, *ib.* 445, 447.

[9] 15 Ves. 447. For form of order in such a case, see Seton, 700, No. 3. The following cases may be referred to, for the principles on which the Court appoints a person to act as guardian during the lifetime of the father. Wilcox *v.* Drake, 2 Dick. 631; Lyons *v.* Blenkin, Jac. 245, 254, and cases there cited; Wellesley *v.* Duke of Beaufort, 2 Russ. 1; S. C. *nom.* Wellesley *v.* Wellesley, 2 Bligh N. S. 124; *Re* England, 1 R. & M. 499; *Re* Fynn, 2 De G. & S. 457; 12 Jur. 713; Thomas *v.* Roberts, 3 De G. & S. 758; Anon., 2 Sim. N. S. 54. Whenever a father is guilty of gross ill-treatment or cruelty towards his infant children, or is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or he professes atheistical or irreligious principles; or his domestic associations are such as tend to the corruption and contamination of his children; or he otherwise acts in a manner injurious to the morals or interests of his children; in every such case the Court of Chancery will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education. Powel *v.* Cleaver, 2 Bro. C. C. (Perkins's ed.) 500, 501, and notes and cases cited; 1 Macpherson, Infants, 142, 147. The English cases on this subject are numerous. See some of them cited 2 Story Eq. Jur. § 1341, in note; De Manneville *v.* De Manneville, 10 Sumner's Ves. 52, and notes; see also *Ex parte* Wollstonecraft, 4 John. Ch. 80; *Ex parte* Waldron, 13 John. 419; People *v.* Mercien, 8 Paige, 47; U. States *v.* Green, 3 Mason, 482; *In re* Mitchell, R. M. Charlt. 489, 494, 495; 2 Kent, 220, 221, and notes; Ahrenfeldt *v.* Ahrenfeldt, 1 Hoff. Ch. 497; Cockrell *v.* Cockrell, 36 Ala. 673; Cowls *v.* Cowls, 3 Gilman, 435.

[1] Coham *v.* Coham, 13 Sim. 639.

The Court of Chancery has jurisdiction over the custody of children of British subjects, although born and domiciled out of England; and will, upon their coming within the jurisdiction, appoint guardians for them;[2] and the Court will appoint a guardian for an infant who is out of the jurisdiction, if his property is situate here, or under the control of the Court; but it is usual to require that the parent, or one of the guardians, should be within the jurisdiction.[3]

By the 12 Car. II. c. 24, it is provided that the father of any child under the age of twenty-one years, and not married at the time of his death, may, whether such father is within the age of twenty-one years, or of full age, by deed[4] or will[5] dispose of the custody and tuition of such child in such manner as he shall think fit, for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons in possession or remainder.[6] And such disposition *of the custody of such *1351 child will be good and effectual against all persons claiming the custody or tuition of such child as guardian in socage or otherwise; and such person or persons to whom the custody of such child is so disposed or devised, may maintain an action of ravishment of ward or trespass against any person or persons who may wrongfully take away or detain such child, and may recover damages for the same in the said action for the use and benefit of such child. And such person or persons to whom the custody of such child is so disposed or devised, may take into his or their custody, to the use of such child, the profits of all lands, tenements, and hereditaments of such child, and also the custody, tuition,

[2] Johnstone *v.* Beattie, Dawson *v.* Jay, and Stuart *v.* Moore, *ante*, p. 1348, note (3); Hope *v.* Hope, 4 De G., M. & G. 328; and see Dawson *v.* Jay. *Re* Dawson, 3 De G., M. & G. 764, as to a guardian taking an infant ward out of the jurisdiction.

[3] Logan *v.* Fairlee, Jac. 193; Lockwood *v.* Fenton, 17 Jur. 127, V. C. S.; and see Stephens *v.* James, 1 M. & K. 627; De Weever *v.* Rochport, 6 Beav. 391.

[4] In some of the United States it is expressly provided by statute that the father may by deed, executed in his lifetime, dispose of the custody and tuition of his children during their minority. 2 Kent, 225, note; Thomas *v.* Williams, 9 Florida, 289.

In some of the States, the word deed is omitted from the statute empowering the father to appoint guardians for his children; as in Ohio and Massachusetts. See Byrne *v.* Love, 14 Texas, 81.

[5] The guardian himself may be one of the attesting witnesses. Morgan *v.* Hatchell, 19 Beav. 86; 1 Jur. N. S. 125.

[6] The guardianship of children appears never to have been made the subject of testamentary disposition until the statute 12 Charles II., per Lord Alvanley in *Ex parte* The Earl of Ilchester, 7 Ves. 370.

In Massachusetts, "a father may by his last will in writing appoint guardians for his children, whether born at the time of making the will or afterwards, to continue during the minority of the child or a less time." Genl. Sts. c. 109, § 5. The will in such case must be executed with the formalities required by the general law respecting the execution of wills. Wardwell *v.* Wardwell, 9 Allen, 518. The guardian derives his authority directly from the will. Norris *v.* Harris, 15 Cal. 226.

This power of the father to constitute a guardian by will, has been pretty extensively adopted in the United States. It is a personal trust, and not assignable. 2 Kent, 224, 225; Eyre *v.* Shaftesbury, 2 P. Wms. 121; Balch *v.* Smith, 12 N. H. 441; Norris *v.* Harris, 15 Cal. 226; see Peyton *v.* Smith, 2 Dev. & Bat. Eq. 325; M'Allister *v.* Olmstead, 1 Humph. 210.

[As to what language will constitute a person testamentary guardian, see Macknet *v.* Macknet, 9 C. E. Green, 278.]

In New York, by a law of 1862, c. 172, § 6, the consent of the mother, if living, is necessary to the appointment of a testamentary guardian by the father.

If the will is not executed with the requisite formalities to render it valid and binding as a will, still the Court in appointing a guardian will have great regard to the express wishes of the father. Wardwell *v.* Wardwell, 9 Allen, 518, 522; Watson *v.* Warnock, 31 Geo. 716.

and management of the goods, chattels, and personal estate of such child till his age of twenty-one years or any lesser time, according to such disposition as aforesaid, and may bring such action or actions in relation thereunto as by law a guardian in common socage might do.[1] It has, however, since been enacted, "that no will made by any person under the age of twenty-one years shall be valid:"[2] so that a father, while under that age, cannot now by will dispose of the custody of his children.[3] There does not, however, seem any reason why the power to dispose of the custody by deed should not still continue, in a like case.[4]

The 12 Car. II. c. 24, only enables the father to dispose of the custody of his unmarried children; but it seems that, if a male child be unmarried at the time of the death of his father, the testamentary guardianship does not determine until he attains the age of twenty-one years, notwithstanding his marriage:[5] though in such a case, the guardianship of a female would necessarily determine by marriage.[6]

*1352 The Act confers authority upon no person * except a father,[1] and with respect to a father, it has reference only to legitimate children.[2]

A testamentary guardian is subject to the control of the Court,[3]

[1] Sects. 8, 9, 10. Formerly a Roman Catholic could not be a guardian, but the disqualification was removed by the 10 Geo. IV. c. 7.

[2] 7 Will. IV. & 1 Vic. c. 26, § 7.

[3] This must of course be true in all States where a minor has not power to make a valid will. But in several of the United States, the father, though a minor, may appoint a testamentary guardian, who should have the powers of a guardian in common socage. 2 Kent, 225 note.

[4] But see the remarks of Lord Eldon in *Ex parte* The Earl of Ilchester, 7 Ves. 367; Lord Shaftsbury *v.* Hannam, Finch, 323; 2 Kent, 225.

[5] Earl of Shaftsbury's Case, cited 3 Atk. 625.

[6] Mendes *v.* Mendes, 1 Ves. S. 91. Chancellor Kent says it is the better opinion, that a testamentary guardian continues till the age of twenty-one, though the infant be a female, and marry in the mean time, if the will be explicit as to the duration of the trust; for the statute gives that authority to the father. The later cases lead to the conclusion that the marriage of the female infant does not absolutely determine the guardianship, and that it would require a special order in Chancery to do it. 2 Kent, 225, 226; *In re* Whitaker, 4 John. 380. He adds, "The cases are not very clear and consistent on this point. It would be quite reasonable that the marriage of a female ward should determine the guardianship, both as to her person and her estate, if she married an adult. It ought to be so as to her person, but not as to her estate, if she marries a minor." 2 Kent, 226: see Jones *v.* Ward, 10 Yerger; Roach *v.* Garvan, 1 Ves. S. 160. In *Re* Whitaker, 4 John. Ch. 380; Nicholson *v.* Wilborn, 13 Geo. 467; Porch *v.* Fries, 3 C. E. Green, 204; Burr *v.* Wilson, 18 Texas, 367.

By statute in Massachusetts, the marriage of a female, under guardianship as a minor, discharges her guardian from all right to her custody and education, but not to her property. Genl. Sts. c. 109, § 26.

In New Jersey, the power of a guardian appointed by the Orphans' Court over a female ward, ceases upon her marriage under age. From the marriage, her husband stands in the place of her guardian, both as to her person and her property. Porch *v.* Fries, 3 C. E. Green, 204; see Jones *v.* Ward, 10 Yerger, 160; Macpherson on Infants, 90.

[1] Brigham *v.* Wheeler, 8 Met. 127. A grandfather cannot appoint a guardian for his grandchildren. Hoyt *v.* Hellen, 2 Edw. Ch. 202. Nor can a mother for her children. Matter of Pierce, 12 How. Pr. 532. [Bell, *Ex parte*, 2 Tenn. Ch. 327.]

But in Illinois, by statute of 1835, power is given by deed, or last will, to the mother as well as to the father to appoint a guardian of her children, if she be sole, and the father has made no such disposition.

A party permitted by the Act of the Legislature of Louisiana to adopt a minor, cannot appoint a testamentary tutor to such adopted minor, to the exclusion of the natural father. In Tutorship of Upton, 16 La. An. 175.

[2] Ward *v.* St. Paul, 2 Bro. C. C. 583; Peckham *v.* Peckham, *ib.* n.; 2 Cox, 46; Chatteris *v.* Young, 1 J. & W. 106; Macpherson, 87; Chambers, 38.

[3] Duke of Beaufort *v.* Berty, 1 P. Wms. 703, 704.

both with respect to the property and the person of the infant:[4] and the Court may remove him and appoint another guardian in his stead,[5] or may, without removing him, appoint another person to have the care of the infant.[6] As a general rule, however, the Court does not remove testamentary guardians, but makes orders to regulate their conduct.[7]

Where a testamentary guardian has once taken the trust upon him and acted as guardian, if it is sought to remove him for misconduct, a bill must be filed; but not where he has declined to act: for that is as if there had been no appointment of him as guardian.[8] In such cases, a guardian should be appointed, in a summary way; and the mere circumstance of a dispute concerning the person to be appointed guardian is no reason why the application should not be made without suit:[9] although it is a reason why no order should be made without an inquiry.[10]

* Upon the application for the appointment of a guardian, evi- *1353
dence must be adduced to show: the ages of the infants; the nature and amount of their fortunes and incomes; and what relations they have.[1] What "relations" are to be included in the inquiry is a matter of discretion in each case: as a general rule, it should at least be shown what persons there are of or within the same degree of relationship as the proposed guardian; and if the mother is proposed as a guardian, the evidence should extend to uncles and aunts on the father's and mother's sides.[2] The summons should be served upon such relations: unless their acquiescence in the appointment of the proposed guardian is otherwise proved, or service on them is dispensed with.[3]

[4] Talbot *v.* Earl of Shrewsbury, 4 M. & C. 672; Witty *v.* Marshall, 1 Y. & C. C. C. 68, 71; Gardner *v.* Blane, 1 Hare, 381, and cases cited *ib.* 382, n. (*a*); Jones *v.* Powell, 9 Beav. 345.

[5] See 2 Story Eq. Jur. § 1339, note. In Massachusetts, when a guardian, appointed either by a testator, or by the Probate Court, becomes insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the Court, after notice to him and all others interested, may remove him, and appoint another in his stead. Genl. Sts. c. 109, § 24.

The general jurisdiction over every guardian, however appointed, still resides in Chancery; and a guardian appointed by the surrogate, or by will, is as much under the superintendence of the Court of Chancery, and of the power of removal by it, as if he were appointed by the Court. *In re* Andrews, 1 John. Ch. 99; *Ex parte* Crumb, 2 John. Ch. 439; 2 Kent, 226, 227, and note; Wilcox *v.* Wilcox, 4 Kernan (14 N. Y.), 575; [McPhillips *v.* McPhillips, 9 R. I. 536].

If not removed by the Court, the Chancery guardian continues until the majority of the infant, and is not controlled by the election of the infant when he arrives at the age of fourteen. 2 Kent, 226, 227: In the Matter of Nicoll, 1 John. Ch. 25.

[6] Roach *v.* Garvan, 1 Ves. S. 160; Smith *v.* Bate, 2 Dick. 631; and see Ingham *v.* Bickerdike, 6 Mad. 275.

[7] Roach *v.* Garvan, *ubi sup.*; Goodall *v.* Harris, 2 P. Wms. 560.

[8] Per Ld. Redesdale, in O'Keefe *v.* Casey, 1 Sch. & Lef. 106; and see *Re* M'Cullochs, Dru. 276.

[9] Lady Teynham *v.* Lennard, 4 Bro. P. C. ed. Toml. 302, cited in Eyre *v.* Countess of Shaftsbury, 2 P. W. 120; *Ex parte* Earl of Ilchester, 7 Ves. 348, 353; *Re* M'Cullochs, *ubi sup.*

[10] Beattie *v.* Johnstone, 1 Phil. 17, 30; 5 Jur. 671; S. C. *nom.* Johnstone *v.* Beattie, 10 Cl. & F. 42.

[1] Regul. 8 Aug., 1857, r. 19; Bloxam, 43.

[2] *Ibid.* In New Jersey, the mother, and after the mother the next of kin of the infant, are entitled to be appointed guardians of a minor under the age of fourteen years; and such claim cannot be disregarded unless for some satisfactory reason apparent to the Court. Albert *v.* Perry, 1 McCarter, 540.

[3] *Ibid.* As to what relations are preferred in the selection of a guardian, see Macpherson, 112.

Evidence is also required of the fitness of the proposed guardian; and his willingness to act should be proved by the production of his written consent.[4] The usual evidence of fitness has sometimes been dispensed with: thus, where a reputed father had appointed, by will, a guardian to an illegitimate child (which, as we have seen,[5] is inoperative under the statute), and no objection was made, the Court acted upon such nomination without further evidence, and thereby carried into effect that which the father intended, but could not strictly, by law, accomplish.[6] So, also, the Court at once appointed a guardian upon the nomination of the infant, who was fourteen: he appearing himself in Court for the purpose.[7]

If the mother of the infant, or any other female, is appointed guardian by the Court, and marries after her appointment, her guardianship determines, and a new appointment is necessary;[8] but it seems she will usually be reappointed.[9] So, also, where one of several guardians appointed by the Court dies, the right of the survivors determines, and it becomes necessary to apply again to make a new appoint-
*1354 ment.[10] If, however, no objection appears, it is *usual to reappoint the survivors.[1] But in the case of testamentary guardians, even though there are no words of survivorship in the deed or will appointing them, the office will, upon the death of one, survive to the others.[2]

Where there is no suit pending which will enable the Court to take upon itself the management of the infant's property, a guardian of the estate, as well as of the person, may be appointed on summons; but where such suit is pending, a guardian of the person only will be appointed.[3] Formerly, it was considered that the Court had no jurisdiction to appoint a receiver of an infant's property, unless a bill was filed;[4] but this rule has been frequently relaxed in modern practice, and guardians and receivers have been appointed on summons, without suit.[5] The more usual course, however, is to appoint a guardian of the person and estate, without a receiver.[6]

The application must be supported by evidence, showing the nature, rental, or income, and other material particulars of the estate,

[4] For forms of affidavit and consent, see Vol. III.

[5] *Ante*, pp. 1351, 1352.

[6] Chatteris *v.* Young, 1 J. & W. 106, and cases cited; Macpherson, 109; and see Beattie *v.* Johnstone, 1 Phil. 17, 30; 5 Jur. 671.

[7] *Ex parte* Edwards, 3 Atk. 519.

[8] This is the law by statute in Massachusetts. Genl. Sts. c. 109, § 25. As to the appointment of a married woman sole guardian, see *In re* Kaye, L. R. 1 Ch. Ap. 387. In some States, such appointment may be made with the assent of her husband, but not otherwise. Palmer *v.* Oakley, 2 Doug. (Mich.) 443; Farrer *v.* Clark, 29 Miss. (7 Cush.) 195. The policy of the law of New York is against the appointment of married women as guardians of the estate of minors. And where the mother of the minor is living with the second husband, though otherwise competent, she will not be appointed guardian of his estate. Holley *v.* Chamberlain, 1 Redfield (N. Y. Sur.), 333.

[9] *Re* Gornall, 1 Beav. 347; Jones *v.* Powell, 9 Beav. 345; and see Anon., 8 Sim. 346.

[10] Bradshaw *v.* Bradshaw, 1 Russ. 528.

[1] Hall *v.* Jones, 2 Sim. 41.

[2] Eyre *v.* Countess of Shaftsbury, 2 P. Wms. 103, 107; see Albert *v.* Perry, C. E. Green, 540, 542.

[3] See 2 L. C. Eq. 572; Macpherson, 105.

[4] *Ex parte* Whitfield, 2 Atk. 315; *Ex parte* Mountford, 15 Ves. 445.

[5] Seton, 705, and cases there cited.

[6] *Ibid.*

and also the fitness of the proposed guardian, and his consent to act.[7]

It is usual to appoint the same person to be guardian of the estate, as of the person of the infant; but this rule is sometimes departed from.[8]

The person appointed guardian of the estate must, ordinarily, give security duly to account, in the same manner as a receiver.[9] The amount of the security is regulated, as in the case of a receiver, by the sum which the guardian is likely to receive during the currency of his periodical account.[10] Where, however, the property is small, the Court has sometimes been satisfied with the undertaking of the guardian to account;[11] and where the estate consists exclusively of realty or leaseholds, the whole of the rents of which are allowed to the same guardian for the infant's maintenance, a recognizance is not generally required. The appointment is completed, and the guardian's accounts passed, in the same manner as in the case of a receiver.[12]

An application to remove a guardian of the person or estate, or supply a vacancy occasioned by death, or by the marriage of a female guardian, should be made by summons, supported by evidence * of the facts which render the application necessary, and of the *1355 fitness of the proposed guardian, and his consent to act.[1]

When the persons of infants are, by due and proper course of law, brought before the Court, it will take especial care that they remain within its jurisdiction, and obey its directions therein; and will not in general, whether they be actually wards or not, permit them to be taken, or go out of it.[2] Under special circumstances, however, the Court has permitted infants to go out of the jurisdiction, for the purpose of temporary, or even of permanent, residence there, or, when already abroad, to remain there, under restrictions whereby their property, and their education, and marriage, still remained within its control; but this must be on the ground of undoubted advantage to the infants, and on the responsibility of the guardian for the proper care of their persons; and the Court must be satisfied, if possible, that they will, at the proper period, be brought again within its power.[3] For this purpose, Ireland[4] and Scotland[5] are looked upon as foreign countries.[6]

[7] For forms of affidavits and consent, see Vol. III.

[8] See Seton, 701; 2 Kent, 227.

[9] See *post*, Chap. XXXIX., *Receivers*.

[10] *Ibid*.

[11] *Re* Sidingham, cited Seton, 706.

[12] See *post*, Chap. XXXIX., *Receivers*; Seton, 702. For forms, see Vol. III.

[1] For forms of summons, affidavit in support, and consent to act, see Vol. III.

[2] Chambers, 25; and see Macpherson, 129–132; 2 L. C. Eq. 588; Seton, 719–721; see Woodworth *v.* Spring, 4 Allen, 321, 335.

[3] Chambers, 28; Macpherson, 129; Stephens *v.* James, 1 M. & K. 627; Wyndham *v.* Lord Egmismore, 1 Keen, 467; Campbell *v.* Mackay, 2 M. & C. 31, 33; Talbot *v.* Earl Shrewsbury, 4 M. & C. 672; and see *Re* Bentley, cited Seton, 720; and also Jac. 265.

[4] Lethem *v.* Hall, 7 Sim. 141.

[5] Mountstuart *v.* Mountstuart, 5 Ves. 363; 1 Hov. Sup. to Ves. J. 603.

[6] Chambers, 28. The rights and authority of guardians over the person and property of their wards, are, like the rights and authority of executors and administrators, strictly local, and cannot be exercised in other States. Morrell *v.* Dickey, 1 John. Ch. 156; Sabin *v.* Gilman, 1 N. H. 193; Armstrong *v.* Lear, 12 Wheat. 169; Story Confl. Laws, §§ 499, 504; Woodworth *v.* Spring, 4 Allen, 321, 324;

An application for leave to remove an infant out of the jurisdiction may be made by summons, supported by affidavit of the grounds on which such removal is deemed proper.[7] The person taking the ward out of the jurisdiction usually signs an undertaking, indorsed on the summons,[8] to bring him back by the time prescribed by the Court; but this rule is occasionally relaxed in practice; and the undertaking of counsel has been sometimes considered sufficient.[9] In *Lethem* v. *Hall*,[10] a recognizance was entered into by the guardians, to bring the *1356 infant within the jurisdiction * whenever required, on his being placed at the University of Dublin.

Maintenance and Advancement.

The Court may, by an order to be made on the petition of the guardian of any infant in whose name any stock is standing (or any sum of money by virtue of any act for paying off any stock), and who is beneficially entitled thereto, or, if there is no guardian, by an order to be made in any cause, direct all or any part of the dividends due, or to become due in respect of such stock, or any such sum of money, to be paid to any guardian of such infant, or to any other person, according to the discretion of the Court, for the maintenance [1] and education, or otherwise for the benefit of such infant: such guardian or other person being named in the order directing such payment.[2]

Where there is a fund in Court, or under the control of the Court, belonging to an infant, or the income whereof is applicable to his maintenance, an application may be made, by summons, for an allowance thereout for such maintenance.

For the purpose of providing for the maintenance of infants during minority, out of property held in trust for them, it is customary to

Kraft *v.* Wickey, 4 Gill & J. 322; Johnstone *v.* Beattie, 10 Cl. & Fin. 42, 113, 145; Potter *v.* Hiscox, 30 Conn. 508; Leverich *v.* Adams, 15 La. An. 310; Townsend *v.* Kendall, 4 Min. 412; Grist *v.* Forehand, 36 Miss. 69; Warren *v.* Hofer, 13 Ind. 167. Where a guardian removed from a State in which he received his appointment, carrying with him a part of the infant's property, the Court, without notice to him, appointed another in his place. Cook *v.* Beale, 11 Ired. 36; Loskey *v.* Reid, 4 Bradf. (N. Y.) 334.

In Massachusetts, when a person under guardianship removes out of the State, his guardian may pay over and transfer the whole or any part of his property to any guardian or trustee appointed by competent authority, in the State to which the residence of the ward is removed, upon such terms and in such manner as the Supreme Court shall decree. Genl. Sts. c. 109, § 23. [The Code of Tern. makes provision for such cases. § 2539 *et seq.*]

[7] For forms of orders, see Seton, 719–720; 4 M. & C. 677; Macpherson Ap. 18; and for form of summons, see Vol. III.

[8] Or written in the Registrar's book, where the application is made in open Court, see Seton, 719, No. 1.

[9] Macpherson, 132. For form of undertaking, see Vol. III.

[10] 7 Sim. 141.

[1] As to maintenance of infants, see Macpherson, 213–258, lxx.-lxxii.; Chambers, 250–379, 892–898; 2 L. C. Eq. 598–609; Lewin, 757; Seton, 704. By the 28 & 29 Vic. c. 99, § 1, the County Courts have all the power and authority of the High Court of Chancery, in all proceedings relating to the maintenance or advancement of infants, in which the property of the infant does not exceed in amount or value 500*l.*; but see §§ 3, 9, as to transferring any suit or matter to the Court of Chancery; and §§ 18, 19, as to appeals; and see *post*, Chap. XLV., *Statutory Jurisdiction.*

[2] 11 Geo. IV. & 1 Will. IV. c. 65, § 32; see Seton, 722; *Re* Westwood, 6 N. R. 316, V. C. S.

insert in settlements, express powers, authorizing the legal holders of the funds to apply either the whole or some portion of the income or capital for the maintenance and advancement of the infants, according to such conditions as may be considered convenient. In the absence of any such powers, the income of an infant's estate may be applied towards his maintenance; and such payments (if clearly necessary) would be allowed the trustee or guardian in passing his accounts.[3]

It has been recently enacted, that in all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, such trustees, at their sole discretion, may pay to the guardians (if any) of such infant, or otherwise apply for or towards his maintenance or education, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund ap-
plicable to the same purpose, * or any other person bound by *1357
law to provide for such maintenance or education, or not; and such trustees are to accumulate all the residue of such income by way of compound interest, by investing the same, and the resulting income thereof, from time to time, in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen; but the trustees may at any time, if it appear to them expedient, apply the whole or any part of such accumulations, as if the same were part of the income arising in the then current year.[1] This statutory power is not, however, exercisable if the instrument creating the trust declares that such power shall not take effect; and where there is no such declaration, the statutory power is exercisable subject to such variations or limitations, if any, as are contained in such instrument.[2] The act does not empower any trustees to deal with or affect the rights of any persons soever, except to the extent to which they might have dealt with or affected such rights, if the instrument under which the trustees are empowered to act had contained express powers for such trustees so to deal with or affect such rights;[3] and the provisions of the act extend only to persons entitled to acting under a deed, will, codicil, or other instrument executed after the passing of the Act,[4] or under a will or codicil confirmed or revived by a codicil executed after that date.[5]

In cases not strictly within the provisions of the act last referred to, the trustee or guardian acts upon his own responsibility; and it is therefore usual, when there is a necessity for an application of a portion of the infant's property towards his support, and no power to authorize it, for the Court, upon the application of the infant, by his next friend, to make an order for his maintenance.[6]

[3] See Prince *v.* Hine, 26 Beav. 634.
[1] 23 & 24 Vic. c. 145, § 26.
[2] *Ib.* § 32.
[3] *Ib.* § 33.
[4] 28th August, 1860.
[5] 23 & 24 Vic. c. 145, § 34.
[6] See Cummins *v.* Cummins, 29 Ill. 452.

The practice of ordering maintenance, without suit, is more recent than that of so ordering the appointment of a guardian. According to Lord Hardwicke, Sir Joseph Jekyll was the first Judge who went so far in this summary way as to direct an allowance for maintenance: before his time, the Court would do no more than appoint a guardian in socage, till the infant had attained his age of fourteen.[7] The practice, however, though completely established, was considered to be confined to cases where the income of the infant was small: in other cases, it was deemed necessary that a bill should be filed.[8] The more recent cases show that this rule no longer exists; and that the
*1358 distinction * which formerly subsisted, between the cases where the income of the infant was derived from real estate, and where it was derived from personal estate, has been abolished.[1] Where, however, the infant's right to maintenance is doubtful, a bill should be filed.[2]

As a general rule, the Court will not, during the lifetime of the father, order maintenance for his children out of their property: as it is his duty to support them.[3] When, however, the father is not of sufficient ability to educate them according to their estate, an allowance for their maintenance will be authorized;[4] and for this purpose, it is not necessary that the father should be absolutely without the means of sup-

[7] *Ex parte* Ricards, 3 Atk. 519.

[8] See *Ex parte* Mountford, 15 Ves. 445, 448; *Ex parte* Lakin, 4 Russ. 307; *Re* Molesworth, 4 Russ. 308.

[1] *Ex parte* Starkie, 3 Sim. 339; *Re* Christie, 6 Sim. 43; *Ex parte* Angell, 13 Sim. 258; Nunn *v.* Harvey, 2 De G. & Sm. 301; see Matter of Bostwick, 4 John. Ch. 102.

[2] Fairman *v.* Green, 10 Ves. 45, 47; Corbet *v.* Tottenham, 1 B. & B. 60.

[3] Jackson *v.* Jackson, 1 Atk. 515; Fawkner *v.* Watts, *ib.* 408; Butler *v.* Butler, 3 Atk. 60; Darley *v.* Darley, *ib.* 399; Andrews *v.* Partington, 2 Cox, 223; Thompson *v.* Griffin, C. & P. 317; Kekewich *v.* Langston, 11 Sim. 291, 303, 305; 2 Story Eq. Jur. § 1354 *a*.

[4] Fendall *v.* Nash, 5 Ves. 197, n. (*a*); Cavendish *v.* Mercer, *ib.* 195, n. (*a*); Errat *v.* Barlow, 14 Ves. 202; Jervoise *v.* Silk, G. Coop. 52; *Ex parte* Williams, 2 Col. 740; Lucknow *v.* Brown, 12 Jur. 1017, V. C. W. In Massachusetts, if a minor, who has a father living, has property sufficient for his maintenance and education in a manner more expensive than the father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the maintenance and education of such child may be defrayed out of his own property in whole or in part, as shall be deemed reasonable by the Probate Court. Genl. Sts. c. 109, § 21; see Whipple *v.* Dow, 2 Mass. 415; Dawes *v.* Howard, 4 Mass. 97; Wilkes *v.* Rodgers, 6 John. 566. It is said by Chancellor Kent, that the Courts now look with great liberality to the circumstances of each particular case, and to the respective estates of the father and children; and in one case, where the father had a large income, he was allowed for the maintenance of his infant children, who had a still larger income. 2 Kent, 191; Jervoise *v.* Silk, Cooper Eq. 52; see also, Maberly *v.* Turton, 14 Ves. 599; Watts *v.* Steele. 19 Ala. 656; Osborne *v.* Van Horn, 2 Florida, 360; Matter of Burke, 4 Sandf. Ch. 617; Haase *v.* Roehrschied, 6 Ind. 67; Matter of Davison, 6 Paige, 136. It was held in Meyers *v.* Meyers, 2 M'Cord Ch. 255, that, if the father is in indigent circumstances, and the children are wealthy, the Court will allow for maintenance; otherwise the parent must support his children. See also, to the same effect, Chapline *v.* Moore, 7 Monroe, 173; [McKnight *v.* Walsh, 8 C. E. Green, 136; Trimble *v.* Dodd, 2 Tenn. Ch. 500.] See further, Dupont *v.* Johnson, 1 Bailey Eq. 279; Cudworth *v.* Thompson, 3 Desauss. 258; Ambler *v.* Macon, 4 Call. 606; Alston *v.* Alston, 34 Ala. 15. As to allowing maintenance for past time, see Andrews *v.* Partington, 3 Bro. C. C. (Perkins's ed.) 60, note (*a*) and cases cited; [Wright *v.* Vanderplank, 8 De G., M. & G. 133;] Matter of Bostwick, 4 John. Ch. 104; Greenwell *v.* Greenwell, 5 Summer's Ves. 199, and note (*b.*); Carmichael *v.* Hughes, 6 Eng. Law & Eq. 71; Presley *v.* Davis, 7 Rich. Eq. 105; in the Matter of Kane, 2 Barb. Ch. 375; *post*, 1360, note (9).

For circumstances under which application of fund for maintenance by trustee was sanctioned, and bill by *cestui que trust* to make him refund dismissed, see Aveline *v.* Melhuish, 2 De G., J. & S. 288.

porting his children: an order for maintenance may be made, if his circumstances are such as to prevent him from educating them in a manner suitable to the fortune they have a right to expect.[5] The rule that, if a father is of sufficient ability, he must educate and maintain his children out of his own fortune, applies, even though the gift of the property to them contains provisions authorizing their maintenance thereout: unless it is expressly given to their father for that *purpose.[1] This ground of exception is thus stated by Lord *1359 Thurlow, in *Andrews* v. *Partington:*[2] "If the will had given the dividends to the father for the maintenance of the children, it would have amounted to a legacy of the dividends to the father: which he would have been entitled to, though he had not spent half of it in the children's maintenance." This distinction was also acted upon by Sir Lancelot Shadwell V. C. in *Hawkins* v. *Watts*,[3] where a testator gave a share of his personal estate to his son-in-law, in trust to apply the same for the maintenance of his children by the testator's daughter; and it was held that the son-in-law was entitled to apply the interest of the share for his children's maintenance, notwithstanding he might be of ability to maintain them.

Another exception to the general rule, rendering it incumbent upon a father to maintain his children exclusively out of his own property, occurs where the father has contracted that certain property should be applied to that purpose;[4] but before he can be entitled to this benefit, he must show that such was his contract.[5]

In general, the Court will not direct a sum to be paid for maintenance out of the capital of the infant's property. If, however, the infant has no other means of subsistence, or it can be shown to be necessary for his advancement in life, the capital may be broken into.[6]

[5] Buckworth *v.* Buckworth, 1 Cox, 80.

[1] Hughes *v.* Hughes, 1 Bro. C. C. 387; Andrews *v.* Partington, 3 Bro. C. C. 60; Mundy *v.* Earl Howe, 4 Bro. C. C. 224; White *v.* Grane, 18 Beav. 571; but see Ransome *v.* Burgess, 1 W. N. 342, V. C. K.

[2] 2 Cox, 223, 224; 3 Bro. C. C. 60; but see Hoste *v.* Pratt, 3 Ves. 730.

[3] 7 Sim. 199.

[4] Stocken *v.* Stocken, 4 M. & C. 95, 98; and see S. C. 4 Sim. 152; 2 M. & K. 480; Mundy *v.* Earl Howe, *ubi sup.*; Meacher *v.* Young, 2 M. & K. 490; Birch *v.* Sumner, 3 Jur. N. S. 712, V. C. W.

[5] Thompson *v.* Griffin, C. & P. 317, 321.

[6] *Ex parte* Green, 1 J. & W. 523; *Ex parte* Swift, 1 R. & M. 575; *Ex parte* Chambers, *ib.* 577; Clay *v.* Pennington, 8 Sim. 359; Fentiman *v.* Fentiman, 13 Sim. 171; Bridge *v.* Brown, 2 Y. & C. C. C. 181; *Ex parte* Hays, 3 De G. & S. 485; *Re* Lane, 17 Jur. 219, M. R.; Walsh *v.* Walsh, 1 Drew. 64; and see Worthington *v.* M'Crace, 23 Beav. 81; Prince *v.* Hine, 26 Beav. 634; Seton, 704; Macpherson, 252, 255; Chambers, 354; Notley *v.* Palmer, L. R. 1 Eq. 241; 11 Jur. N. S. 968, V. C. K.; see Huffer's Appeal, 2 Grant's Cases (Penn.), 341; State *v.* Clark, 16 Ind. 97. In order to justify a guardian in exceeding the income of his ward's estate in expenditures for the maintenance and education of the ward, and in order to obtain an allowance for such excess, there must first have been an order of the Court authorizing him to do so. Gilbert *v.* McEachen, 38 Miss. 469; Foteaux *v.* Lepage, 6 Clarke (Iowa), 123; [Downey *v.* Bullock, 7 Ired. Eq. 102; Villard *v.* Chorin, 2 Strobh. Eq. 407; Beeler *v.* Dunn, 3 Head, 91; Cohen *v.* Shyer, 1 Tenn. Ch. 192. But see Roseborough *v.* Roseborough, 3 Baxt. 314, where it is held that the expenditure may be subsequently ratified].

Under the statute of Maine, a guardian is not authorized by law to make advances from his own means for the maintenance of his ward, but is bound to provide for such maintenance from the income and, if necessary, from the principal of the ward's personal estate, and, if these are insufficient, to obtain license of Court, and sell real estate

*1360 There is no rule requiring the mother to maintain her * children;[1] and therefore, if the father is not of sufficient ability,[2] or is dead,[3] maintenance will be allowed without reference to her ability.

An application at Chambers for the allowance of maintenance is made by an ordinary summons, in cases where a suit or matter is pending: in other cases, it is made by a summons in the form used for originating proceedings at Chambers.[4] The summons must be served on the trustees, or other persons interested in the fund out of which the maintenance is to be paid; and must be supported by evidence, showing that the income or *corpus* of the fund is applicable to the purpose. A scheme, showing the heads of the intended expenditure, should also be put in evidence.[5]

If an increase of the allowance is afterwards required, the application for it is made by an ordinary summons, supported by an affidavit showing the necessity for the increase.[6] The summons should be served on the trustees or other persons above mentioned.

Where, on the hearing of the cause, directions are given as to the appointment of guardians, or an allowance for maintenance, an inquiry what is proper to be allowed for the maintenance of the infant, and out of what fund the allowance ought to be made, will be directed.[7]

The guardian will usually be allowed any costs he may have incurred, as between solicitor and client,[8] but any sums which he has expended, and which would not be allowed under that head, should be mentioned at the hearing of the application: in which case, if necessary, a special direction will be given in the order concerning them.[9]

of the ward to provide the required means. Preble *v.* Longfellow, 48 Maine, 279.

A guardian cannot, by making such advancements for his ward's support, make the ward his debtor upon arriving at full age; nor can a guardian maintain an action against his late ward, when of age, to obtain remuneration for such advancements; nor for a balance due to him on his guardianship account as adjusted and allowed by the Probate Court. Preble *v.* Longfellow, *ubi supra*; Frost *v.* Warren, 32 Mis. 489; see Wyatt *v.* Wood, 31 Mis. 551.

If a third person has furnished necessaries to a minor under guardianship, having property, his remedy is against the estate of the minor in the hands of the guardian, but not against the guardian personally, unless he enters into a contract on which he can be held liable individually. Spring *v.* Woodworth, 4 Allen, 325, 327, 328; Cole *v.* Eaton, 8 Cush. 587; Conant *v.* Kendall, 21 Pick. 36. The only remedy against the guardian who neglects his duty in discharging the proper debts of the ward, or in discharging claims for necessaries furnished for the ward, out of the ward's property, is an action on the Probate bond. Conant *v.* Kendall, 21 Pick. 36; Cole *v.* Eaton, 8 Cush. 587.

[If the guardian properly provide for the ward, neither the guardian nor the ward's estate can be made liable even for necessaries furnished the ward. Nichol *v.* Steger, 2 Tenn. Ch. 528, citing Elrod *v.* Myers, 2 Head, 35; Kline *v.* L'Amoreux, 2 Paige, 420; Rivers *v.* Gregg, 5 Rich. Eq. 274; Kraker *v.* Byrum, 13 Rich. Eq. 163; Montara *v.* Hall, 6 Sim. 465; Angell *v.* McLellan, 16 Mass. 31.]

[1] See 2 Kent, 191; Whipple *v.* Dow, 2 Mass. 415.

[2] Haley *v.* Bannister, 4 Mad. 275, 280; Cavendish *v.* Mercer, 5 Ves. 195, n. (*a*); Hughes *v.* Hughes, 1 Bro. C. C. 387; Dawes *v.* Howard, 4 Mass. 97.

[3] Douglas *v.* Andrews, 12 Beav. 310; and see Lanoy *v.* Duke of Athol, 2 Atk. 447; *Ex parte* Lord Petre, 7 Ves. 403; Macpherson, 224; Chambers, 114.

[4] *Ante*, p. 1331.

[5] For forms of summons, affidavit, and scheme, see Vol. III.

[6] For forms of summons, see Vol. III.

[7] See forms of orders in Seton, 700, 701.

[8] See Taylor *v.* Kilgore, 33 Ala. 214.

[9] In general, past maintenance will not be ordered, unless a strong case for it is made; see Hill *v.* Chapman, 2 Bro. C. C. 231; Sherwood *v.* Smith, 6 Ves. 454; *Ex parte* Bond, 2 M. & K. 439; Clay *v.* Pen-

If the allowance is to be free from income tax, this should be expressed in the order; otherwise, it must be deducted.[10]

* It may be here mentioned, that where the infant and her *1361 father were resident abroad, the Court made an order, that upon the father appointing an attorney to receive the maintenance, the dividends of a fund in Court should be paid to the attorney half-yearly, upon the production to the Accountant-General of an affidavit by the father that he had duly applied, in the maintenance and education of the infant, all moneys received by him on that account to the time of making the affidavit;[1] and where the infant resided in the United States with her guardian, appointed by a foreign Court, the dividends of a fund of 531*l.*, in Court here, were ordered to be paid to her solicitor: he undertaking to remit them to the guardian.[2]

Where a person of weak or unsound mind, who has not been so found by inquisition or other proceedings in lunacy, has property under the jurisdiction of this Court, the Court may, without the aid of the jurisdiction in lunacy, appoint a person to act as guardian of the person, or person and estate, of the lunatic; and may order the income of his property to be applied for his maintenance;[3] or may even direct the *corpus* of such property to be applied in repaying past advances for maintenance.[4] The application, in such case, is made by petition, or, more usually, by summons, supported by similar evidence to that required in the case of infants;[5] and by affidavits showing the state of mind of the lunatic, that he is unable to manage his affairs, and that he has not been found lunatic by proceedings in lunacy.[6]

As long as guardians of the person, or other persons having an allowance for maintenance, duly maintain the person entrusted to their care, they are not accountable for their expenditure.[7]

In settlements it is customary, as we have seen,[8] to insert express

[10] Ord. 8 July, 1842, Cons. Ord. Ap.; Seton, 702.

[1] De Weever *v.* Rochport, 6 Beav. 391, 392, n. (*b*); and see Seton, 719, 720.

[2] *Re* Morrison, 16 Sim. 42; 11 Jur. 984; and see Volans *v.* Carr, 2 De G. & S. 242, where the infant had been found of unsound mind by a foreign Court.

[3] Wilkinson *v.* Letch, 2 C. P. Coop. t. Cott. 195; Volans *v.* Carr, *ubi sup.*; *Re* Berry, 13 Beav. 455; *Re* Barlee, 2 De G., F. & J. 124; 6 Jur. N. S. 717; *Re* Tayler, 2 De G., F. & J. 125; *Re* Ward, 6 Jur. N. S. 717, L. JJ.; *Re* Macfarlane, 2 J. & H. 673; 8 Jur. N. S. 208; *Re* Bignell, cited Seton, 710; and see *Re* Spiller, 6 Jur. N. S. 386, L. JJ.; *Re* Coleman, 1 W. N. 209, V. C. S. *In re* Sturge, 5 Jur. N. S. 423; 7 W. R. 395, M. R., an annual statement was directed to be made to Chambers of the lunatic's state of mind and property. As to the jurisdiction of this Court, with regard to the property of a lunatic not so found by inquisition, see cases cited *ante*, 86, note (1); and see 25 & 26 Vic. c. 86, there cited. As to pauper lunatics, see *post*, Chap. XLV., *Statutory Jurisdiction*.

[4] *Re* Law, 7 Jur. N. S. 410, V. C. W.; *Re* Macfarlane, *ubi sup.*; Williams *v.* Allen, 33 Beav. 241; and see Peters *v.* Grote, 7 Sim. 238; 2 C. P. Coop. t. Cott. 192.

[5] *Ante*, pp. 1352, 1360.

[6] For forms of orders, see Seton, 709, 710; and for forms of petition, summons, and affidavit, see Vol. III.

[7] Jodrell *v.* Jodrell, 14 Beav. 397; and see Leach *v.* Leach, 13 Sim. 304; Carr *v.* Living, 28 Beav. 644, 647. [It is otherwise, generally, in the United States, where, by statute, guardians are usually required to make stated settlements. See Tenn. Hospital *v.* Fuqua, 1 Lea, 608.]

[8] *Ante*, p. 1356.

powers authorizing the application of the whole or some portion of *1362 the income or capital of each child's expectant or apparent * share for the advancement of such child; and in the absence of express power, a like application of the infant's share may be made by the trustee without the sanction of the Court, where the same, if expended for maintenance, would not have been allowed him.[1]

Where the fund out of which the advancement to be made is in Court, or the infant is a ward of Court, or the administration of his estate, or his maintenance, is under the direction of the Court, an allowance for the purpose of purchasing him a commission in the army, or binding him apprentice, or otherwise for his advancement, may be applied for by summons,[2] supported by affidavit or other evidence showing the amount required to be advanced, the wishes of the infant, and his fitness for the profession, trade, or business selected.[3] Where it is proposed to article or apprentice the infant, the respectability of the intended master, and the propriety of the premium, are also usually required to be shown by affidavit. The articles or indentures of apprenticeship are usually settled at Chambers, in the ordinary way; and where the amount advanced is to be paid out of a fund in Court, it is usually necessary that the execution of the articles should be certified by the Chief Clerk.[4] Provision is sometimes made by the articles for the return by the Master of a portion of the premium, in the event of either the Master or the infant dying during the term.[5]

Management of Property.

The Court exercises a vigilant care over guardians of the estate in regard to the management and disposal of the property of infants;[6] and will carry its aid and protection in favor of infants so far as to reach other persons than those who are guardians strictly appointed: for, if a man intrudes on the estate of an infant, and takes the profits thereof, he will be treated as a guardian, and held responsible for the same to the infant in a Court of Equity.[7]

[1] Lewin, 386. As to advancement for infants, see Chambers, 380–388, 821; Macpherson, 253, 255, 335–337, xxxi.; Seton, 704; and as to the jurisdiction of the County Courts under 28 & 29 Vic. c. 99, in proceedings relating to advancement, see *ante*, p. 1356, note (1). [As to the exercise of the power of advancement after the institution of the suit, see Talbot *v.* Marshfield, L. R. 4 Eq. 661; 3 Ch. App. 622.]

[2] For form of summons, see Vol. III.

[3] For form of order to purchase a commission in the army, see Seton, 708, No. 9; and for form of affidavit, see Vol. III.

[4] For form of order, see Seton, 709. Where the amount is small, the drawing up of the order is sometimes deferred till after the articles have been executed, as, by so doing, the expense of a certificate of approval and of execution may be saved. See Wenn *v.* Wenn, M. R. in Chambers, 30 June, 1865, Reg. Lib. B. 1774.

[5] For form of articles, containing such a provision, see Vol. III.

[6] See 2 Kent, 229 *et seq.* and notes.

[7] Story Eq. Jur. § 1356; Newburgh *v.* Bickerstaffe, 1 Vern. 295; Cary *v.* Bertie, 2 *id.* 342; Bennet *v.* Whitehead, 2 P. Wms. 645; Morgan *v.* Morgan, 1 Atk. 489; West, 265; Dormer *v* Fortesque, 3 Atk. 130; Pulteney *v.* Warren, 6 Ves. 89; 1 C. P. Coop. t. Cott. 480; Wyllie *v.* Ellice, 6 Hare, 505; Blomfield *v.* Eyre, 8 Beav. 250; 9 Jur. 717; Nanney *v.* Williams, 22 Beav. 452, 469;

*There is some difficulty in determining with precision the ex- *1363
tent of the authority which is possessed by a guardian of the estate of an infant, who has been appointed by the Court of Chancery.[1] In the case of *Ex parte* Starkie,[2] Sir Lancelot Shadwell V. C. is reported to have said, that the order discharged the party making the payment, to the extent only of the allowance made; and it has been inferred from this, that a guardian cannot give a valid receipt to a tenant, unless there is an order for maintenance to the full extent of the infant's fortune. The language, however, of the orders appointing guardians, both in ancient and in modern times, seems to show that the power over the estate is more extensive than what could be inferred from this case. Moreover, it is the custom, as we have seen,[3] to make the guardian enter into a recognizance to account for what he receives of the estate: which would be unnecessary if the appointment gave him no control over the property of the infant.

The power of the testamentary guardian over the property of the infant, is more clearly defined:[4] he derives his authority from an Act of Parliament,[5] and has control as well over the lands descended to the infant from his father, as also over all other the real and personal estate belonging to the infant. The statute, moreover, expressly authorizes him to bring all such actions in relation thereto, as, by law, a guardian in common socage might do. The testamentary guardian seems to possess, as an incident to his office, the power of making valid leases of the estate of the infant for the term of his guardianship, upon which ejectment can be maintained; but a lease made by such a guardian to last beyond the minority of the ward is absolutely void, after the infant comes of age.[6]

Although, however, the testamentary guardian possesses these legal rights over the estate of the infant, he is, in all respects, subject to the control of the Court, and liable to account for what * he *1364
receives.[1] His rights and liabilities seem to be nearly the same as those of the guardian in socage: except, that they continue until the

Seton, 687; Mason *v.* Roosevelt, 5 John. Ch. 534; Sherman *v.* Ballou, 8 Cowen, 304; [Merriman *v.* Canovan, 1 Tenn. Leg. Rep. 94.] As to the management of the estates of infants by the Court, see Chambers, 508–596; Macpherson, 330–347; and as to granting and taking leases on behalf of infants, see *post*, Chap. XLV., *Statutory Jurisdiction* (*Property Law Amendment Act*).

[1] See 2 Kent, 220, 230, 231, and notes.

[2] 3 Sim. 339. On referring to the original petition in this case, and the order entered, Reg. Lib. 1824, B. 590, it appears that the infant's estate was vested in trustees, who had no power to advance maintenance. It may, therefore, be supposed that the observation of the Vice-Chancellor referred only to a case where trustees in possession of the estate make payments to a guardian of the person. It is obvious that in such a case the trustees would only be discharged to the extent of the allowance made for maintenance; but it does not follow that a guardian of the estate, where there is no trustee, cannot give a receipt for the full amount of the infant's fortune.

[3] *Ante*, p. 1354.

[4] In Chapman *v.* Tibbits, 33 N. Y. 289 it was held that the general guardian of an infant has the same power over the property and estate of his ward, as a testamentary guardian.

[5] 12 Car. II. c. 24, *ante*, p. 1350.

[6] Roe *dem.* Paray *v.* Hodgson, 2 Wils. 135; Woodfall, 41; Chambers, 515.

[1] 2 Kent, 227, 229; *In re* Andrews, 1 John Ch. 99; *Ex parte* Crumb, 2 John. Ch. 439; 2 Story Eq. Jur. § 1344; Gen. Sts. Mass. c. 199, § 6; Richards *v.* Swan, 7 Gill, 366; Swan *v.* Dent, 2 Md. Ch. Dec. 114; Matter of Van Horne, 7 Paige, 46.

infant is twenty-one, instead of terminating, as in the case of the guardian in socage, at fourteen.[2] According to Lord Hardwicke, "It is at the peril of a guardian in socage what he applies for maintenance; and he will be allowed according to the discretion he has used."[3]

From what has been stated concerning the power of a guardian appointed by the Court over the estate, it may be inferred, that he has no power incident to his office of making a lease valid at Law of any portion of the infant's estate; nor is there any authority as to the circumstances under which a lease made by such a guardian, during the minority, would be supported in Equity.[4] Consequently, when a suit is instituted, it is usual for a receiver to be appointed: in which case, the estate is managed according to the practice hereafter stated.[5] The Court, however, could not, under its original jurisdiction, in such a case, enable a receiver to create any legal term in the land; nor could it in any manner insure the occupation of the tenant, beyond the period of the infant's minority. A statute[6] has, therefore, been passed, under which the infant or his guardian may, with the sanction of the Court, accept renewals of leases, and grant leases: which will be valid, *1365 although they * exceed the period of the minority of the infant. The practice under this Act will be described hereafter.[1]

Guardians will not ordinarily be permitted to convert the personal estate of infants into real estate; since it may not only affect the rights of the infant himself, but also his representatives, if he should die under age. Guardians may, however, under special circumstances, where it is manifestly for the benefit of the infant, change the nature of the estate; and the Court will support their conduct, if the act be such

2 It is remarked by Chancellor Kent (2 Kent, 226), "The distinction of guardians, by nature and by socage, seems now to be lost or gone into oblivion, and those several kinds of guardians have become essentially superseded in practice by the *Chancery Guardians*, or guardians appointed by the Court of Chancery, or by the surrogates in the respective counties of New York, and by Courts of a similar character, and having jurisdiction of testamentary matters, in the other States of the Union. Testamentary guardians are not very common, and all other guardians are now appointed by the one or the other of those jurisdictions." See Putnam *v.* Ritchie, 6 Paige, 390; Wilson *v.* Roach, 4 Cal. 362.

It was remarked by Platt B. in Gilbert *v.* Schwenck, 14 M. & W. 488, 493, that testamentary guardians have no more power than guardians in socage, and are but trustees. See Duke of Beaufort *v.* Berty, 1 P. Wms. 703; Frederick *v.* Frederick, 1 P. Wms. 721. In Massachusetts, testamentary guardians have the same powers and duties, with regard to the person and estate of the ward, as a guardian appointed by the Probate Court. Genl. Sts. c. 109, § 5.

3 *Ex parte* Whitfield, 2 Atk. 315.

4 The guardian of the estate has no further power over, or concern with, the real estate than that which relates to the leasing of it, and the reception of the rents and profits, and it is his duty to place the ward's land upon lease. 2 Kent, 228; Genett *v.* Tallmadge, 1 John. Ch. 561; Jones *v.* Ward, 10 Yerger, 160. He may lease during the minority of the ward and no longer. Field *v.* Schieffelin, 7 John. Ch. 154; Snook *v.* Sutton, 5 Halst. 133; Putnam *v.* Ritchie, 6 Paige, 391. He may receive money secured to the ward by mortgage, and discharge the mortgage, before the same becomes due. Chapman *v.* Tibbits, 33 N. Y. 289. He may sell the personal estate without the previous order of the Court. Field *v.* Schieffelin, 7 John. Ch. 150; Ellis *v.* Essex M. Bridge, 2 Pick. 243; Bank of Virginia *v.* Craig, 6 Leigh, 399; Hunter *v.* Lawrence, 11 Grattan, 111; Woodward *v.* Donally, 27 Ala. 198. But the safer course for the guardian is, to have such previous order. 2 Kent, 228, note. And in Massachusetts provision is made by statute for obtaining it. Genl. Sts. c. 109, § 2.

5 See *post*, Chap. XXXIX., *Receivers*.

6 11 Geo. IV. & 1 Will. IV. c. 65.

1 See *post*, Chap. XLV., *Statutory Jurisdiction* (*Property Law Amendment Act*).

as the Court itself would have done, under the like circumstances, by its own order.[2] The act of the guardian in such case must not be wantonly done; but it must be for the manifest interest and convenience of the infant; and hence it is common for guardians to ask the positive sanction of the Court to any acts of this sort. Where the Court orders any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it, if it had remained in its original state.[3] This object may be obtained by conveying the land to a trustee, in trust for the infant, his executors and administrators, until he attains twenty-one, and afterwards for him and his heirs;[4] or by a conveyance to the use of the infant, his heirs or assigns; but if he dies under twenty-one, then to the use of trustees, upon trust to sell, and hold the purchase-money upon the trusts on which such money, and the income thereof, would have been held if the money had remained part of the infant's personal estate.[5] The practice as to investments in land, with the approval of the Court, has been already stated.[6]

[2] Story Eq. Jur. § 1357; Inwood *v.* Twyne, Amb. 419. As to the conversion of an infant's property, see Macpherson, 278–308; Chambers, 565–570; Seton, 694, 695.

[3] Lord Ashburton *v.* Lady Ashburton, 6 Ves. 6; and see Tullit *v.* Tullit, Amb. 370; Sergeson *v.* Sealey, 2 Atk. 413; *Ex parte* Phillips, 19 Ves. 122; Webb *v.* Lord Shaftesbury, 6 Mad. 100. [See Oberle *v.* Lerch, 3 C. E. Green, 346, 575; Paul *v.* York, 1 Tenn. Ch. 547. And see, where there was an infant *en ventre sa mère* at the date of the conversion, Knott *v.* Stearns, 91 U. S. 638.]

[4] 6 Ves. 7.

[5] This was the form adopted in Pym *v.* Pym, M. R. in Chambers, June, 1865.

[6] *Ante*, p. 1339.

*1366

*CHAPTER XXX.

THE FURTHER CONSIDERATION OF CAUSES.

Where accounts or inquiries have been directed, the decree, at the original hearing, adjourns the further consideration of the cause; and in order to obtain a final decree, the cause must be set down to be heard on further consideration.[1] The cause cannot, however, be set down until the accounts or inquiries directed by the decree have been taken or made, and the Chief Clerk's certificate, or Master's report, of their result filed; or a special certificate or report obtained, showing why the accounts and inquiries, or any of them, have not been proceeded with.

The Court will not, in general, entertain a summary application relating to the general matters of the suit, after the adjournment of further consideration,[2] unless liberty has been given to the parties, by the decree, to apply to the Court as they may be advised:[3] which is usually done.[4] It will, however, entertain applications for collateral matters: such as the appointment of a receiver.[5]

A cause cannot be set down, on further consideration, on a separate certificate or report: an order on a separate certificate or report must, as we have seen, be obtained on petition, or summons.[6]

The certificate or report cannot be challenged, at the hearing on further consideration, by any person who has not applied to discharge or vary it, and whose application does not then come on for hearing.[7]

No further evidence than the certificate or report, as to matters directly in issue in the cause, will be received on the hearing on further consideration; but, if necessary, the Court will, at the suggestion *1367 of counsel, direct further inquiries as to such matters.[8] * Mat-

[1] *Ante*, p. 986; Seton, 56. As to setting down the cause for further hearing after the trial of a question of fact, see *ante*, p. 1146 *et seq.*

[See Ruckman *v.* Decker, 1 Stew. Eq. 5. In the United States, the usual formula for the adjournment of the cause for further consideration is "other matters are reserved," and the cause is again heard, after the reference has been complied with, when again called in order on the docket at a regular term. Shepard *v.* Akers, 2 Tenn. Ch. 627, 630.]

[2] Cooke *v.* Gwyn, 3 Atk. 689.

[3] *Ante*, p. 996.

[4] See form of decree adjourning further consideration, Seton, 56.

[5] Cooke *v.* Gwyn, *ubi sup.*

[6] Van Kamp *v.* Bell, 3 Mad. 430.

[7] Smith *v.* Armstrong, 6 De G., M. & G 150, 154; Lambe *v.* Orton, 6 Jur. N. S. 61; S. C. *nom.* Lambe *v.* Orton, 8 W. R. 111, V. C. K.; Jaquet *v.* Jaquet, 7 W. R. 543, M. R.

[8] Fleming *v.* East, Kay Ap. 52; 18 Jur. 1112; Lyne *v.* Lyne, 21 Beav. 316; 8 De G., M. & G. 553; Howard *v.* Chaffers, 9 Jur. N. S. 634; 11 W. R. 585, V. C. K.; Curling *v.* Austin, 2 Dr. & Sm. 129; and see *Re* Delevante, Delevante *v.* Child, 6 Jur. N. S. 118, V. C. S.

ters not directly in issue may, if the Court thinks proper, be proved by affidavit.[1]

Upon the hearing on further consideration, the Court will make such further order in the cause as, upon reading the Chief Clerk's certificate, or Master's report, appears to be consistent with the justice of the case as it stands upon the decree and certificate or report. If the Court is dissatisfied with the manner in which the certificate or report has been drawn up, it will direct the certificate or report to be reviewed;[2] or the cause will be ordered to stand over, in order that the Chief Clerk may give the Judge such explanations as he may require: in which case, the Judge will either see the Chief Clerk on the subject, or the Registrar will make a note that the cause stands over for the purpose of obtaining further information on the particular part of the case; and this note is then communicated to the Chief Clerk.[3] If further investigation is required, it will be made by the Chief Clerk, and a note of the result thereof communicated by him to the Judge, and, if necessary, to the parties; but no formal certificate is usually drawn up.

The Court will not, however, direct the certificate or report to be reviewed for the purpose of deducing consequences from the facts stated therein; but will itself draw the conclusions from the facts stated:[4] as it will, where erroneous conclusions have been drawn in the certificate or report from facts correctly stated.[5] And where the certificate reserves for the consideration of the Court the conclusions to be drawn from the facts stated therein, the Court will look at the evidence on which the certificate was based.[6]

In general, if the case is such as will admit of it, the Court will, upon the first hearing on further consideration, make a final decree; and, when preliminary inquiries have been directed, it will, when the case comes before it upon the Chief Clerk's certificate, or Master's report, declare the rights of the parties in the matters in question. If the declaration of the Court, or the result of the former inquiries, renders any further inquiries necessary, the Court will take this occasion to direct such further inquiries: adjourning again the further consideration of the cause; and this it will repeat, as often as may be necessary.[7]

The Court usually, at the hearing on further consideration, disposes of the costs of the suit, so far as they have not been already *disposed of. Where the costs have been partly disposed of *1368 at the original hearing, the further consideration of the costs

[1] 13 & 14 Vic. c. 35, § 38. For cases on this section, see Dovey *v.* Thornton, 9 Hare, 233; Bush *v.* Watkins, 14 Beav. 33; Bear *v.* Smith, 5 De G. & S. 92; Fallows *v.* Lord Dillon, 2 W. R. 507, V. C. S.; see also Hoghton *v.* Hoghton, 15 Beav. 278; Fowler *v.* Reynell, 15 Jur. 1019, L. C.; Bateman *v.* Margerison, 2 W. R. 607, M. R.; *Re* Delevante, Delevante *v.* Child, *ubi sup.*

[2] *Ante*, 1319.

[3] Saunders *v.* Walter, 9 Hare Ap. 5; 16 Jur. 1008.

[4] Bick *v.* Motley, 2 M. & K. 312; Gregory *v.* West, 2 Beav. 541; *ante*, p. 1314, note (4), 1317, note (4), 1318, note (8).

[5] Adams *v.* Claxton, 6 Ves. 226; *ante*, p. 1243.

[6] Stott *v.* Meanock, 10 W. R. 605, *bis*, L. JJ.

[7] Seton, 57.

should be expressly adjourned by the decree.[1] Formerly, it was usual expressly to reserve the costs of the suit, in cases where no order was made with reference to them at the hearing; but this is now no longer necessary;[2] and it may be remarked here, that where costs are given by the decree at the hearing, the subsequent costs will be included;[3] and, therefore, if this is not intended to be done, the costs should only be given up to the date of the decree. The Court will not, on the question of costs, look at the proceedings in Chambers, or at evidence made use of there, or upon interlocutory applications.[4]

The Court will not take any matters into consideration, at the further hearing, which were in issue at the first hearing, but were not then decided, put into a train of investigation, or reserved;[5] such matters being considered as abandoned, or in such a state as not to entitle the plaintiff to any order on them.[6] If there be any error or omission in the decree it can only be corrected by a rehearing;[7] except that, in the case of an information relating to a charity, the Court will correct an omission of the original decree, upon further consideration.[8]

It seems, formerly, to have been thought that no direction could be given at a hearing upon further consideration, for the computation of interest, where the question of interest had not been reserved by the original decree;[9] but, according to the present practice, the computation of interest may be directed upon further consideration, although the question has not been reserved by the original decree;[10] and *1369 not only may the computation of simple * interest be so directed, but, where the Court finds large sums of money in the hands of an agent, receiver, trustee, or personal representative, it may direct balances from time to time in the hands of the accounting party to be ascertained, and interest to be computed on them.[1]

[1] See Seton, 56, 57.

[2] *Ib.* 57.

[3] Quarrell *v.* Beckford, 1 Mad. 269, 286; Clutton *v.* Pardon, T. & R. 304; Seton, 57; Morgan & Davey, 64; and see *post*, p. 1376.

[4] Curling *v.* Austin, 2 Dr. & Sm. 129.

[5] The principle is settled, that Chancery will not, on further directions, decide a question not reserved by the original decree. Lee *v.* Pindle, 12 Gill & J. 288.

By the Equity practice in Massachusetts questions once argued and decided in the full Court are not to be reheard at a subsequent stage of the cause, unless there is apparent error. Pingree *v.* Coffin, 12 Gray, 288.

[6] Passingham *v.* Sherborn, 9 Beav. 424, 432; and see Le Grand *v.* Whitehead, 1 Russ. 309, 311; Morgan *v.* Morgan, 13 Beav. 441; Jones *v.* Morrall, 2 Sim. N. S. 241, 250; Hughes *v.* Jones, 3 De G., F. & J. 307; 8 Jur. N. S. 399, 402.

[7] Lord Shipbrooke *v.* Lord Hinchinbrook, 13 Ves. 387, 394. Verbal errors in an interlocutory decree in Equity, inconsistent with the opinion on which it is founded, may be corrected before entering a final decree. Pingree *v.* Coffin, 12 Gray, 288. [And so, after decree entered, and at a succeeding term, in the Appellate Court, for the opinion being made a record, there is record evidence by which to make the corrections. Elliot *v.* Cochran, 1 Coldw. 389. And see Dorsheimer *v.* Rorback, 9 C. E. Green, 33; *ante*, 1029, n. 4.]

[8] Attorney-General *v.* Whiteley, 11 Ves. 241, 247; and see *ante*, pp. 14, 384.

[9] Ryves *v.* Coleman, 2 Atk. 440; Champ *v.* Moody, 2 Ves. S. 470; Herle *v.* Greenbank, 1 Dick. 370; Goodyere *v.* Lake, Amb. 584; S. C. 1 West, 490; Sammes *v.* Rickman, 2 Ves. J. 36; Creuze *v.* Hunter, 4 Bro. C. C. 318; S. C. 2 Ves. J. 164; Lee *v.* Pindle, 12 Gill & J. 288.

[10] Goodyere *v.* Lake, Amb. 584; Sammes *v.* Rickman, 2 Ves. J. 36; Creuze *v.* Lowth, 4 Bro. C. C. 316; S. C. *nom.* Creuze *v.* Hunter, 2 Ves. J. 164; Plintoff *v.* Haynes, 4 Hare, 309; Mackintosh *v.* Great Western Railway Company, 11 Jur. N. S. 681, 684, V. C. S. [See also Smith *v.* Smith, 4 Johns. Ch. 448; Benzein *v.* Robinett, 2 Dev. Eq. 67; Smith *v.* Godbold, 4 Strobh. Eq. 186; Shepard *v.* Akers, 2 Tenn. Ch. 627; *ante*, 382, n. 4.]

[1] Pearse *v.* Green, 1 J. & W. 135, 141, 144;

The Court has even gone the length of charging an accounting party with interest on the balance in his hands, on further consideration, not only where there was no reservation of the question of interest by the original decree, but even where the original bill did not pray that he might be so charged, and where the circumstances were such that a claim for interest existed, or was known to exist, at the time of the filing of the bill.[2]

The equitable right to charge an accounting party with interest — as where an agent, or trustee, or personal representative, has for a long time, had a considerable sum of money in his hands, belonging to the parties in the suit — generally appears by the Chief Clerk's certificate, or Master's report, in cases where the Court directs a computation of interest when it has not been reserved by the original decree. Where this does not so appear, it seems that the Court will allow evidence of new facts to be adduced on further consideration, upon which to ground an inquiry as to balances, for the purpose of charging interest.[3]

*Although the Court will, in cases where a proper ground *1370 appears, direct the computation of interest on further consideration, where the question of interest has not been reserved by the original decree, yet, where the original decree contains no declaration or inquiry as to wilful default on the part of the defendant, it will not, at the hearing on further consideration, make an order charging him with wilful default, or direct an inquiry upon the subject, notwithstanding the bill has made a case, and the certificate has laid the foundation for such an inquiry.[1] In such a case, the proper course appears to be

Johnson *v.* Prendergast, 28 Beav. 480; and see Davenport *v.* Stafford, 14 Beav. 319; 2 De G., M. & G. 901. As to the practice of allowing rests and compound interest against trustees, &c., see Fay *v.* Howe, 1 Pick. 527 (2d ed.), 528, and cases cited in note (1); Boynton *v.* Dyer, 18 Pick. 1; Hughes *v.* Smith, 2 Dana, 253; Karr *v.* Karr, 6 Dana, 3; Hodge *v.* Hawkins, 2 Dev. & Bat. 566; Ringgold *v.* Ringgold, 1 Harr. & G. 11; Harland's Accounts, 5 Rawle, 323. Trustees, executors, guardians, &c., will in cases of gross delinquency be charged with compound interest. See the cases cited above, and 2 Kent, 231, note, in which this subject is considered, and the cases cited. Diffenderffer *v.* Winder, 3 Harr. & G. 311; 2 Story Eq. Jur. 1277; Clarkson *v.* Depeyster, 1 Hopk. 424; Rogers *v.* Rogers, *ib.* 515; Dornford *v.* Dornford, 12 Sumner's Ves. 127, note (*a*); Evartson *v.* Tappan, 5 John. Ch. 497. Where a trustee has employed the trust money in trade, and refuses to account, he will be charged with compound interest. Schieffelin *v.* Stewart, 1 John. Ch. 620; see [McKnight *v.* Walsh, 8 C. E. Green, 137]. Where interest was ordered to be paid annually for maintenance and education, interest was allowed on the annual arrears of interest. Myers *v.* Myers, 2 M'Cord Ch. 214, 266; Bowles *v.* Drayton, 1 Desaus. 489; Wright *v.* Wright, 2 M'Cord Ch. 202; Spark *v.* Long, 1 Ired. Eq. 426. As to charging executors and trustees with interest, see further, Newton *v.* Bennett, 1 Bro. C. C. (Perkins's ed.) 361, 362, notes; [Frey *v.* Frey, 2 C. E. Green, 71; Barney *v.* Saunders, 16 How. 542].

[2] Turner *v.* Turner, 1 J. & W. 39, 43; Pearse *v.* Green, *ib.* 135; Good *v.* Blewitt, cited *ib.* 142; Wilson *v.* Metcalf, 1 Russ. 530, 533, 537; Hollingsworth *v.* Shakeshaft, 14 Beav. 492; Stafford *v.* Fiddon, 23 Beav. 386; Johnson *v.* Prendergast, *ubi sup.*; Fry *v.* Fry, 10 Jur. N. S. 983.

[3] Parnell *v.* Price, 14 Ves. 502; but see Curling *v.* Austin, 2 Dr. & Sm. 129. There is a very material discrepancy between the report of Parnell *v.* Price, in the original and second edition of Mr. Vesey's Reports. In the report in the original edition, which appears to be erroneous, it is stated that "The directions were given for interest and costs, upon the Master's report; and that the inquiry prayed by the petition was *refused*;" whereas, in the second edition, it stands thus: "The directions were given for interest and costs, upon the Master's report, and the inquiry prayed by the petition was *granted*."

[1] Garland *v.* Littlewood, 1 Beav. 527; Green *v.* Badley, 7 Beav. 274; Jones *v.* Morrall, 2 Sim. N. S. 241, 250; Coope *v.* Carter, 2 De G., M. & G. 292, 297; Massey *v.* Massey, 2 J. & H. 728; *Re* Delevante, Delevante *v.* Child, 6 Jur. N. S. 118, V. C. S.; *contra*, Travers *v.* Townsend, 1 Moll. 496; Franklin *v.* Beamish, 2 Moll. 383.

for the plaintiff to apply for leave to file a supplemental bill, in the nature of a bill of review.[2]

Although a receiver has been refused upon the hearing of the cause, yet if, upon the certificate, a new state of facts appears: for example, a balance in the hands of the defendant: the Court will entertain a renewed application for a receiver.[3]

As a general rule, the Court will not make a decree between co-defendants.[4] Where, however, it makes such a decree it will only be made on further consideration:[5] unless the evidence at the original hearing is so clear and satisfactory, that the Court is convinced that no further evidence can be produced by the defendants at any subsequent proceedings.[6]

The Court will not, upon the further consideration of the cause, make any order which will have the effect of varying or impugning the original decree: even though a new state of circumstances appears by the certificate, showing that, if the facts, as they are stated upon the certificate, had been before the Court at the time when it pronounced the decree, it would not have given the directions contained in the original decree;[7] but where the original decree only directs ac-
*1371 counts and inquiries, and the Court, at the * hearing on further consideration, is of opinion that the plaintiff is not entitled to maintain the suit, it may dismiss the bill.[1]

Formerly, it was not necessary that the cause should be set down for the further hearing before the branch of the Court in which the decree was pronounced;[2] but now, further proceedings in a cause must be had before the Judge to whose Court such cause is attached: unless removed therefrom by a special order of the Lord Chancellor or Lords Justices.[3]

[2] Hodson *v.* Ball, 1 Phil. 177, 179; Partington *v.* Reynolds, 4 Drew. 253, 259; 4 Jur. N. S. 200, 201; Morrall *v.* Pritchard, 14 W. R. 172, V. C. S. The plaintiff need only make out a *primâ facie* case, on the application for leave to file the bill. Partington *v.* Reynolds, 6 W. R. 615, V. C. K.

[3] Attorney-General *v.* Mayor of Galway, 1 Moll. 95.

[4] [Fletcher *v.* Green, 33 Beav. 513.]

[5] [Smith *v.* Baker, 1 Y. & C. C. C. 223, 228.]

[6] "Where," says Lord Eldon, "a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a Court of Equity is entitled to make a decree between the defendants, and is bound to do so." Chamley *v.* Lord Dunsany, 2 Sch. & Lef. 718. And see, to the same effect, Cottingham *v.* Earl of Shrewsbury, 3 Hare, 638; Farqharson *v.* Seton, 5 Russ. 45, 62; Green *v.* Pledger, 3 Hare, 170; Hood *v.* Clapham, 19 Beav. 90; Bate *v.* Hooper, 5 De G., M. & G. 345; Raby *v.* Ridehalgh, 7 De G. & M. 104; Sanford *v.* Morrice, 11 Cl. & F. 667, 681. See also, under the Judicature Act, Furness *v.* Booth, 4 Ch. Div. 586.

The American authorities are in accord, with an inclination to extend the principle in order to prevent a multiplicity of suits. Elliott *v.* Pell, 1 Paige, 268; Henshaw *v.* Ward, 9 Humph. 568; Allen *v.* Baugus, 1 Swan, 404; Ingram *v.* Smith, 1 Head, 428; La Grange, &c. R. Co. *v.* Memphis, &c. R. Co., 7 Coldw. 420, 452; Mount *v.* Potts, 8 C. E. Green, 188; Corcoran *v.* Chesapeake, &c. Co., 94 U. S. 741; Vance *v.* Edwards, 11 W. Va. 342.]

[7] Wilson *v.* Metcalf, 1 Russ. 530, 536; Quarrell *v.* Beckford, 1 Mad. 269, 286; Pritchard *v.* Draper, 1 R. & M. 191; and see Lyne *v.* Lyne, 8 De G., M. & G. 553.

[1] Barton *v.* Barton, 3 K. & J. 512; 3 Jur N. S. 808; and see Anon., 11 Ves. 169; [Fourniquet *v.* Perkins, 16 How. 82; and see Topp *v.* Pollard, 24 Miss. 682. And, in general, a decretal or interlocutory order may, on final hearing, be altered, modified, or vacated. Gibson *v.* Reese, 50 Ill. 383; Jaques *v.* Methodist Episcopal Church, 17 John. 548; Sherin *v.* Smith, 79 N. C. 310; Shaw *v.* Patterson, 2 Tenn. Ch. 174. See *ante*, 986, n. 3.]

[2] Pemberton *v.* Pemberton, 11 Ves. 53.

[3] Ord. VI. 5. As to the transfer of causes, see *ante*, pp. 70, 798.

In order to set a cause down on further consideration,[4] the solicitor for the plaintiff, or party having the conduct of the cause, should, after the expiration of eight days, and within fourteen days from the filing of the Chief Clerk's certificate,[5] leave at the Order of Course seat in the Registrars' office, a written request that the cause may be set down for further consideration, before the Judge by whom it is to be heard.[6] After the expiration of the fourteen days, it will be set down by the Registrar, upon a like request of the solicitor for the plaintiff or any other party[7] desiring to have the same set down. In either case, the decree or order adjourning further consideration, or an office copy thereof, and an office copy of the Chief Clerk's certificate, or a memorandum of the date when such certificate was filed, indorsed on the request by the Clerk of Reports, must be produced to the Registrar's clerk.[8] The Registrar's clerk retains the request for filing; and sets down the cause on the same day the request is left with him;[9] but the cause, when so set down, will not be put into the paper for further consideration until after the expiration of ten days from the day on which it is set down; and it is marked in the cause book accordingly. Notice thereof must be given to the other parties in the cause, at least six days before the day for which the same may be so marked for further consideration.[10]

A cause may be marked for hearing on further consideration as a short cause, upon production of the certificate of the plaintiff's counsel that the cause is fit to be so heard without the consent * of *1372 the solicitors for any of the defendants; but it will not be so marked for any day, until after the expiration of the ten days above mentioned; unless by consent of all parties.[1] Notice that the cause has been marked for hearing as a short cause should, where not so marked by consent, be given to the other solicitors in the cause, by the solicitor of the plaintiff.[2]

If the cause has originated in Chambers, it may after the expiration of eight days, and within fourteen days, from the filing of the certificate of the Chief Clerk, be brought on for further consideration by a summons to be taken out by the plaintiff or party having the conduct of the cause; and after the expiration of such fourteen days, by a summons to be taken out by any other party; and such summons must be

[4] If further directions, instead of further consideration, have been reserved by the former decree or order (which was the practice before Nov., 1852), the cause is set down for hearing on further directions, in the same manner as a cause is set down for hearing after a trial: as to which, see *ante*, p. 1146; and see Ord. XXI. 9; and Braithwaite's Pr. 438.

[5] By consent, the cause may be set down at any time after the certificate is filed, notwithstanding the eight days have not expired. For form of consent, see Vol. III.

[6] Ord. XXI. 10. For form of request, see *ibid* and Vol. III

[7] *Ibid.*

[8] Reg. Regul. 15 March, 1860, r. 9.

[9] *Ib.* r. 1.

[10] Ord. XXI. 10. If the bill has been taken *pro confesso* against an absconding defendant, notice to him will be unnecessary. Green *v.* Harrison, 4 W. R. 696.

[1] Reg. Regul. 15 March, 1860, r. 10. For forms of certificate and consent, see Vol. III.

[2] See Molesworth *v.* Snead, 11 W. R. 934, V. C. W.; and *ante*, p. 972. For form of notice, see Vol. III.

served on the other parties six clear days before the return thereof.[3] Upon the return of the summons, the cause will be heard on further consideration in Chambers, or, if there is a question which the Judge thinks ought, or the parties desire, to be argued by counsel, it will be adjourned into Court. Where the hearing on further consideration is adjourned into Court, a note signed by the Chief Clerk to that effect is left with the clerk at the Order of Course seat in the Registrar's office; and when the cause has been set down by him, notice thereof should be given to the other parties, by the solicitor, at whose instance it is set down.[4] If the parties desire that the cause should be heard as a "short cause," the note mentions the short cause day on which it is to be heard. In other cases, it will not, except by consent, be put into the paper before the expiration of ten days from the time when it was set down.[5]

Notice that a cause has been set down on further consideration, or the summons for the further consideration thereof, must be served on any person who has been served with notice of the decree, and has obtained an order for leave to attend proceedings, as well as on the parties named on the record.[6] If there has been a sale, and the purchase-money in Court is to be distributed, the purchaser must be served with a notice that the cause is coming on for further consideration, and that the purchase-money will be disposed of under the direction of *1373 the Court.[7] The purchaser will * not, however, be allowed his costs of appearance, if he has obtained his conveyance.[1] So, also, if any person has obtained what is ordinarily termed a "stop order," that is, an order that a fund, or some part of it, shall not be dealt with, without notice to him, he must be served with a similar notice, where it is intended to deal in any manner with the fund to which the stop order applies.[2]

Before the cause comes on to be heard in Court, a print of the bill, a copy of the decree or order adjourning the further consideration, of the record and verdict thereon (where there has been a trial of a question of fact),[3] of the Chief Clerk's certificate, and of any other orders or certificates which will be referred to at the hearing, should be left with the Usher for the use of the Court by the solicitor for the party who has set the cause down.

As in other cases, if it is found that the hearing cannot be conveniently proceeded with, in consequence of the solicitor for any party

[3] Regul. 8 Aug., 1857, r. 18. By consent, the six days, as well as the four days between the signature of the certificate by the Chief Clerk and the approval by the Judge, and the eight days following the filing of the certificate, may be waived, and the summons made returnable immediately after the certificate is filed. For form of summons, see Regul. 8 Aug., 1857, r. 18; and Vol. III.; and for form of consent, see Vol. III.

[4] For forms of note and notice, see Vol. III.

[5] Seton, 41. In the Chambers of V. C. Stuart, no direction will be given for hearing the cause as a short cause. *Ibid.*

[6] Seton, 40.

[7] Seton, 40; Bamford *v.* Watts, 2 Beav. 201.

[1] Barton *v.* Latour, 18 Beav. 526; Noble *v.* Stow (No. 2), 30 Beav. 272; and see Rowley *v.* Adams, 16 Beav. 312.

[2] Seton, 40; and see *post*, Chap. XXXVII. § 3, *Stop Orders*.

[3] *Ante*, p. 1146.

having neglected to attend personally, or by some proper person, or of his having neglected to deliver the proper papers for the use of the Court, such solicitor may be ordered personally to pay to any of the parties such costs as the Court may think fit to award.[4]

The course of proceeding at the hearing is much the same as that pursued at the original hearing.[5] The parties should be provided with affidavits of service of, or of having been served with, the notice of setting down the cause for hearing on further consideration, or the summons for the further consideration of the cause where the cause is to be heard in Chambers, in order that, in case any party makes default, the cause may be heard in his absence.[6] Where a purchaser does not appear, an affidavit of service of notice to him of the intended application of the purchase-money, and that the conveyance has been executed and delivered to him, will be necessary.[7]

Any person who has been found by the certificate to be interested in the subject-matter of the suit: such as a creditor whose claim has been allowed: has a right to appear upon the hearing * of *1374 the cause for further consideration, to protect his own interest; and he may do so, without previously obtaining leave to appear, provided he desires to take advantage of nothing but what appears in the certificate.[1]

Upon a hearing on further consideration, the Court will not alter, or add to, the original decree; nor will it permit facts to be brought before it, in order to ground upon them a direction not warranted by the original decree.[2] Any facts, however, which have occurred since the original decree, and have altered the situation of the parties, or affected their rights in the subject-matter, and which have not been brought before the Court by supplemental proceedings, and are not directly in issue in the cause, may be proved by affidavit at the hearing on further consideration;[3] and the Court will direct any further inquiries or accounts, where circumstances have arisen which render it necessary to give such directions, in order to fulfil the objects of the decree.[4]

If any money belonging to a married woman is to be dealt with on further consideration, the Court will receive proof by affidavit of all

[4] Ord. XXI. rr. 11, 12; *ante*, p. 977.

[5] *Ante*, pp. 977 *et seq.* No further consideration will be allowed to stand over to an indefinite period. Ord. XXI. 13. The brief of each party on further consideration will consist of the decree or order made at the former hearing, the Chief Clerk's certificate, and any intermediate orders or certificates; but no part of the schedules to the certificate, or of any account filed therewith, should be included, unless the special circumstances of the case may render the same necessary. The brief should be accompanied by such observations as may be deemed advisable, and by the brief and other papers held by counsel at the former hearing or hearings. As to consultation and refresher and other fees and costs, see *ante*, p. 977, note (6). For forms of briefs and indorsements, see Vol. III.

[6] Trewick *v.* Paramore, 7 Jur. 1123, V. C. K. B. For forms of affidavits, see Vol. III.

[7] Seton, 40; Reg. Regul. 15 Mar., 1860, r. 30; *ante*, p. 1372.

[1] Young *v.* Everest, 1 R. & M. 426; Hutchinson *v.* Freeman, 4 M. & C. 490; 3 Jur. 694; but see Grace *v.* Terrington, 2 Coll. 53; 9 Jur. 421.

[2] *Ante*, p. 1368.

[3] 13 & 14 Vic. c. 35, § 28; *ante*, 1367.

[4] Fleming *v.* East, Kay Ap. 52; 18 Jur. 1112; *Re* Delevante, Delevante *v.* Child, 6 Jur. N. S. 118, V. C. S.; Howard *v.* Chaffers, 9 Jur. N. S. 634; 11 W. R. 585, V. C. K.; Curling *v.* Austin, 2 Dr. & Sm. 129.

such matters as are necessary to enable the Court to order payment thereof.[5] In the absence of such evidence, the money will be carried over to the separate account of the husband and wife, or of the wife alone, subject to further order.[6]

An order made upon further consideration is a decree of the Court; and is drawn up by the Registrar, passed, entered, enrolled, and enforced, in the manner pointed out in a preceding chapter.[7] The party bespeaking the order must leave with the clerk of the Registrar in attendance in Court on the day the order was pronounced, counsel's brief; the original decree, or the last order on further consideration, and any subsequent orders to revive or carry on the proceedings, or office copies thereof; an office copy of the Chief Clerk's certificate; and office copies of affidavits and any exhibits, documents, or other evidence used at the hearing; and a consent brief for any purchaser, or an affidavit of notice to him, and that the conveyance has been executed and delivered to him;[8] if any fund in Court is dealt with, the Accountant-General's certificate, and, if the funds are restrained by any *1375 order, the * restraining order, or an office copy thereof, will be required to be left;[1] if payment is ordered to legal personal representatives, the probate or letters of administration, stamped for a sufficient amount, must also be left.[2]

[5] 13 & 14 Vic. c. 35, § 28.
[6] Seton, 70; *ante*, p. 94.
[7] *Ante*, Chap. XXVI. §§ 3, 4, 7, pp. 1008 *et seq.*
[8] Ord. I. 20; Reg. Regul. 15 Mar., 1860, rr. 29, 30; *ante*, p. 1011.
[1] Reg. Regul. 15 March, 1860, r. 16.
[2] *Ib.* r. 17; and see *ante*, pp. 1009 *et seq.*; and *post*, Chap. XLI., *Payment out of Court.* For terms of orders on further consideration, see Seton, 38, 39; 140 *et seq.*; 159 *et seq.*; 239 *et seq.*; 256 *et seq.* As to the fee payable on the order, see *ante*, p. 1015, note (2).

[In the United States, the subject of costs is regulated by statute; and being usually confined to the fees of the officers of Court, only the general principles and not the details of this chapter are applicable to our system.]

*CHAPTER XXXI. *1376

COSTS.

SECTION I. — *Costs in General.*

WHERE the Court adjourns the further consideration of a cause, it does not usually make any order as to costs until the further hearing.[1] Where, however, some of the defendants are, or some part of the bill is, dismissed at the hearing, or where an improper defence has been set up, the Court usually disposes of the costs of the dismissed defendants, or the costs occasioned by the dismissed part of the bill, or the improper defence, at the original hearing.[2]

Where the costs are given generally by the decree, the subsequent costs will be included;[3] and this will be the case, although there is a reservation of "the costs of the suit not before provided for," if there are other costs which might be included under these words.[4] If, therefore, the subsequent costs are not intended to be included, the direction should be confined to the costs up to the decree.[5]

The giving of costs in Equity is entirely discretionary:[6] as well with respect to the period at which the Court decides upon them, as with respect to the parties to whom they are given. It must not be supposed, however, that the Court is not governed by definite principles in its decisions relative to the costs of proceedings before it. All that is meant by the *dictum*, that the giving of costs in Equity is entirely discretionary, is, that the Court is not, like the ordinary Courts, held inflexibly to the rule of giving the costs of the suit to the suc-

[1] Seton, 57; Morgan & Davey, 65. As to the delivery of bills of costs and taxations, on applications under the Solicitors' Acts, see *post*, Chap. XLIV., *Solicitors*.

[2] Seton, 57.

[3] Quarrell *v.* Beckford, 1 Mad. 269, 286; Clutton *v.* Pardon, T. & R. 304; Morgan & Davey, 66, 344; and see *ante*, p. 1368.

[4] Quarrell *v.* Beckford, *ubi sup.*

[5] Seton, 57. For form of such an order, see *ib.* 56.

[6] Scarborough *v.* Burton, 2 Atk. 111; Bennet College *v.* Carey, 3 Bro. C. C. 390; Millington *v.* Fox, 3 M. & C. 338, 352; Remnant *v.* Hood, 6 Jur. N. S. 1173, L. JJ.; see Saunders *v.* Frost, 5 Pick. 271; Clark *v.* Reed, 11 Pick. 449; Temple *v.* Lawson, 19 Ark. 148; [Ogg *v.* Leinart, 1 Heisk. 43]. The giving of costs is not the subject of error. Cowles *v.* Whitman, 10 Conn. 121.

*1377 cessful party; but that it * will, in awarding costs, take into consideration the circumstances of the particular case before it, or the situation or conduct of the parties, and exercise its discretion with reference to those points. In exercising this discretion, however, the Court does not consider the costs as a penalty or punishment; but merely as a necessary consequence of a party having created a litigation in which he has failed;[1] and the Court is, generally, governed by certain fixed principles which it has adopted upon the subject of costs, and does not, as is frequently supposed, act upon the mere caprice of the Judge before whom the cause happens to be tried.[2]

A difference between the Courts of Law and Equity, with respect to costs, frequently arises from the nature of the property over which the latter are called upon to exercise their jurisdiction. A large proportion of suits in Equity are instituted for the purpose of obtaining the administration of property; and, in cases of that description, the practice of the Court is, not to direct the costs of the proceedings to be paid by one party to another, but to order payment of them out of the estate. The Court will also, for the purpose of affording due protection to trustees or others concerned in the administration of trust property, order the costs they have been put to, to be paid out of the trust fund which is the subject of litigation.

In considering the subject of costs, the attention of the reader will, therefore, be directed: 1st, To the rules upon which the Court acts, in awarding the costs of a suit to be paid by one party to another;[3] and, 2dly, To the rules which regulate its determination, with regard to the payment of costs out of the subject-matter of the litigation.[4] The Court of Chancery makes a distinction with regard to the principle upon which the officer of the Court is to proceed, in the taxation of costs, by allowing a larger proportion of actual expenditure to parties *1378 holding particular characters * than it allows in ordinary circumstances. This distinction is marked by the terms of: "costs as between party and party," which are the ordinary costs allowed by the Court; and "costs as between solicitor and client," which are the

[1] Per Lord Cranworth in Clarke *v.* Hart, 6 H. L. Ca. 633; 5 Jur. N. S. 447, 453; see also Wortham *v.* Lord Dacre, 2 K. & J. 437, 438; Purser *v.* Darby, 4 K. & J. 41; Caton *v.* Caton, L. R. 1 Ch. Ap. 137, 149; 12 Jur. N. S. 171, 175, L. C.

[2] Brooks *v.* Byam, 2 Story, 553, 554; Gray *v.* Gray, 15 Ala. 779; Coleman *v.* Moore, 3 Litt. 355; Tomlinson *v.* Ward, 2 Conn. 396. Costs do not always follow a decree in favor of a party, even of one praying relief, but rest in the discretion of the Court, and are to be awarded or refused, according to the justice of each particular case. Kaye *v.* Bank of Louisville, 9 Dana, 261, 264; Tomlinson *v.* Ward, 2 Conn. 396; Hunt *v.* Lewin, 4 Stew. & P. 138; Randolph *v.* Rosser, 7 Porter, 249; Travis *v.* Waters, 12 John. 300; Meth. Epis. Church *v.* Jacques, 1 John. Ch. 65; *ib.* 166; Cowles *v.* Whitman, 10 Conn. 121; Coleman *v.* Moore, 3 Litt. 355; but see Hightower *v.* Smith, 5 J. J. Marsh. 542, 544; Burgh *v.* Kenny, 1 Irish Eq. 264. And inasmuch as costs in Chancery do not necessarily follow a decree, there must not only be a decree in favor of a party, but there must also be an express order or decree for his costs, or they are lost. Connable *v.* Bucklin, 2 Aik. 221; Stone *v.* Locke, 48 Maine, 425; see Travis *v.* Waters, 12 John. 500; S. C. 1 John. Ch. 85. Where a bill has been dismissed from the docket, for want of prosecution, on motion of the defendant, without any reservation of the question of costs, the cause cannot properly be brought forward, at a subsequent term on motion, to obtain an order for costs. Stone *v.* Locke, 48 Maine, 425, 427.

[3] See *post*, § 2.

[4] *Ib.* § 3.

costs allowed by the Court to parties filling the characters alluded to.[1] A third section, therefore, will be devoted to the consideration of the principles of taxation, for the purpose of pointing out those cases in which the Court allows the taxation of costs upon a more extended scale than the usual scale of taxation between party and party.[2] After which will be considered: 4thly, The method of taxation, and the course to be adopted to bring the determination of questions relating to the taxation before the Court;[3] and, 5thly, The course to be adopted for enforcing the payment of the costs, when taxed.[4]

In treating further of the subject of costs, in the present section, the attention of the reader will be directed to the costs only of the general proceedings in the suit; that is, to those costs which are technically termed "costs in the cause." The rules with regard to the costs of interlocutory proceedings, and other incidental matters, will generally be found, upon referring to those parts of this treatise which have been appropriated to the consideration of those matters.

Certain rules exist, with respect to the costs of interlocutory proceedings being, or not being, "costs in the cause;" and those costs which do not come within the definition of costs in the cause, under these rules, cannot be obtained as such without the special direction of the Court.[5] What costs of interlocutory applications, by motion, are to be considered as "costs in the cause," may be collected from the following rules laid down by Sir John Leach V. C. in 1823.[6] These rules were the result of certain questions proposed to the Registrar, for the purpose of ascertaining in what cases the costs of a motion, where the Court gives no direction as to such costs, became "costs in the cause," to a party whose costs of suit are given upon the hearing, and are as follows: (1) That the party making a successful motion is entitled to his costs, as "costs in the cause;"[7] but the party opposing it is not entitled to his costs, as "costs in the cause."[8] (2) That the party making a *motion which fails, is not entitled to his costs, *1379 as "costs in the cause;" but the party opposing it is entitled to his costs, as "costs in the cause."[1] And (3) that, where a motion is

[1] The importance of this distinction has been somewhat diminished by Ord. XL. 32; *see post*, § 4. Formerly, in cases of notorious frauds, the Court made the defendant pay exemplary costs; but this practice has been disused, from the difficulty of carrying it into execution. Waltham *v.* Broughton, 2 Atk. 43.

[2] See *post*, § 4.

[3] See *post*, § 5.

[4] See *post*, § 6.

[5] Gardner *v.* Marshall, 14 Sim. 575, 588; 9 Jur. 958; see, however, Hind *v.* Whitmore, 2 K. & J. 458; Finden *v.* Stephens, 12 Jur. 319, L. C., overruling S. C. 16 Sim. 40; 11 Jur. 898.

[6] Memorandum, 1 S. & S. 357; Morgan & Davey, 31.

[7] Hind *v.* Whitmore, 2 K. & J. 458; [Harris *v.* Hilliard, 20 L. T. N. S. 216.]

[8] 1 S. & S. 357; Stafford *v.* Bryan, 2 Paige, 45; Halst. Dig. 176. If the object of the motion be in the nature of an indulgence to the party applying, he will have to pay the costs, although the motion is granted. Browne *v.* Lockhart, 10 Sim. 420.

[1] 1 S. & S. 357; see also White *v.* Lisle, 4 Mad. 214, 226. The rule applies to motions to obtain or to dissolve an injunction: Marsack *v.* Reeves, 6 Mad. 108, 109; Stafford *v.* Bryan, 2 Paige, 45. Where a party successfully opposes a motion, and nothing is said about costs in the order denying the application, he is entitled to his costs of opposing as costs in the cause, if he obtains a decree for costs. Rogers *v.* Rogers, 2 Paige, 209; see Wilkinson *v.* Henshaw, 4 Paige, 257.

made by one party, and not opposed by the other, the costs of both parties are "costs in the cause."[2] To these rules may be added a fourth, that where a bill is dismissed with costs, a defendant is entitled to his costs of unsuccessfully opposing a motion for an injunction, as "costs in the cause."[3]

Whenever, by reason of special circumstances, it is not the intention of the Court that these rules should apply, particular directions must be given with respect to the costs.

Where the costs of interlocutory proceedings are reserved, they should be reserved till the hearing of the cause, or further order, and not to the hearing, simply: because, in the latter case, no order can be made relating to them unless the cause is actually brought to a hearing.[4]

The Court will not order the payment of the costs of a cause without taxation;[5] but, upon interlocutory applications, where the Court deems it proper to award costs, to either party, the Court may, by the order, direct payment of a sum in gross, in lieu of taxed costs; and direct by and to whom such sum in gross is to be paid.[6] The Court does not, however, usually order a sum in gross to be paid, for the costs of interlocutory applications which are heard in open Court: unless the parties are poor, and anxious to put an end to the matter.[7] In the case of proceedings at Chambers, a sum in gross is often ordered to be paid.[8]

The costs of an abandoned motion[9] are not costs in the cause; therefore, where a party gave notice of a motion, and died before the motion was heard, and the suit having been revived by his executors, who declined to proceed with the motion, the bill was subsequently dismissed with costs, and the Master, in taxing the costs, disallowed the defendants the costs of the abandoned motion, an application to the *1380 Court, for liberty to except to the Master's * certificate, was refused with costs.[1] It is now, however, provided that, where a party gives notice of a motion and does not move accordingly, he shall pay to the other side costs to be taxed by the Taxing Master: unless the Court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs.[2] And it may be here mentioned, that, as

[2] 1 S. & S. 357.

[3] Stevens *v.* Keating, 1 M'N. & G. 659, 663; 13 Jur. 157; overruling S. C. 13 Jur. 974; Finden *v.* Stephens, 12 Jur. 319; L. C., overruling S. C. 16 Sim. 40; 11 Jur. 898; Betts *v.* Clifford, 1 J. & H. 74. [So, where plaintiff succeeds in the suit, but is ordered to pay costs up to a certain day after the dissolution of the injunction. Webster *v.* Manby, L. R. 4 Ch. App. 372. And where the motion stands over until the hearing. Mounsey *v.* Earl of Lonsdale, L. R. 10 Eq. 557.]

[4] Rumbold *v.* Forteath, 4 Jur. N. S. 608, V. C. W.; and see Gardner *v.* Marshall, 14 Sim. 575; 9 Jur. 953; Jones *v.* Batten, 10 Hare Ap. 11.

[5] King *v.* King, 1 Jur. N. S. 972, V. C. W.

[6] Ord. XL. 37; see Stahlschmidt *v.* Lett, 7 Jur. N. S. 1271; 9 W. R. 830, V. C. S.

[7] London and Blackwall Railway Company *v.* Limehouse Board of Works, 26 L. J. Ch. 164, V. C. W.; see, however, Yearsley *v.* Yearsley, 19 Beav. 1; Dakins *v.* Garratt, 4 Jur. N. S. 579, V. C. K.; Gover *v.* Stillwell, 21 Beav. 182.

[8] Seton, 94.

[9] For what is an abandoned motion, see *post*, Chap. XXXV. § 2, *Motions*.

[1] Lewis *v.* Armstrong, 3 M. & K. 69; see also Farquharson *v.* Pitcher, 4 Russ. 510; Warner *v.* Armstrong, 4 Sim. 140.

[2] Ord. XL. 23; and see *post*, Chap. XXXV. § 2, *Motions*.

a general rule, a party cannot abandon one course of proceeding and adopt another, without previously paying the costs occasioned by the abandoned proceedings.[3]

Except by consent, it is only at the hearing, that a defendant can be ordered to pay the costs of the suit. The plaintiff is, therefore, entitled to bring the cause to a hearing, for the purpose of determining the question of costs: although the defendant has, in other respects, submitted to the plaintiff's demands.[4] He should, however, in such a case, first apply to the defendant for his consent to have the question of costs disposed of, on motion,[5] or petition.[6] Where, however, the question in dispute has been settled by compromise out of Court, without providing for the costs of the suit, the Court will not permit the cause to be brought to a hearing, merely for the purpose of disposing of the costs.[7]

An answer may be read by the defendant upon the question of costs, although it cannot, where replication has been filed (except by consent), be read as evidence on his own behalf, upon the matter in dispute between him and the plaintiff.[8] The Court will frequently, although compelled, by the evidence read in the cause, to decree against a defendant, give credit to his own statement, contained in his answer upon oath, as to his conduct, and make the decree against him without costs.[9] The same practice also extends to the answers of peers:[10] although they are put in upon honor only, and not upon oath.[11]

Where the Court orders the payment of any costs previously * directed to be taxed, it may also order the payment of interest *1381 at the rate of 4*l.* per cent from the date of the certificate of taxation, on the amount of such costs, including the costs of taxation, as ascertained by the certificate; the amount of such interest to be payable and recoverable out of the same fund, or in the same manner, as the amount of such costs.[1] It seems, however, that this provision can only be applied in favor of solicitors and attorneys.[2]

[3] Davey *v.* Durrant, 2 De G. & J. 506; 24 Beav. 411; 4 Jur. N. S. 398. If the costs have not been taxed, the party must pay a sufficient sum into Court. Burdell *v.* Hay, 33 Beav. 189; and see Bellchamber *v.* Giani, 3 Mad. 550. [See Stempson *v.* Jepson, 18 W. R. 962.]

[4] *Ante*, p. 794; Fradella *v.* Weller, 2 R. & M. 247, 249; Kelly *v.* Hooper, 1 Y. & C. C. C. 197, 199; Langham *v.* Great Northern Railway Company, 16 Sim. 173; 12 Jur. 574; Burgess *v.* Hills, 26 Beav. 244; 5 Jur. N. S. 233; Burgess *v.* Hately, 26 Beav. 249; M'Naughtan *v.* Hasker, 12 Jur. 956, V. C. K. B.; Collins Company *v.* Walker, 7 W. R. 222, V. C. K.; Wilde *v.* Wilde, 10 W. R. 503, L. JJ.; Morgan *v.* Great Eastern Railway Company, 1 H. & M. 78; M'Andrew *v.* Bassett, 10 Jur. N. S. 492, V. C. W.; *contra*, Sivell *v.* Abraham, 8 Beav. 598; Whalley *v.* Lord Suffield, 12 Beav. 402; Hennet *v.* Luard, *ib.* 479, 480; North *v.* Great Northern Railway Company, 2 Giff. 64; 6 Jur. N. S. 244; Hudson *v.* Bennett, 12 Jur. N. S. 519; 14 W. R. 911, V. C. S.

[5] Morgan *v.* Great Eastern Railway Company, *ubi sup.*

[6] Tompson *v.* Knights, 7 Jur. N. S. 704; 9 W. R. 789, V. C. W.

[7] Roberts *v.* Roberts, 1 S. & S. 39; Gibson *v.* Lord Cranley, 6 Mad. 365; Whalley *v.* Lord Suffield, *ubi sup.* [*Infra*, 1381, n. 4.]

[8] Vancouver *v.* Bliss, 11 Ves. 458, 464; Howell *v.* George, 1 Mad. 13.

[9] Millington *v.* Fox, 3 M. & C. 338, 351.

[10] Dawson *v.* Ellis, 1 J. & W. 524.

[11] *Ante*, p. 746.

[1] 23 & 24 Vic. c. 127, § 27; Carter *v.* Carter, 2 N. R. 512, V. C. W.; Fox *v.* Charlton, 6 N. R. 352, V. C. K.

[2] Jenner *v.* Morris, 11 W. R. 943, 945, V. C. K.

Section II. — *Costs from one Party to another.*

It was the rule of the Civil Law, that *victus victori in expensis condemnatus est.*[3] This is the general rule adopted by the Court of Chancery; and the unsuccessful party must show the existence of circumstances sufficient to displace the *primâ facie* claim to costs given by success to the party who prevails.[4]

If, however, the unsuccessful party can show to the Court any circumstances which may satisfy it that it would be against the ordinary principles of justice that he should pay the costs of the proceeding, he will be permitted to do so,[5] and the Court will even, under certain circumstances, not only excuse the unsuccessful party from the payment of costs to his opponent, but will actually throw his costs upon the party succeeding. Cases of the latter kind, however, are very limited.[6]

*1382 * The general rule which gives the costs of the suit to the victorious party, and throws them upon the unsuccessful party, applies equally to cases in which the parties are suing or defending in *autre droit*, and to those in which they are *sui juris*. Therefore, executors, administrators, trustees, or assignees in bankruptcy,[1] instituting

[3] Cod. 1, 3, 13.

[4] Vancouver *v.* Bliss, 11 Ves. 458, 463; Staines *v.* Morris, 1 V. & B. 8, 16; Millington *v.* Fox, 3 M. & C. 338, 353; Colburn *v.* Simms, 2 Hare, 543, 562; 7 Jur. 1104; Earl Nelson *v.* Lord Bridport, 10 Beav. 305; Bartlett *v.* Wood, 9 W. R. 817, L. C.; Edelsten *v.* Edelsten, 1 De G., J. & S. 185; 9 Jur. N. S. 479; Ferguson *v.* Wilson, 1 W. N. 324; 15 W. R. 80, L. JJ.; [L. R. 2 Ch. App. 77, 92; Patch *v.* Ward, L. R. 3 Ch. App. 203; Hilton *v.* Woods, 4 Eq. 432]. As a general rule, the prevailing party is *primâ facie* entitled to costs, as well in a Court of Equity, as at Law; but the Court may, at its discretion, award costs to either party. Saunders *v.* Frost, 5 Pick. 260, 271; Clark *v.* Reed, 11 Pick. 446, 449; Bryant *v.* Russell, 23 Pick. 508; Tomlinson *v.* Ward, 2 Conn. 396; Lee *v.* Pindle, 12 Gill & J. 288; Brooks *v.* Byam. 2 Story, 553; Eastburn *v.* Kirk, 2 John. Ch. 317; Frisby *v.* Balance, 4 Scam. 287; Burton *v.* Fort, 18 Ark. 202; Perkins *v.* McGavock. 3 Hay, 255; White *v.* Walker, 5 Florida, 478; Stone *v.* Locke, 48 Maine, 425. And when a creditor recovers a debt in the Court of Chancery, he recovers costs also, unless special and strong reasons to the contrary intervene. And those costs, in general, are the costs of the whole litigation; although the creditor may have failed as to part of his demand. Hunn *v.* Norton, 1 Hopk. 344; Woodson *v.* Palmer, 1 Bailey Eq. 95; Ward *v.* Davidson, 2 J. J. Marsh. 443; Shackleford *v.* Helm, 1 Dana, 338; Bradford *v.* Allen, Hardin, 1. Where the parties to a suit make a settlement between themselves out of Court, without any arrangement as to costs, neither party is entitled to costs against his adversary. Bruce *v.* Gale, 2 Beasley (N. J.), 211; Den *v.* Pidcock. 7 Halst. 363; Eastburn *v.* Kirk, 2 John. Ch. 317.

[5] Per Putnam J. in Clark *v.* Reed, 11 Pick. 449; Travis *v.* Waters, 12 John. 500; Meth. Epis. Church *v.* Jacques, 1 John. Ch. 65; Cowles *v.* Whitman, 10 Conn. 121.

[6] A plaintiff who had filed a bill to quiet his title, which had been neither impeached nor threatened by the defendants, was charged with the defendants' costs, though successful in the suit. Robinson *v.* Cropsey, 2 Edw. Ch. 138.

A party, who is brought before the Court as a mere stakeholder, is entitled to costs. Dowdall *v.* Lennox, 2 Edw. Ch. 267. So, for a mere confirmation of title. Blight *v.* Banks, 6 Monroe, 192. So a party, who is brought into Court, against whom no decree can be made. Moore *v.* Fountleroy, 3 A. K. Marsh. 360.

Costs are not given in the Supreme Court of the United States, where a suit is dismissed for want of jurisdiction. Inglee *v.* Coolidge, 2 Wheat. 363. Costs are not decreed in proceedings in the nature of an amicable suit. M'Connell *v.* M'Connell, 11 Vermont, 290. A defendant in no fault is not to be charged with costs. Clay *v.* Richardson, 2 A. K. Marsh. 199; Murray *v.* Ballou, 1 John. Ch. 566.

[1] Morris *v.* Cannan, 10 W. R. 389, L. C.; but where the defendant became bankrupt during the suit, and the assignee continued the defence, the latter was only held liable for the costs to the bankruptcy. Foxwell *v.* Greatorex, 33 Beav. 345.

or defending suits against strangers to their trusts in those capacities, are subject to the same rules, as to costs, as they would be if they were suing or defending in their own right:[2] thus, an executor or administrator instituting a suit against a debtor to his testator's or intestate's estate, as he will, if he succeeds, be entitled, under the general rule, to the costs of his suit from the debtor, so if he fails, he must pay the costs of his adversary.[3] In like manner, a trustee for sale, filing a bill against a purchaser for a specific performance of his agreement, is liable to pay or receive costs from his adversary, in the same manner as a person instituting or defending such a suit in his own right.[4] The question whether a party who sues or defends in *autre droit*, and is unsuccessful, shall be reimbursed his costs out of the estate which he represents, or in respect of which he is a trustee, is a totally distinct one, and will be referred to hereafter, when we come to treat of cases in which costs are payable out of the fund which is the subject of litigation.[5]

There are, however, certain cases, arising from the character sustained by the party, in which the Court generally gives the costs to that party, whatever may be the result of the suit. One of these cases is, where an heir-at-law is made a party to a suit for the purpose of establishing a claim against real estate: it being the almost invariable rule of the Court to give the heir-at-law his costs of such a proceeding.[6] In this respect the heir is more favored than executors. "Executors," says Lord Hardwicke, "shall not have costs: because they may renounce; but it is the Law which casts the descent upon the heir, and that differs his *case from the executor's; and if he has accounted, *1383 justly, for such money as is come to his hands, it certainly entitles him to his costs."[1] Where the claim will wholly exhaust the estate, the heir is entitled to his costs as between solicitor and client: because he is, in that case, a trustee for the claimant; but under other circumstances, he is only entitled to his costs as between party and party.[2] So, where an heir-at-law is made party to a suit, for the purpose of proving a will against him, he will be entitled to his costs;[3] and he will not forfeit this right by cross-examining the plaintiff's witnesses.[4] So,

[2] See Morgan & Davey, 288 *et seq.*; Jones *v.* Jones, 2 De G., J. & S. 204.

[3] Westley *v.* Williamson, 2 Moll. 458; Murray *v.* Phillips, 1 Paige, 472; Arnoux *v.* Steinbrenner, 1 Paige, 82; Nicoll *v.* Trustees of Huntington, 1 John. Ch. 166; Goodrich *v.* Pendleton, 3 John. Ch. 520; Roosevelt *v.* Ellithorp, 10 Paige, 415; Harrison *v.* McMennomy, 2 Edw. Ch. 251; Capehart *v.* Huey, 1 Hill Ch. 405; Peyton *v.* McDowell, 3 Dana, 314; Shepherd *v.* McClain, 3 C. E. Green (N. J.), 128.

[4] Edwards *v.* Harvey, G. Coop. 40.

[5] See *post*, pp. 1410 *et seq.*

[6] Where specific performance of a contract by the ancestor is decreed against the heir, to whom nothing has come by descent except the property in question, the costs will be charged upon the plaintiff in the suit for performance. Sutphen *v.* Fowler, 9 Paige, 280; Hunter *v.* Dashwood, 2 Edw. Ch. 415; see Dyer *v.* Potter, 2 John. Ch. 152; [*Ex parte* Pearse, 1 Turn. & R. 325; Carter *v.* Montgomery, 2 Tenn. Ch. 455].

[1] Humphrey *v.* Morse, 2 Atk. 408; Popple *v.* Henson, 5 De G. & S. 318. For the rules as to the costs of the heir, in suits by women for dower, see *ante*, pp. 1166, 1167.

[2] Tardrew *v.* Howell, 2 Giff. 530; 7 Jur. N. S. 937; Shittler *v.* Shittler, 4 N. R. 475, M. R.; see, however, Festing *v.* Allen, 5 Hare, 567, 579.

[3] Crew *v.* Joliff, Prec. in Ch. 93; Luxton *v.* Stephens, 3 P. Wms. 373.

[4] Bidulph *v.* Bidulph, 2 P. Wms. 285.

also, where an heir-at-law is brought before the Court in the case of a charity, he will be entitled to his costs; and, in general, if he makes no improper point, he will be awarded them as between solicitor and client.[5] And in a charity case, where an heir-at-law was made a defendant, pursuant to an order of the Court, he was allowed his costs as between solicitor and client: although the Court was, upon the hearing, of opinion that there was no resulting trust in his favor.[6]

The rule, that an heir-at-law is entitled to his costs, is not, however, without exceptions. Thus, where an heir set up a claim to property as undisposed of under the will and failed, he was refused his costs;[7] and, where the object of the bill is merely to perpetuate the testimony of the witnesses to the will, if the heir examines witnesses of his own in chief, he will not be allowed his costs of so doing.[8] This, however, is only where the bill does not pray relief, or is not one of a nature which is brought to a hearing;[9] where the cause is one which may be brought to a hearing, more latitude is allowed;[10] and if he chooses to examine witnesses himself, the question of costs will depend upon the circumstances; he is also indulged further: for he has a right to require the validity of the will to be tried as a question of fact,[11] and is entitled to the costs of the trial, even though the verdict is against him, and the will is established,[12] unless there are any peculiar cir-
*1384 cumstances in the case * which may induce the Court to refuse them.[1] Thus, where one of the witnesses did not clearly prove the execution of the will, and the heir asked for an issue, on the trial of which the will was found to have been duly executed: upon the case coming on for further directions the heir asked for his costs, both at Law and in Equity, and they were given him by the Court.[2]

Amongst the peculiar circumstances which will induce the Court to refuse costs to an heir, may be mentioned his attempting to set up insanity, or any other disability, against the person who made the will.[3] And a defendant, brought before the Court as heir, was deprived of his costs, both at Law and in Equity, because he had thought proper to state in his answer to the original bill that he was heir-at-law to the testator, and to dispute the will: although he knew, as he admitted in his answer to the supplemental bill, that his elder brother had left

[5] Currie *v.* Pye, 17 Ves. 462, 468; but see Whicker *v.* Hume, 14 Beav. 528, where the costs were only allowed as between party and party.

[6] Attorney-General *v.* Haberdashers' Company, 4 Bro. C. C. 178; S. C. *nom.* Attorney-General *v.* Tonna, Beames on Costs, Ap. No. 18; and see James *v.* James, 11 Beav. 397.

[7] Rashley *v.* Masters, 1 Ves. J. 205.

[8] Berney *v.* Eyre, 3 Atk. 387; see Vaughan *v.* Fitzgerald, 1 Sch. & Lef. 316.

[9] See *ante*, p. 810; *post*, Chap. XXXIV. § 2, *Bills of Discovery*; § 4, *Bills to Perpetuate Testimony*.

[10] Berney *v.* Eyre, *ubi sup.*

[11] *Ante*, p. 1074; White *v.* Wilson, 13 Ves. 87; but see Man *v.* Ricketts, 7 Beav. 93; S. C. *nom.* Ricketts *v.* Turquand, 1 H. L. Ca. 472.

[12] White *v.* Wilson, 13 Ves. 87; Berney *v.* Eyre, *ubi sup.*; Webb *v.* Claverden, 2 Atk. 424; but see Tuthill *v.* Scott, 2 Moll. 468; Tucker *v.* Tucker, 1 M'L. & Y. 425; 13 Pri. 609; Newton *v.* Lucas, 1 M. & C. 391, 392.

[1] For the practice with regard to the costs of issues to try the validity of wills, see *ante*, p. 1148.

[2] Wright *v.* Wright, 5 Sim. 449.

[3] Berney *v.* Eyre, 3 Atk. 387; Grove *v.* Young, 5 De G. & S. 38, 42; 15 Jur. 1099; *ante*, pp. 1148, 1149.

children.[4] And where a defendant, heiress-at-law, asked for an issue, with notice of circumstances which rendered her success improbable, she was, although the will was open to great and grave suspicion, held not entitled to the costs of the issue.[5]

Where, also, an heir-at-law unnecessarily filed a cross-bill, for the purpose of establishing his claim to certain legacies to charities which the testator had charged upon real estate, the whole benefit of which he might have had under the original bill, Lord Thurlow gave the costs of the cross-bill out of the real estate: which, in effect, fixed them upon the heir.[6]

But although, where an heir is brought before the Court as a defendant, he may, under the circumstances suggested, be deprived of his costs, yet the Court will not give costs against him, even though he should insist upon the will's being fraudulent, or the testator being insane, and upon the question of fraud or insanity being tried, he fails in the attempt to overturn the will.[7] It must be a very strong case which will induce the Court to give costs against the heir: such as spoliation or secreting the will;[8] or where he vexatiously contests the will, by setting up a case of insanity, knowing the devisor to be perfectly sane;[9] or where he refuses to convey to a purchaser, under a contract entered into by his ancestor.[10]

* The heir-at-law is entitled to his costs, as a matter of course, *1385 in those cases only in which he comes before the Court as a defendant. Where he assumes the character of a plaintiff, and seeks to impeach a will on the ground of insanity, or upon any other ground upon which he might impeach it by ejectment at Law, he will, if unsuccessful, be ordered to pay the costs;[1] and this, even though he is an infant: "because he may, notwithstanding, bring a bill on coming of age, or ejectment; indeed, it is not certain whether another *prochein ami* may not bring a bill."[2] It is only, however, in cases in which the heir might have proceeded at Law that he will be liable to costs if his bill be dismissed: where that is not the case, he will not be compelled to pay the costs. The Court, in fact, considers that an heir-at-law, contending for his inheritance upon fair grounds, ought not to pay the costs, though he does not succeed in establishing his right; and, therefore, where the testator, previously to making his will, conveyed his estate to a trustee, upon trust to convey it as he, the testator, should direct by his will, and the heir filed a bill to impeach the will, which was dismissed, Sir John

[4] Roberts *v.* Scoones, 7 Sim. 418, 421; and see Burne *v.* Breen, 1 B. & B. 308.

[5] Stacey *v.* Spratley, 4 De G. & J. 199; 5 Jur. N. S. 503.

[6] Leacroft *v.* Maynard, 1 Ves. J. 279; and see Beames on Costs, 63.

[7] Webb *v.* Claverden, 2 Atk. 424; Smith *v.* Dearmer, 3 Y. & J. 278; Roberts *v.* Kerslake, 1 K. & J. 751.

[8] *Ante*, p. 1149; Berney *v.* Evre, *ubi sup.*; Middleton *v.* Middleton, 5 De G. & S. 656; Williams *v.* Williams, 33 Beav. 306; Cowgill *v.* Rhodes, *ib.* 310, 314; and see Marriott *v.* Marriott, 12 W. R. 303, V. C. W.

[9] White *v.* Wilson, 13 Ves. 87, 92; *ante*, p. 1149.

[10] Hoddel *v.* Pugh, 33 Beav. 489.

[1] Webb *v.* Claverden, 2 Atk. 424; Seal *v.* Brownton, 3 Bro. C. C. 214; Johnson *v.* Gardiner, 1 Dick. 313; Swinfen *v.* Swinfen, 27 Beav. 148, 167.

[2] Blinkehorne *v.* Feast, 1 Dick. 153.

Leach M. R. determined that, as the circumstance of the trust rendered it necessary for the heir to come into Equity, the dismissal should be without costs: although he ordered the heir to pay the costs of an issue, which had been directed, and in which he had failed.[3]

Another case in which the Court generally gives costs to the party, without reference to his success in the suit, is that of a mortgagee or other incumbrancer having a specific lien upon property: the principle of the Court being, that where the owner comes to deliver the estate from the incumbrance which he himself, or those under whom he claims, have put upon it, the person having that pledge is not to be put to expense with regard to that proceeding; and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified.[4]

*1386 This principle was formerly applied, * also, to those cases in which, although the transaction between the parties did not originally consist in borrowing or lending money, or charging an estate with a particular sum, the Court thought proper to consider a party advanc-

[3] Scaife *v.* Scaife, 4 Russ. 309; see also Tatham *v.* Wright, 2 R. & M. 1, 32. It seems, from some early cases, to have been the doctrine of the Court, that an heir-at-law, or heir male of the honor of a family, has a right to come into Equity for a production and inspection of the deeds by which he is disinherited: and that, if he does so, he will not be liable to costs. See Leman *v.* Alie, Amb. 163; Harrison *v.* Southcote, 2 Ves. S. 389, 396; 1 Atk. 539; Earl of Suffolk *v.* Howard, 2 P. Wms. 177; Shales *v.* Barrington, 1 P. Wms. 481.

[4] Detillin *v.* Gale, 7 Ves. 583; Loftus *v.* Swift, 2 Sch. & Lef. 642, 657; Taylor *v.* Baker, Dan. 71; [Pearce *v.* Morris, L. R. 5 Ch. App. 227;] and see Fisher, 554 *et seq.*; Morgan & Davey, 155 *et seq.*; Seton, 376 *et seq.*; Danbury *v.* Robinson, 1 McCarter (N. J.), 324. Where a party files his bill to redeem, the general rule is, that he must pay costs to the mortgagee, although he should be successful. Slee *v.* Manhattan Co., 1 Paige, 48; Vroom *v.* Ditmas, 4 Paige, 527. In Saunders *v.* Frost, 5 Pick. 272, the Court say that the rule, that the mortgagee is under no circumstances chargeable with costs, is not only unreasonable, but is opposed to the Statute of Massachusetts, 1798, c. 77, which expressly authorizes the Court "at their discretion to award costs to either party, as Equity may require." In the above case of Saunders *v.* Frost, upon a bill to redeem, the defendant interposed objections, some of which were groundless and unreasonable, and he failed in his defence, but the plaintiff was also in fault, and the Court refused to allow costs to either party. See Turner *v.* Turner, 3 Munf. 66; Clark *v.* Reed, 11 Pick. 449; Bartlett *v.* Johnson, 9 Allen, 530, 537.

In Massachusetts, where a suit to redeem is brought without a previous tender, and it appears that any thing is due upon the mortgage, the plaintiff shall pay the costs of suit, unless it appears that the defendant has unreasonably refused or neglected, when requested, to render a just and true account of the money due on the mortgage, and of the rents and profits, and sums paid for taxes, repairs, improvements, and other necessary expenses, or that he has otherwise, by his default, prevented the plaintiff from performing or tendering performance of the condition before the commencement of the suit. In all other cases of a suit for redemption, the Court may, in their discretion, award costs to either party, as Equity may require. Genl. Sts. c. 140, § 21. In a suit to redeem, the mortgagee will not be subjected to costs on the ground that "he has unreasonably refused or neglected, when requested, to render a just and true account," merely because the account rendered by him is found, upon examination by the Court, to be to some extent inaccurate. The refusal to render a true account should be such as would show an intention to embarrass the other party. Whitwood *v.* Kellogg, 6 Pick. 420; but see Currier *v.* Webster, 45 N. H. 226; Whitney *v.* Deming, 46 Maine, 382. In Miller *v.* Lincoln, 6 Gray, 556, where a suit to redeem was brought without previous tender, it was held that the mortgagee, if he had not prevented the performance of the condition by the mortgagor, *was entitled to costs*, although, upon an examination of the account rendered by the mortgagee, it was decided by the Court, that the mortgagor was entitled to an allowance for a large amount of rent for which the mortgagee had rendered no account. See Platt *v.* Squire, 5 Cush. 551; Putnam *v.* Putnam, 13 Pick. 129; Willard *v.* Fiske, 2 Pick. 540; Conklin *v.* Coddington, 1 Beasley (N. J.), 250; Whitney *v.* Deming, 46 Maine, 382; Pease *v.* Benson, 28 Maine, 336; Sprague *v.* Graham, 38 Maine, 328. In Woodward *v.* Phillips, 14 Gray, 132, it was held that the mortgagee not having rendered a correct account, and the mortgagor not having made any tender, neither party was entitled to costs.

ing money in the light of a mortgagee or incumbrancer. The cases to which allusion is made are those in which the Court orders securities to be delivered up, or sales of reversionary interests to be set aside, because the bargain has been unconscientious: in these cases, the Court generally decree for the plaintiff, upon terms that he shall repay the defendant the amount actually advanced or paid by him, with interest; and, looking upon him as a mortgagee for that amount, it formerly treated him as such, by ordering the plaintiff to pay him his costs.[1] The Court now, however, considers cases of this description to be analogous to redemption suits, where the mortgagee resists the right to redeem; and no costs are given on either side;[2] but if the defendant has refused to accept terms which were better than those to which the Court considers him entitled, he will be ordered to pay the costs of the suit.[3]

At Law, after a mortgage is forfeited, the estate is the absolute * property of the mortgagee, and he may deal with it as his own; *1387 he may sell it, or incumber it, or devise it. If, therefore, the mortgagor applies to a Court of Equity for redemption, it is only granted to him upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts: thus, a mortgagor, filing a bill to redeem, must pay the costs, not only of the mortgagee himself, but of all persons claiming under him.[1] The same rule applies to a foreclosure, as well as a redemption suit; and, in general, it makes no difference whether the bill is filed by the mortgagor to redeem, or by the mortgagee to foreclose: in either case, the mortgagee is entitled to his principal, interest, and costs.[2] Thus, where a mortgagee assigned his mortgage money to the trustee of his marriage settlement, and afterwards filed a bill of foreclosure against the mortgagor, to which the trustee was made a party, he was ordered to pay the costs of the trustee, and to add them to the mortgage debt.[3] Where, however, a second mortgagee filed his bill to redeem the first, and foreclose subsequent mortgages, and the estate was not sufficient to pay the first mortgage, the bill was dismissed, with costs as against the first mortgagee, and without costs as against the other defendants.[4]

[1] Peacock *v.* Evans, 16 Ves. 512; Gowland *v.* De Faria, 17 Ves. 20, 26; Bowes *v.* Heapes, 3 V. & B. 117, 121; and see Priestly *v.* Wilkinson, 1 Ves. J. 214; see Holland *v.* Cruft, 20 Pick. 337.

[2] Salter *v.* Bradshaw, 26 Beav. 161; 5 Jur. N. S. 831; Bromley *v.* Smith, 26 Beav. 644; 5 Jur. N. S. 833; St. Albyn *v.* Harding, 27 Beav. 11; Foster *v.* Roberts, 29 Beav. 467; Talbot *v.* Staniforth, 1 J. & H. 484.

[3] Emmet *v.* Tottenham, 10 Jur. N. S. 1090; S. C. *nom.* Tottenham *v.* Emmet, 13 W. R. 123, M. R.; and see Berdoe *v.* Dawson, 11 Jur. N. S. 254; 13 W. R. 420, M. R.; 34 Beav. 603.

[1] Wetherell *v.* Collins, 3 Mad. 255; Coles *v.* Forest, 10 Beav. 552, 555. As to costs, in suit by pauper, see Batchelor *v.* Middleton, 6 Hare, 86.

[2] Burlew *v.* Hillman, 1 C. E. Green, 23; see Bradley *v.* Hitchcock, Kirby, 231; Frazer *v.* Jones, 5 Hare, 483; Dunstan *v.* Patterson, 2 Ph. 344. A mortgagee, acting as his own solicitor, will be allowed, as against a second mortgagee, his costs out of pocket, but no other costs. Sclater *v.* Cottam, 1 Seton Dec. (3d Eng. ed.) 376; Jur. (57) 630, V. C. K.

[3] Bartle *v.* Wilkin, 8 Sim. 238. As to the costs of the solicitor to the suitor's fee fund, as guardian for an infant defendant, in a foreclosure suit, see Harris *v.* Hamlyn, 14 Jur. 55, V. C. K. B.; 3 De G. & S. 470; see also *ante*, p. 162, note (10).

[4] Gibson *v.* Nicol, 9 Beav. 403, 407; 10 Jur. 419; see Danbury *v.* Robinson, 1 McCarter (N. J.), 324.

A mortgagee will not only be allowed his own costs, and the costs of those claiming under him, but he will be allowed, as against the estate, all costs which he may have incurred in asserting or defending his title to the estate. Thus, where a mortgagee had filed a bill of foreclosure, he was allowed the costs he had incurred in procuring administration to an annuitant under the will of the mortgagor: such annuitant being a necessary party to the foreclosure.[5] So, where an infant, claiming under a mortgagor, had endeavored to defeat the mortgage by setting up a supposed entail, and after a special verdict, and great litigation at Law, the mortgagee prevailed, whereupon the infant brought his bill to redeem, and the mortgagee swore that he had expended above 120*l.* in defending his mortgage at Law: although he had but 60*l.* costs allowed him there, it was held that he should not be confined to his taxation at Law, but should, upon the account, be allowed all he had laid *1388 out or expended; and it appearing that * the mortgagee, fearing his mortgage would have been defeated at Law, got administration as creditor in the Ecclesiastical Court, he was allowed his costs expended there also.[1]

And so, in another case, where a first mortgagee, after he had been put to great expense in suits to foreclose, and otherwise in respect to the estate, had a bill filed against him by a second mortgagee to redeem, the Court ordered that his costs should not be taxed as in an adverse suit, but that he should be allowed all his costs and expenses: as is done in the case of a solicitor who lays out and disburses money for his client: the rents to be applied, in the first place, to pay such costs, before they were applied to sink the principal.[2] And on a bill for redemption, Sir John Leach M. R. gave to the mortgagee the costs of an action, which he had brought against a person who had joined the mortgagor as surety, in a bond for the mortgage money: the fruit of the action being lost by the insolvency of the surety: and his Honor stated the principle to be, that the mortgagee was entitled to be allowed, in account, against the mortgagor, all expenses properly incurred for the recovery of the mortgage money.[3]

All extra costs and expenses should, however, be asked by the bill, and mentioned in the decree.[4]

Upon the same principle, it is stated that, if a mortgagee or real creditor is brought before the Court to have his security impeached, and the bill is dismissed, there is hardly an instance in which it is not with costs: for, being brought before the Court without just grounds, the Court would not do him justice, unless costs were given to him, as he

[5] Hunt *v.* Fownes, 9 Ves. 70.

[1] Ramsden *v.* Langley, 2 Vern. 536; 1 Eq. Ca. Ab. 328, 329, pl. 5. But an equitable mortgagee will not be entitled to the costs incurred at Law in unsuccessfully defending his possession. Dryden *v.* Frost, 3 M. & C. 670, 675; see Cocks *v.* Gray, 1 Giff. 77; Peers *v.* Ceeley, 15 Beav. 209.

[2] Lomax *v.* Hide, 2 Vern. 185; Ainsworth *v.* Roe, 14 Jur. 874, M. R.

[3] Ellison *v.* Wright, 3 Russ. 458; Peers *v.* Ceeley, 15 Beav. 209.

[4] Seton, 381. For forms of orders as to such extra costs and expenses, see *ib.* 396.

is a creditor and incumbrancer.[5] In *Brodie* v. *St. Paul*,[6] however, where certain mortgagees and trustees were brought before the Court upon a bill for a specific performance of an agreement for a lease, not for the purpose of impeaching their title, but as necessary parties to confirm the lease, and the bill was dismissed against the principal party without costs, on account of the hardship of the case, the mortgagees and trustees were refused their costs: Mr. Justice Buller, who heard the cause, saying, that if the decree had been for the plaintiff, perhaps he might have given the trustees their costs, because he could have given them over against the other defendants; but that, as it was, they must have their remedy against their principal.

* The rule, that the mortgagor is to pay the costs of the mortga- *1389
gee, and of those made necessary parties by his act, does not apply where the title to the mortgage is disputed; and, in that case, the mortgagee's costs should only be borne by the estate, as against the persons interested in the equity of redemption, when they have concurred or assisted in the litigation.[1] Upon this principle, where the plaintiff was devisee of a mortgagee, and filed his bill against the mortgagor for a foreclosure, making the heir-at-law of the mortgagee a party, in order to have the will established against him, Lord Kenyon M. R. thought the estate ought not to be burdened with his costs.[2] So, where the mortgagee, after bill of foreclosure filed, became insolvent, the costs of his assignee, made a defendant, were not thrown on the mortgaged estate.[3] And, in general, if a mortgagee, after a decree to account, assigns his interest to another, the costs of the proceedings necessary to bring the assignee before the Court must be paid by the mortgagee.[4]

In these cases, the costs given to a mortgagee are scarcely in the nature of costs in the cause: they are rather sums that the mortgagee has a right to be paid, before the relief asked for against him can be granted.[5]

The rule, that a mortgagee is to have his costs paid, is subject to an exception in cases where he is a lunatic. In such cases, the costs of a committee of a lunatic mortgagee requisite to enable him to convey to the mortgagor under the statute, are to be paid out of the lunatic's estate, where the lunatic is beneficially interested in the mortgage

[5] Per Lord Hardwicke, in Taner *v.* Ivie, 2 Ves. S. 466, 468.

[6] 1 Ves. J. 326, 334.

[1] Parker *v.* Watkins, John. 133; and see Pelly *v.* Wathen, 7 Hare, 372; 14 Jur. 9.

[2] Skipp *v.* Wyatt, 1 Cox, 353.

[3] Horam *v.* Woolongham, 1 Beat. 1.

[4] Barry *v.* Wrey, 3 Russ. 465.

[5] In Horlock *v.* Smith, 1 Coll. 298, a mortgagee was not allowed costs of a successful ejectment under the head of just allowances, where the decree was silent as to such costs; and so, where the decree had not mentioned extra costs, they could not be granted on petition. Barron *v.* Lancefield, 17 Beav. 208. On redemption by a second mortgagee, the original mortgagee will be allowed extra costs incurred by him in foreclosing the mortgagor; Lomax *v.* Hide, 2 Vern. 185; and interest will be allowed on sums expended by him; and the costs of a stop order, to complete the security on a fund, were allowed the mortgagee upon his petition for payment of the fund out of Court. Waddilove *v.* Taylor, 6 Hare, 307. But extra costs and expenses should be asked by the bill, and mentioned in the decree. 1 Seton Dec. (3d Eng. ed.) 381.

money, and the application is made by the Committee.[6] Where it clearly appears on the face of the mortgage deed, that the lunatic mortgagee is only a trustee, the mortgagor must bear the costs;[7] but this will not be ordered, where the trust does not appear on the deed.[8] If the mortgagor applies, he must pay the costs of obtaining the order, unless the committee has declined to apply for it.[9]

*1390 *The right of a mortgagee or incumbrancer to his costs will prevail, in cases in which the Court directs a sale of the property pledged; and the mortgagee is entitled to the payment of his costs, before the subsequent mortgagees receive any part of their principal, interest, or costs: the practice of the Court being to direct each mortgagee to be paid his principal, interest, and costs, according to his priority;[1] but it has been held, that where a mortgagee commences or adopts a suit for the administration and sale of the mortgagor's estate, he does not rest exclusively on his contract, but seeks something beyond it; and the costs of the suit are the first charge, if the estate prove deficient.[2] It has also been held, that an equitable mortgagee, by filing a bill for the sale of the mortgaged property, and the payment of the balance out of the general assets, and for administration, does not render the proceeds of the mortgaged estate liable to the costs of the suit, in priority to the plaintiff's claim.[3]

Where the suit is instituted by a subsequent incumbrancer, to ascertain priorities, making a prior mortgagee or incumbrancer a party, the subsequent incumbrancer ought to offer by his bill to redeem the prior incumbrancer; and, if he omits to do so, the prior incumbrancer has a right to insist upon being dismissed with costs. But if the prior incumbrancer, instead of asking to be dismissed, consents to a sale, and to take his principal and interest out of the proceeds, he must, as he thereby adopts the suit and takes the benefit of it, contribute to the costs of it: therefore, the costs of all parties will be paid out of the fund, even though there may not be enough left to pay the prior incumbrancer his principal and interest.[4] Where, however, the property had been pre-

[6] *Ex parte* Richards, 1 J. & W. 264; *Re* Wheeler, 1 De G., M. & G. 434; *Re* Viall, 8 De G., M. & G. 439; *contra*, *Re* Marrow, C. & P. 142; *Re* Biddle, 23 L. J. Ch. 23, L. JJ.; Morgan & Davey, 171.

[7] *Re* Lewes, 1 M'N. & G. 23.

[8] *Re* Townsend, 2 Phil. 348; 1 M'N. & G. 686.

[9] *Re* Stuart, 4 De G. & J. 317; *Re* Jones, 2 De G., F. & J. 554; 7 Jur. N. S. 115.

[1] Belchier *v.* Butler, 1 Eden, 523; Upperton *v.* Harrison, 7 Sim. 444; Barnes *v.* Racster, 1 Y. & C. C. C. 401, 407; 6 Jur. 595; Hepworth *v.* Heslop, 3 Hare, 485, 487; 9 Jur. 796; Wilde *v.* Lockhart, 10 Beav. 320, 323; Carr *v.* Henderson, 11 Beav. 415; Cutfield *v.* Richards, 26 Beav. 241; Crosse *v.* General Reversionary Company, 3 De G., M. & G. 698; Langton *v.* Langton, 7 De G., M. & G. 30; 1 Jur. N. S. 1078; and see Berry *v.* Hebblethwaite, 4 K. & J. 80; see also Seton, 293, 379; *contra*, Kenebel *v.* Scrafton, 13 Ves. 370.

[2] Armstrong *v.* Storer, 14 Beav. 535; White *v.* Gudgeon, 30 Beav. 545: Dighton *v.* Withers, 31 Beav. 423; Seton, 293, 379; but see Judgment of L. J. Turner, in Ward *v.* Mackinlay, 10 Jur. N. S. 1063, 1064; 13 W. R. 65; 1 De G., J. & S. 363, 368; see also Aldridge *v.* Westbrook, 5 Beav. 188, 193.

[3] Tipping *v.* Power, 1 Hare, 405, 407; 6 Jur. 434; Wade *v.* Ward, 4 Drew. 602; and it seems that, according to V. C. Wood, the same rule applies to a legal mortgage. Seton, 293, 380; Berry *v.* Hebblethwaite, 4 K. & J. 80; Tuckley *v.* Thompson, 1 J. & H. 126.

[4] White *v.* Bishop of Peterborough, Jac. 402; see also Brace *v.* Duchess of Marlborough, Mos. 50; Seton, 380.

served by the diligence of the plaintiff, a *puisne* incumbrancer, his costs were first provided for; and the costs of the other incumbrancers were directed to be added to their securities, and paid according to their priorities.[5]

The rule above laid down, that a mortgagee or incumbrancer is * entitled to his costs, as well as to his principal and interest, *1391 is liable to exception, also, in cases in which the Court considers him guilty of any misconduct with reference to the suit, or the subject of it.[1] In *Detillin* v. *Gale*,[2] Lord Eldon said: "Though a mortgagee acting reasonably as such, is to have his reasonable expenses, it does not follow that he can claim his own expenses from other persons, with whom he is litigating, with regard to those acts which, upon his part, are not only unreasonable, but grossly oppressive." In that case, the mortgagee was deprived of his costs of that part of the suit where he had been guilty of improper conduct. So, where a mortgagee sets up an unfounded claim,[3] or an unjust defence, insisting on his deed as an absolute purchase, he will be deprived of his costs.[4] And from the case of *Smith* v. *Green*,[5] it appears that, if a first mortgagee receives from a second mortgagee a tender of all that is due for principal, interest, and costs, the first mortgagee will not be entitled to the costs of a foreclosure suit after the tender. Nor will he be allowed his costs in a redemption suit, if he has not been ready with and offered to show his accounts.[6]

In *Detillin* v. *Gale*, before referred to, Lord Eldon appears to have expressed an opinion, not only that a mortgagee might be deprived of his costs, but that, under some circumstances, he might be called upon to pay costs. He there said: "It is said it will be an extremely bad precedent to hold, that in no case a mortgagee can be called upon to pay the costs of the mortgagor.[7] I will not say the Court will not, and am very far from saying the Court ought not, to make that precedent; but it ought to be made upon very great consideration." [8] His Lordship afterwards referred to the case of *Shuttleworth* v. *Lowther*,[9] in which Lord Lonsdale, a mortgagee, was made to pay costs (on the ground of

[5] Ford *v.* Earl of Chesterfield, 21 Beav. 426; Wright *v.* Kirby, 23 Beav. 463.

[1] See Saunders *v.* Frost, 5 Pick. 259; Whitwood *v.* Kellogg, 6 Pick. 420; Bartlett *v.* Johnson, 9 Allen, 538; Kittredge *v.* McLaughlin, 38 Maine, 513.

[2] 7 Ves. 583, 585; and see —— *v.* Trecothick, 2 V. & B. 181; Loftus *v.* Swift, 2 Sch. & Lef. 642, 657.

[3] Montgomery *v.* Calland, 14 Sim. 79, 81, and see Barrett *v.* Hartley, L. R. 2 Eq. 789, V. C. S.

[4] Francklyn *v.* Fern, Barnard, 30; see also Sevier *v.* Greenway, 19 Ves. 413, 415; Kirkham *v.* Smith, 1 Ves. S. 258, 262; Wheaton *v.* Graham, 24 Beav. 483; *Re* Unsworth, 13 W. R. 448, V. C. K.; Slee *v.* Manhattan Co., 1 Paige, 48; May *v.* Eastin, 2 Porter, 414; Brown *v.* Simons, 45 N. H. 211; McNeil *v.* Call, 19 N. H. 403. Although the defendant in a bill to redeem has complied with the plaintiff's demand to render an account, yet if he denies the right of the plaintiff to redeem when he is entitled to it, he can recover no costs. Kittredge *v.* McLaughlin, 38 Maine, 513.

[5] 1 Coll. 555; see also Williams *v.* Sorrell, 4 Ves. 389.

[6] Powell *v.* Trotter, 1 Dr. & Sm. 388.

[7] See Saunders *v.* Frost, 5 Pick. 272; Smith *v.* Bailey, 10 Vt. 163.

[8] 7 Ves. 583, 586.

[9] Cited *ibid.*; and see Roberts *v.* Williams, 4 Hare, 129, 131; Emmet *v.* Tottenham, 10 Jur. N. S. 1090; S. C. *nom.* Tottenham *v.* Emmet, 13 W. R. 123, M. R.; Hoskin *v.* Sincock, 11 Jur. N. S. 477; 13 W. R. 487, V. C. K.

a tender, and an appropriation of the money; which was paid into a bank and refused), as affording an instance in which a mortga-
*1392 gee had been *made to pay the costs; and there are other cases in the books which may be cited in support of the same proposition.[1] Thus, in *Mocatta* v. *Murgatroyd*,[2] the mortgagee was ordered to pay costs to the plaintiffs, who were indorsees of subsequent mortgages or bills of sale of a ship; but he was not to have his costs over, against the first mortgagor: Lord Cowper saying, that it was not reasonable that he should onerate his pledge with costs occasioned by his unjust defence;[3] and this principle has been acted upon in *Harvey* v. *Tebbutt*,[4] where a mortgagee, who had resisted the right to redemption, by setting up a decree of foreclosure collusively obtained, was decreed to pay so much of the costs as was occasioned by his resistance.[5]

Where a mortgagee, by a bill of foreclosure, attempted to tack a bond to a mortgage as against creditors, the bill was to that extent dismissed with costs;[6] and where the difficulty in a foreclosure suit was occasioned by the loss of the mortgage deed, the mortgagee was ordered to pay the costs;[7] and a similar order was made, where a redemption suit was rendered necessary by the mortgagee having lost the title-deeds.[8]

But although a mortgagee may, under peculiar circumstances,
*1393 *not only be deprived of his costs but be ordered to pay them, there must be positive misconduct on his part to bring such a

[1] Brown *v.* Simons, 45 N. H. 211; Brockway *v.* Wells, 1 Paige, 617; Currier *v.* Webster, 45 N. H. 226; McNeill *v.* Call, 19 N. H. 403; [Lozear *v.* Shields, 7 C. E. Green, 448; S. C., on appeal, 8 C. E. Green, 509].

[2] 1 P. Wms. 393, 395.

[3] See also Baker *v.* Wind, 1 Ves. S. 160; England *v.* Codrington, 1 Eden, 169, 174; Lord Cranstown *v.* Johnston, 5 Ves. 277, 279; Taylor *v.* Baker, Dan. 71.

[4] 1 J. & W. 197, 202.

[5] Where a defendant set up a judgment, which was satisfied, and a mortgage on which he claimed more than was due, he was held not entitled to costs against the plaintiff. Brinkerhoff *v.* Lansing, 4 John. Ch. 79. And the plaintiff who failed in supporting his charge that the mortgage was satisfied, and kept on foot by fraud, was also held not to be entitled to his costs. Brinkerhoff *v.* Lansing, 4 John. Ch. 79. Where the mortgagee sets up an unconscientious defence, he is not only refused costs, but must pay costs to the other party. Slee *v.* Manhattan Co., 1 Paige, 48. So if he improperly resists the claim of the plaintiff to redeem. Vroom *v.* Ditmas, 4 Paige, 527; see also Van Buren *v.* Olmstead, 5 Paige, 9; Brockway *v.* Wells, 1 Paige, 617; Saunders *v.* Frost, 5 Pick. 271-274; Union Ins. Co. *v.* Van Rensselaer, 4 Paige, 85. Where the plaintiff in a suit to foreclose so mistakes the rights of the defendant as to render it necessary for him to put in an answer to protect his rights, the plaintiff may be personally charged with the extra costs occasioned thereby. Union Ins. Co. *v.* Van Rensselaer, 4 Paige, 85.

First mortgagee, resisting a suit by a second mortgagee to rectify a mistake, had to pay costs. Harryman *v.* Collins, 18 Beav. 11. A sub-mortgagee had to pay costs of suit to set aside the original mortgage as fraudulent. Cockell *v.* Taylor, 15 Beav. 127; and so the original mortgagee, S. C. A mortgagee will pay the costs of an unsustained charge of fraud. West *v.* Jones, 1 Sim. N. S. 218. Where a mortgagee resisted the right to redeem, and mortgagor charged misconduct which he did not prove, mortgagor paid the costs, in Cowdry *v.* Day, Jur. (59) 1199; 1 Seton Dec. 376. A mortgagee who had neglected on request to furnish the mortgagor with the accounts, was not allowed the costs up to the hearing of a redemption suit. Powell *v.* Trotter, 1 Dr. & S. 388. But the merely extending by a mortgagee of his claim, in good faith, beyond what the Court decides he is entitled to, as where he sets up a claim under a tax-title, bought in with intent to protect his mortgage, though disallowed by the Court, is no ground for refusing his costs. Concklin *v.* Coddington, 1 Beasley, 250.

[6] Hamerton *v.* Rogers, 1 Ves. J. 513; and see Graham *v.* Hosen, 1 W. N. 166.

[7] Stokoe *v.* Robson, 19 Ves. 385; and for the order, see Seton, 629, No. 1; Price *v.* Price, 1 Seton Dec. 377.

[8] Lord Middleton *v.* Eliot, 15 Sim. 531; and for the order, see Seton, 629, No. 2.

visitation upon him.[1] The mere circumstance that he has extended his claim beyond what the Court finally decides he is entitled to, will not be a ground for refusing him his costs ;[2] and, although he may have suggested a doubt as to the mortgagor's title to redeem, yet, if the Court thinks there is sufficient ground for entertaining such doubt, he will not be charged with the costs, even where his doubt eventually proves unfounded. Thus, where, on a bill by a devisee to redeem, the mortgagee insisted that the heir of the mortgagor was alive, and an issue was directed to try whether he was living or dead, upon the trial of which the jury found that he was dead, Sir John Leach V. C. determined that the mortgagee must not pay the costs of the issue, as he could not be charged with vexation in a case where the Court thought there was so much weight in his objection as to direct an issue.[3]

The right of a mortgagee to his costs is not defeated by the circumstance of his having remained in possession of the estate, after the rents and profits received by him have been sufficient to pay off the principal money and interest due upon the mortgage :[4] the estate being considered as much a security for costs as for the principal and interest ; and a decree for costs almost necessarily following a decree for payment of principal and interest.[5] If, however, in a foreclosure[6] or redemption[7] suit, it turns out, on taking the account, that on the day on which the bill was filed (to which time the account will be directed), nothing was due to the mortgagee, he must bear the expense of the suit :[8] and where a mortgagee in possession, by his answer untruly alleged that the mortgage was not satisfied, he was ordered to pay the costs subsequent to his answer.[9]

* A defendant should raise his defence in the least expensive *1394 manner : therefore, if he enters into evidence in a case in which he might have demurred[1] or pleaded,[2] the bill will be dismissed without

[1] Loftus *v.* Swift, 2 Sch. & Lef. 642, 657; see Willard *v.* Fiske, 2 Pick. 540.

[2] Loftus *v.* Swift, 2 Sch. & Lef. 642, 657; Whitwood *v.* Kellogg, 6 Pick. 420; Miller *v.* Lincoln, 6 Gray, 556; Davis *v.* Phelps, 7 Monroe, 632. Mortgagees of a colliery in possession did not forfeit their right to the costs of a redemption suit, by having overstated the balance due, refused to furnish an account gratis, and dissuaded the mortgagors from redeeming. Norton *v.* Cooper, 5 De G., M. & G. 728; but see Powell *v.* Trotter, 1 Dr. & S. 388; and see Tanner *v.* Heard, 3 Jur. N. S. 427, M. R.

[3] Wilson *v.* Metcalfe, 3 Mad. 45.

[4] Owen *v.* Griffith, 1 Ves. S. 250; Amb. 520; Lord Trimleston *v.* Hamil, 1 B. & B. 377; Wilson *v.* Metcalfe, 1 Russ. 530, 536; but see *contra*, Woodroft *v.* Soys, cited Beames on Costs, p. 26.

[5] East India Company *v.* Ekines, 2 Bro. P. C. ed. Toml. 382; 6 Vin. Ab. 365, pl. 13; Thomas *v.* Puddlesbury, Sel. Ca. Ch. 51.

[6] Binnington *v.* Harwood, T. & R. 477, 485.

[7] Barlow *v.* Gains, 23 Beav. 244.

[8] Morris *v.* Islip, 23 Beav. 244. A mortgagee, who became fully paid during the suit, but made a further claim, and brought the suit to a hearing, such claim being unfounded; had to pay the subsequent costs. Gregg *v.* Slater, 22 Beav. 314; so in Sm[illegible] *v.* Frisell, 1 J. & Lat. 383, for claiming more than was due and misconduct; and in Morley *v.* Bridges, 2 Col. 621, the mortgagee had to pay costs of suit.

Where overpayment is alleged, the usual course is to reserve costs until the result of the account is certified. 1 Seton Dec. 377.

[9] Montgomery *v.* Calland, 14 Sim. 79, 81; and see Snagg *v.* Frizell, 3 Jo. & Lat. 383; Powell *v.* Trotter, 1 Dr. & Sm. 388.

[1] Jones *v.* Davids, 4 Russ. 277, 278; Hill *v.* Reardon, 2 S. & S. 431, 439; Hollingsworth *v.* Shakeshaft, 14 Beav. 492; Webb *v.* England, 29 Beav. 44; 7 Jur. N. S. 153; Ernest *v.* Weiss, 9 Jur. N. S. 145, V. C. K.; 11 W. R. 206; Nesbitt *v.* Berridge, *ib.* 1044; 11 W. R. 446, 448, M. R.; but see S. C. 10 Jur. N. S. 53; 12 W. R. 283, L. C.; Morocco Company *v.* Fry, 11 Jur. N. S. 76, 78; 13 W. R. 310, 312, V. C. S.; *ante*, p. 542.

[2] Sanders *v.* Benson, 4 Beav. 350, 357, Jackson *v.* Ogg, Johns. 397, 402; *ante*, p. 603.

costs; or the defendant will be disallowed the extra costs occasioned by his having defended the suit.[3] So, also, if a plaintiff enters into useless or unnecessary evidence, he may be deprived of costs, or ordered to pay the costs occasioned thereby;[4] and plaintiffs, who instituted two suits where one would have been sufficient, have been refused the costs occasioned by the double proceedings.[5]

In coming to a decision upon the subject of costs, the Court is frequently governed by its wish to discourage unnecessary litigation. In *Millington* v. *Fox*,[6] Lord Cottenham said, that he was very much disposed, as a general rule, to make the costs follow the result: because, however doubtful the title might be, or however proper it might be to dispute it, it was but right that the party who really had the right should be reimbursed, as far as giving him the costs of the suit could reimburse him; but then there was another object which the Court must keep in view, namely, to repress unnecessary litigation, and to keep litigation within those bounds which were essential to enable the parties to vindicate and establish their rights; and accordingly his Lordship, although he held that the plaintiffs were entitled to part at least of the relief they prayed, refused to give them the costs of the cause: because it appeared that the defendant had written to the plaintiffs a letter offering terms which would have rendered the suit unnecessary: which letter, his Lordship held, as to costs at least, rendered it incumbent on the plaintiffs to put to the test whether the defendants were sincere in their offer, and not to go on with the suit, unless they found that they *1395 were insincere.[7] The principle to be * deduced from this case seems to be, that if a plaintiff proceeds with a cause after he has received a complete offer of all that he is entitled to, the Court, in the exercise of its discretion with respect to costs, will punish the unnecessary litigation, by refusing him the whole costs of the suit: as well those incurred after the tender as those incurred before.[1] This principle

[3] Godfrey *v.* Tucker, 33 Beav. 280; 9 Jur. N. S. 1188, M. R.; *ante*, p. 542; and see Morgan & Davey, 77 *et seq.*

[4] *Ante*, p. 836; Ord. XIX. 1; Harvey *v.* Mount, 8 Beav. 439, 453; 9 Jur. 741; Smith *v.* Chambers, 2 Phil. 221, 225; S. C. *nom.* Chambers *v.* Smith, 11 Jur. 359; Mayor, &c. of Berwick *v.* Murray, 7 De G., M. & G. 497, 514; 3 Jur. N. S. 1, 5; [Blest *v.* Brown, 4 De G., F. & J. 367, 377; Booth *v.* Booth, 1 Beav. 130; Farrow *v.* Rees, 4 Beav. 18, 24.]

[5] Bensusan *v.* Nehemias, 4 De G. & S. 381, 387.

[6] 3 M. & C. 338; and see observations of Lord Westbury, in Edelsten *v.* Edelsten, 1 De G., J. & S. 185; 9 Jur. N. S. 479.

[7] 3 M. & C. 353, 354; and see Meader *v.* M'Cready, 1 Moll. 119; Macartney *v.* Graham, 2 R. & M. 353; M'Andrew *v.* Bassett, 10 Jur. N. S. 492, V. C. W.; Moet *v.* Couston, 33 Beav. 578; Chester *v.* Metropolitan Railway Company, 13 W. R. 333, M R.; 11 Jur. N. S. 214; Hosken *v.* Sincock, 11 Jur. N. S. 477; 13 W. R. 487, V. C. K.; and see Morgan & Davey, 72. If the parties stand equally fair in every respect, the party who brings the other into Court, and is the cause of the litigation, ought to bear the expense. Catlin *v.* Harned, 3 John. Ch. 61.

Where a defendant admitted, in his answer, that if a demand of the sum claimed by the bill, had been made, it would not have been complied with, the plaintiff was allowed his costs although no demand was proved. Glen *v.* Fisher, 6 John. Ch. 33; S. P. Glen *v.* Fisher, 6 John. Ch. 36.

[1] Holden *v.* Kynaston, 2 Beav. 204, 206; Moet *v.* Couston, 33 Beav. 578, 581; Hosken *v.* Sincock, *ubi sup.*; but see Wainwright *v.* Sewell, 11 W. R. 560, V. C. S.; Sentance *v.* Porter, 7 Hare, 426. A tender of all which the law would require, and a refusal, subjects the party refusing to after-accruing costs. Rucker *v.* Howard, 2 Bibb, 166. A party who has caused the costs of a suit, by requiring proof of facts well known to himself, should be required to pay them. Grimes *v.* March, 3 A. K. Marsh. 367.

was not, however, adopted by Sir James Wigram V. C. to its full extent, in the case of *Colburn* v. *Simms*:[2] for although the defendant in that case had written a letter to the plaintiffs, offering what his Honor considered they were entitled to demand, yet he only refused the plaintiffs such costs as were incurred after the plaintiffs were in the wrong; and he observed that in the case of *Millington* v. *Fox*, Lord Cottenham's attention was not called to the fact that the expense of filing the bill had been incurred before the plaintiffs received the letter offering compensation.[3]

Unless the offer of the defendants extends to every thing that the plaintiff has a right to demand, whether in the nature of relief or of costs, the Court will not punish the plaintiff for declining the offer, by refusing him his costs;[4] and the rule appears to be general that, wherever costs have been necessarily incurred by a plaintiff in seeking a demand, a tender by the defendant to obviate future costs must extend to the costs already incurred.[5] A plaintiff, in refusing to accept a tender of the amount due, because the costs do not form part of the tender, must be careful to ascertain that costs have been actually incurred by him: otherwise, he will subject himself to the payment of any future costs which he may occasion to the defendant.[6]

A tender, to be effective, must be of the whole sum due, and, as has been stated, of the costs, if any have been incurred; and if * a tender is refused, and it afterwards appears that the sum *1396 actually due exceeds the amount tendered, the defendant will not be exempted from costs.[1] A tender must also be specific, and although it may be of a larger sum than is actually due, yet, if such tender is coupled with a direction to the plaintiff to take out of it such a sum as is actually due to him, it will not be good.[2] So, also, if the tender be clogged with conditions which the party has no right to impose, it will not be effective to excuse the party making it, from the costs: therefore, where an executor, although he had offered to pay a legacy given in trust for the testator's daughter for life, and afterwards to her children, had qualified his offer, by insisting that it should be laid out in such security as he should approve of, Lord Gifford M. R.

[2] 2 Hare, 543, 561; 7 Jur. 1104; see also Williams *v.* Sorrell, 4 Ves. 389.

[3] Generally, costs are properly adjudged in favor of a party who has good cause to sue at the time he does sue, up to the time of filing of the answer, though such party is ultimately unsuccessful from lapse of time, before filing answer and the happening of other circumstances not then existing. Phillips *v.* Barbaroux, 2 B. Mon. 89, 91; Martin *v.* White, 1 Bibb, 584; see Demarest *v.* Wynkoop, 3 John. Ch. 147; Williams *v.* Mattocks, 3 Vt. 189; Clark *v.* Clark, 4 Hey. 36.

[4] Kelly *v.* Hooper, 1 Y. & C. C. C. 197, 200; Geary *v.* Norton, 1 De G. & S. 9, 12; Jamieson *v.* Teague, 3 Jur. N. S. 1206, V. C. W.

[5] Worral *v.* Miller, 3 Aust. 632; Collins Company *v.* Walker, 7 W. R. 222, V. C. K.; Burgess *v.* Hill, 26 Beav. 244; 5 Jur. N. S. 233; Burgess *v.* Hately, *ib.* 249; Wallis *v.* Wallis, 4 Drew. 458; M'Andrew *v.* Bassett, *ubi sup.*; Hudson *v.* Bennett, 12 Jur. N. S. 519; 14 W. R. 911, V. C. S.; but see Lord Kensington *v.* Metropolitan Railway Co., 14 W. R. 754, M. R.

[6] Henning *v.* Willis, 2 Gwill. 898; Beames on Costs, 43.

[1] Taylor *v.* Hall, 2 Gwill. 611, n. (*a*); Worral *v.* Nicholls, 3 Gwill. 1302; Beames on Costs, 43.

[2] Drake *v.* Brooking, 2 Gwill. 594; and see Rumney *v.* Willis, *ib.* 775; Beames on Costs, 43, 44.

ordered the costs to be paid out of the testator's general estate to which the executor was entitled as residuary legatee: on the ground that the executor had no right to add such a stipulation to his offer.[3]

If a tender is not legal, a Court of Equity will not support it; nor will it supply a defect in a tender against a rule of Law, unless, perhaps, where fraud is used to prevent its operation;[4] and where parties came into Equity, to be relieved from a legal demand, on the ground that they had made a tender, Lord Hardwicke refused to relieve: because the tender might have been pleaded at Law.[5]

A tender must be proved: a mere statement of it, in an answer, is not generally sufficient to save the costs.[6]

The principle upon which the Court acts, in admitting a tender, duly proved, as a ground for excusing the party making it from payment of costs, namely, the encouragement of attempts to prevent litigation, will apply to cases of account, where, although, from the uncertain state of the account, the accounting party is not able to make a specific tender of the balance due from him, yet if he has shown a willingness to render an account, the Court will, upon final adjudication, take such willingness into consideration, and exonerate him from paying the costs to the other party: although the result may be that the balance is against him. Thus, on a bill filed to call a trustee to an account, it was said, by Lord Keeper Coventry, that if he, by answer, submits readily to it, though on the account he be found in debt, yet he shall pay interest for the balance, only from the time of the account liquidated, and no *1397 costs if he has not misbehaved himself.[7] In that case, * however, the defendant had said in his answer, he believed the plaintiff considerably indebted to him, and after the matter had depended twenty years, was found 200*l.* in the plaintiff's debt; and the Lord Keeper therefore decreed, that he should pay interest from the time of the bill: "for he had admitted, by his answer, that he had not kept any money for the plaintiff useless or unemployed; and in a manner had dared the plaintiff to the account, and therefore must pay the costs: as the plaintiff must have done, if he had been found indebted to him." So, where a bill was filed against an *elegit* creditor, for an account, who, knowing that the balance was against him, contested the mode of taking the account and failed, he was ordered to pay such part of the expense of taking the account as was incurred after his debt was paid off.[1] It is to be observed that, in this latter case, the defendant was fixed with the costs, on the ground that he had improperly contested the mode of taking the account, otherwise he would not have been made to pay them: the rule of the Court being, as we have seen, that an incumbrancer upon an estate is not bound to deliver possession, until his

[3] Walter *v.* Patey, 1 Russ. 375.
[4] Per Lord Hardwicke, in Gammon *v.* Stone, 1 Ves. S. 339.
[5] *Ibid.*
[6] Milnes *v.* Davison, 3 Mad. 374.
[7] Parrot *v.* Treby, Prec. in Ch. 254; see also Bennett *v.* Attkins, 1 Y. & C. Ex. 247, 249; Ashburnham *v.* Thompson, 13 Ves. 402; but see Attorney-General *v.* Brewers' Company, 1 P. Wms. 376.
[1] Skirrett *v.* Athy, 1 B. & B. 430.

costs are paid, as well as his principal and interest, the estate being as much a security for one as the other.[2]

It may be collected, from many of the cases referred to, that the Court regards, in some respects, the granting of costs to a party somewhat in the light of a testimonial of good conduct; and that it will, generally, withhold such testimonial from a party who has been guilty of any misconduct, with reference to the subject of the suit:[3] even where, under other circumstances, that party would have been considered entitled to them.[4] This position is strongly exemplified in the case of mortgagees or incumbrancers, whose *primâ facie* right to costs may, as we have seen, be defeated by their conduct.[5] And so, although there is no rule more general with respect to costs than that, "where the bill claims, on the ground of fraud, the decree or order of dismission shall be with costs,"[6] yet, where the party succeeding is *particeps criminis*, the Court will not consider him entitled to the costs of the litigation: *as in the case of bills for the delivering up of *1398 securities, given upon considerations which are contrary to the policy of the law.[1] Therefore, although the Court, acting upon the principles of public policy, will set aside a marriage brocage bond, at the instance of the husband, yet it will do so without giving him the costs of the suit which he has instituted for that purpose; and so, where a bill was filed for delivering up a bond, given by the plaintiff to the defendant's wife, in consideration that she would use the influence and power she had over the plaintiff's grandfather (a man of eighty-two) to induce him to leave his whole estate to the plaintiff, the Court, although it set aside the bond as being given without consideration, gave no costs on either side.[2]

The Court expects that there should be an absence of fraud, on the part of the party applying to it for relief; and even where there has been no positive fraud, but the conduct of the party has not been strictly honorable, it will, in cases where the application is to the discretion of the Court, visit him with costs;[3] and so, if a party obtains

[2] *Ante*, p. 1385; Owen *v.* Griffith, 1 Ves. S. 250; Amb. 520.

[3] Armstrong *v.* Blake, 1 Moll. 178; Clowes *v.* Beck, 2 De G., M. & G. 731, 739; Hunter *v.* Nockolds, 2 Phil. 540, 545; Langhorne *v.* Harland, 2 Jur. N. S. 872, V. C. S.; Mirehouse *v.* Herbert, 3 Jur. N. S. 1238, V. C. S.; Holmes *v.* Eastern Counties Railway, 3 K. & J. 675; May *v.* Biggenden, 24 Beav. 207; Great Luxembourg Railway *v.* Magnay, 25 Beav. 586, 599; Williams *v.* Page, 28 Beav. 148; Marquis of Clanricarde *v.* Henning, 30 Beav. 175; Robson *v.* Earl of Devon, 4 Jur. N. S. 245, L. C. & L. JJ.; Lawes *v.* Gibson, L. R. 1 Eq. 135, 139; 11 Jur. N. S. 873, V. C. S.; [Jeffryes *v.* Agra, &c. Bank, L. R. 2 Eq. 674; Vickers *v.* Vickers, L. R. 4 Eq. 529, 537; Lyon *v.* Home, L. R. 6 Eq. 655; Turquand *v.* Marshall, L. R. 4 Ch. App. 376, 387; Pike *v.* Nicholas, L. R. 5 Ch. App. 251, 267:] see Vermont Copper Mining Co. *v.* Barnard, 40 Vt. 65.

[4] Where material misrepresentations on the part of the defendant were established, and the bill was dismissed for other causes, no costs were allowed to him. Bradley *v.* Chase, 22 Maine, 511. So, no costs will be allowed to a plaintiff in fault, though his bill is sustained. Wright *v.* Lynde, 1 Atk. 383.

[5] *Ante*, pp. 1390, 1391, and notes.

[6] Scott *v.* Dunbar, 1 Moll. 442.

[1] Debenham *v.* Ox, 1 Ves. S. 276; Mare *v.* Warner, 3 Giff. 100; 7 Jur. N. S. 1228; Mare *v.* Earle, 3 Giff. 108; 7 Jur. N. S. 1231; *contra*, Jackman *v.* Mitchell, 13 Ves. 581, 587; Mare *v.* Sandford, 1 Giff. 288; 5 Jur. N. S. 1339; W. *v.* B., 32 Beav. 574; Wood *v.* Barker, L. R. 1 Eq. 139; 11 Jur. N. S. 905, V. C. S.

[2] Debenham *v.* Ox *ubi sup.*

[3] Davis *v.* Symonds, 1 Cox, 402, 408; see Kane *v.* Van Vranker, 5 Paige, 62.

an unconscionable advantage over another, the Court, although it may not feel itself justified in depriving him of the advantage he has gained, will not give him his costs of enforcing it. Therefore, where a purchaser obtained a bargain at an inadequate price, but which the Court might be bound to enforce, it would not give him costs against the seller, whose estate he had obtained at an undervalue.[4] So, where a plaintiff has slept upon his rights, and has allowed the defendant to suppose that he would not enforce them, he will frequently, although successful, be deprived of his costs: as, where there had been no demand, nor any rent paid, for thirty years, but the person who was entitled recovered upon a verdict, Lord Hardwicke said the defendant must pay the costs at Law, but as the *laches* arose on the part of the plaintiff, and the obscurity of the title to the rent, from the want of a demand for such a length of time, he should not be allowed costs against the defendant in Equity.[5]

Sometimes, where there has been a misunderstanding between the parties, and the bill is in consequence dismissed, the Court will not give costs to the defendant. Thus, where a bill was filed for a specific performance, and the Court was of opinion that there was no concluded agreement, and that all the correspondence together *did not amount to more than a treaty, it dismissed the bill, but, in consideration that it appeared to have been a case of misunderstanding, arising from the want of clear unequivocal conduct and language, it was dismissed without costs.[1] The Court has also refused costs to a vendor, although it decreed specific performance at his suit, in cases in which the vendor's own representation had given the purchaser a probable cause of suit.[2]

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In cases also where one party, upon the construction of a doubtful point of law, has obtained a great advantage over the other, the Court will not give him his costs: as, where an annuity was charged upon real estate, payable to the annuitant only upon his own receipt, and the annuitant became bankrupt, whereupon a bill was filed by his assignees against the owner of the estate, for the recovery of the annuity, and a case was directed to the Court of King's Bench, who certified that the annuity had ceased by the bankruptcy: upon the Equity re-

[4] Burrowes *v.* Lock, 10 Ves. 470, 476; Sugd. V. & P. 653.

[5] Anon., 2 Atk. 14; see also Clifton *v.* Orchard, 1 Atk. 610; Pearce *v.* Newlyn, 3 Mad. 186, 189; Guest *v.* Homfray, 5 Ves. 818, 824; Lee *v.* Brown, 4 Ves. 362, 369. [Where the successful party claimed too much, and had refused to accede to an inexpensive mode of settling the questions in issue, he was refused his costs. Lawes *v.* Gibson, L. R. 1 Eq. 135. But where, though he claimed too much, his demand was resisted *in toto*, he was given his costs to the hearing. Jeffryes *v.* Agra, &c. Bank, L. R. 2 Eq. 674. And see Cory *v.* Thames Iron Works Co., 16 W. R. 475.]

[1] Stratford *v.* Bosworth, 2 V. & B. 341, 348; Marquis Townshend *v.* Stangroom, 6 Ves. 328, 341. Where the plaintiff had good reason to believe he had sufficient cause for bringing his suit, but, upon the defendant's answer, it appeared that such cause did not exist, the plaintiff will not generally be held to pay costs, if the defendant was in such a situation as to render it probable that he was amenable to the plaintiff upon equitable principles. But if the plaintiff knew all the facts of the case and made a claim in Equity which was successfully resisted, he will be adjudged to pay costs Clark *v.* Reed, 11 Pick. 446, per Putnam J.

[2] Fenton *v.* Browne, 14 Ves. 144, 150; Harrison *v.* Coppard, 2 Cox, 318, 320.

served, the bill was dismissed without costs: Lord Alvanley M. R. saying, it was a doubtful point, and the defendant had a great advantage by the failure of the bankrupt, but that he would consider of the costs at Law.[3]

As the Court will not tolerate fraud in any form, so will it discountenance a groundless allegation of fraud in a bill or other pleading: and upon this principle it is that the rule has been established that, where the bill claims on the ground of fraud, an order of dismission shall be with costs;[4] and a party introducing unfounded charges of fraud, will be made to pay the costs occasioned thereby: though he may be successful in the suit;[5] or the other party may have acted in such a manner as to give reasonable grounds of suspicion;[6] and for the application of this principle, it is not necessary that the word "fraud" should be made use of: a * substantial imputation of it is sufficient.[1] *1400 Mere exaggerations or overstatements will not, however, deprive a successful party of his right to costs;[2] and where the parties have acted in such a manner as to render the charges of fraud not unreasonable, no order will be made as to the costs occasioned thereby.[3]

Where the conduct of both parties has been equally reprehensible, the Court will also abstain from giving costs in favor of either party; thus, where, under a reference to inquire into a vendor's title, it was found that the abstract delivered by the vendor before the filing of the bill was sufficient, but that the purchaser required certain evidence in support of the abstract, some of which was necessary but not furnished, and some not necessary, Lord Eldon decided, that both the parties were in the wrong: and, upon the vendor's bill, he held that no costs ought to be given on either side.[4] Where, however, the vendor had failed in making out his title, upon an objection to the abstract taken by the purchaser, but he afterwards succeeded in establishing it upon another ground, the Court, although it directed the performance of the contract, gave the costs to the purchaser.[5]

[3] Dommett *v.* Bedford, 3 Ves. 149.

[4] *Ante*, p. 1397; Scott *v.* Dunbar, 1 Moll. 442; Pierce *v.* Franks, 10 Jur. 25, V. C. K. B.; Langley *v.* Fisher, 9 Beav. 90, 104; New Brunswick & Canada Railway Company *v.* Conybeare, 9 H. L. Ca. 711; 8 Jur. N. S. 575; Luff *v.* Lord, 11 Jur. N. S. 50, L. C.; 10 *id.* 1248, M. R.; see also Ambrose *v.* Dunmow Union, 9 Beav. 508, 514; Morgan & Davey, 73; Patch *v.* Ward, L. R. 3 Ch. Ap. 203; Clinch *v.* Financial Corp., L. R. 5 Eq. 450; Straker *v.* Ewing, 34 Beav. 147; 11 Jur. N. S. 127; 13 W. R. 286, M. R.

[5] Wright *v.* Howard, 1 S. & S. 190, 205; Thomas *v.* Phillips, 11 Jur. 80, V. C. K. B.; Staniland *v.* Willott, 3 M'N. & G. 664, 666, 682; West *v.* Jones, 1 Sim. N. S. 205, 218; Pledge *v.* Bass, John. 663; Blest *v.* Brown, 8 Jur. N. S. 602; 10 W. R. 569, L. C.; Jones *v.* Ricketts, 10 W. R. 576, M. R.; Douglass *v.* Culverwell, 3 Giff. 251; 8 Jur. N. S. 23, 34; see Brinkerhoff *v.* Lansing, 4 John. Ch. 79; Cowdry *v.* Day, 1 Seton Dec. (3d Eng. ed.) 376. For mode of apportionment of the costs, see Heming *v.* Leifchild, 8 W. R. 352, V. C. W.; 9 W. R. 174, L. JJ.; Standish *v.* Whitwell, 14 W. R. 512, V. C. W.

[6] Theyer *v.* Tombs, 12 W. R. 512, V. C. W.

[1] Marshall *v.* Sladden, 7 Hare, 428, 444.

[2] Thomas *v.* Lloyd, 3 Jur. N. S. 288, V. C. W.; *contra*, Rawlins *v.* Wickham, 1 Giff. 355; 4 Jur. N. S. 990; 3 De G. & J. 304; 5 Jur. N. S. 278.

[3] Griggs *v.* Staplee, 2 De G. & S. 572, 590; and see Thompson *v.* Webster, 4 De G. & J. 600; 5 Jur. N. S. 921; overruling S. C. 4 Drew. 628; 5 Jur. N. S. 668.

[4] Newall *v.* Smith, 1 J. & W. 263. As to costs, in suits for specific performance, see Onions *v.* Cohen, 2 H. & M. 354; 11 Jur. N. S. 198; Morgan & Davey, 177 *et seq.*; and *ante*, p. 990.

[5] Fielder *v.* Higginson, 3 V. & B. 142, and see Sidebotham *v.* Barrington, 5 Beav. 261.

And where both parties had been equally foolish, the one in selling and the other in buying an estate, which was liable to be defeated upon a contingency, which contingency had actually happened before the contract was entered into, L. C. B. Richards, although he set aside the contract, ordered each party to pay his own costs.[6]

It has been said, that, in suits for the specific performance of agreements for the sale or purchase of estates, the circumstance of the title being bad only makes a *primâ facie* case for costs, which is capa-
*1401 ble of being rebutted by circumstances;[7] and, in *Staines* v. *Morris*,[1] Lord Eldon remarked, that, as to the costs of a suit in Equity, although it was in many cases very hard that they should follow the event of the cause, yet all his experience had persuaded him that it was much to be wished that the course of the Court was so; but that certainly it was not the present course of the Court; and that where there is a fair case for consideration, it was not the course to visit the party who fails with costs. In that case, his Lordship, although he held that the purchaser was wrong in resisting a covenant which he was bound to enter into, yet, as the Master's opinion had been the other way, and the Judges at Law would not decide the case until they had the opinion of the Court of Chancery, and professional men had differed upon the question, it would, he said, be too presumptuous in him to set such a value upon his own opinion, by marking the resistance of the purchaser with costs; and, therefore, he made the decree without costs.[2]

Upon the same principle, where a bill was filed against a purchaser for the specific performance of his agreement, and the question turned upon a point of law, which had been determined in favor of the plaintiff's view by the Court of Exchequer, Lord Rosslyn, although he differed from the Court of Exchequer, and therefore felt himself compelled to dismiss the plaintiff's bill, yet, as he could not make a purchaser

[6] Hitchcock *v.* Giddings, Dan. 1; 4 Pri. 135. If it should appear that both parties are in fault, the Court will not give costs to either. Clark *v.* Reed, 11 Pick. 446, 449; Saunders *v.* Frost, 5 Pick. 259, 274; Caldwell *v.* Leiber, 7 Paige, 483; Dorsey *v.* Smith, 7 Harr. & J. 345. So costs were allowed to neither party where the plaintiff failed on the main merits of his bill, and the defendant acted against good faith and in violation of his moral obligations to the plaintiff. Pinnock *v.* Clough, 16 Vt. 500. So, where the plaintiff, seeking the aid of the Court, failed to establish his title, but the defendant showed no better title. Nicoll *v.* Huntington, 1 John. Ch. 166.

And where both parties are equally innocent, and are endeavoring to avoid a loss caused by a third person, no costs will be awarded to either party against the other. Pendleton *v.* Eaton, 3 John. Ch. 69. Nor where both parties have claimed what they were not entitled to, and each has succeeded as to part of the matters in litigation between them. Crippen *v.* Hermance, 9 Paige, 211; Fairchild *v.* Hunt, 1 McCarter (N. J.), 376.

[7] Edwards *v.* Harvey, G. Coop. 40; Monro *v.* Taylor, 8 Hare, 51; Abbott *v.* Sworder, 4 De G. & S. 448, 460; Sherwin *v.* Shakspeare, 17 Beav. 267; Freer *v.* Hesse, 4 De G., M. & G. 495. A vendee entitled to specific execution of his contract, is entitled to costs. Hart *v.* Brand, 1 A. K. Marsh. 162; see Dyer *v.* Potter, 2 John. Ch. 152. Costs are awarded on a decree correcting a mistake in a contract, on a bill for that purpose, and for specific performance. Keisselbrack *v.* Livingston, 4 John. Ch. 149. See Dustin *v.* Newcomer, 8 Ohio, 49, where it was held, that a vendee, on obtaining a decree for specific performance, is not entitled to costs, where he has made no tender of the purchase-money. And in Galloway *v.* Barr, 12 Ohio, 354, it was held that he is not entitled to costs, even if the money was tendered by him, unless it was brought into Court.

[1] 1 V. & B. 8, 16.

[2] See Sugd. V. & P. 649.

take a title in the face of the decision of the Exchequer, he dismissed the bill without costs.[3] And so, in *White* v. *Foljambe*,[4] Lord Eldon dismissed the bill without costs: the ground of his judgment, as his Lordship afterwards said,[5] being, that the question was a pure question of title, which raised very considerable difficulties in the minds of those most capable of judging upon such a subject. And so, where the report was in favor of the plaintiff's title, and exceptions were taken to the report, upon the hearing of which the Court thought the title too doubtful, an order was made dismissing the plaintiff's bill, but without costs.[6]

Although the Court will not, in general, visit with costs a party, who resorts to the Court in a doubtful case, yet, if he is absurd enough to refuse a fair offer of accommodation, and obstinately persists in his suit, it is an aggravation, and his bill will be dismissed * with *1402 costs.[1] And wherever the doubt has been occasioned by the conduct of the party himself, the Court will deprive him of his costs, though he succeeds in the suit.[2]

Where the Court comes to a decision upon a point of law which is contrary to a former decision, either of this Court, or of any other of competent jurisdiction, it will generally exonerate the party against whom it decides, from the payment of costs to his adversary: as in the case of *Roe* v. *Calland*,[3] before referred to;[4] but where the point has been decided before, and the Court thinks that the decision was correct, it will, if the party, against whose interest the decision is, had notice of the previous determination, fix him with the costs of the litigation. Thus, where a bill was filed for specific performance, and the purchaser set up an objection to the title which had already been decided in a former case, of which the purchaser had notice, the purchaser was decreed to pay the costs of the suit.[5] And in suits for specific performance, it is not the mere failure of an objection, taken by the purchaser to a title, that will fix him with costs: a purchaser is considered as entitled to take a fair objection; and, although it be overruled, yet the Court will not, on that ground, give costs against him.[6] This, however, must always depend upon the weight which the Judge may think due to the objection.[7]

[3] Rose *v.* Calland, 5 Ves. 186.

[4] 11 Ves. 337; and see Bond *v.* Bell, 4 Drew. 157; 3 Jur. N. S. 1290.

[5] See 11 Ves. 463.

[6] Willcox *v.* Bellaers, T. & R. 491, 495.

[1] Per Lord Hardwicke, in Biggleston *v.* Grubb, 2 Atk. 48.

[2] Blunt *v.* Cumyns, 2 Ves. S. 331.

[3] 5 Ves. 186.

[4] See Sutton Harbor Improvement Co. *v.* Hitchens, 15 Beav. 161; S. C. 1 De G., M. & G. 161. So in cases of great novelty, it is said that the Court ought not to give costs to either party. Jones *v.* Mason, 5 Rand. 577; Hoffman *v.* Skinner, 5 Paige, 526. And also in cases where the practice of the Court on the subject was unsettled. Hoffman *v.* Skinner, *supra*.

[5] Biscoe *v.* Wilks, 3 Mer. 456; and see Barton *v.* Barton, 3 K. & J. 512; 3 Jur. N. S. 808, 809. *Semble*, a party is not bound to be acquainted with a case which has not appeared in the authorized reports. Pigott *v.* Young, 7 W. R. 235, V. C. K.

[6] Sugd. V. & P. 649; Cox *v.* Chamberlain, 4 Ves. 631, 638; Staines *v.* Morris, 1 V. & B. 8, 14; Sharp *v.* Roahde, 2 Rose, 192.

[7] Sugd. V. & P. 649; see Burnaby *v.* Griffin, 3 Ves. 266, 277; Bishop of Winchester *v.* Paine, 11 Ves. 194, 201; Powell *v.* Martyr, 8 Ves. 146, 149; Fludyer *v.* Cocker, 12 Ves. 25, 27; Calverley *v.* Williams, 1 Ves. J. 210, 213; M'Queen *v.* Farquhar, 11 Ves. 467, 482; Weddall *v.* Nixon, 17 Beav. 160, 170; and see Thomas *v.* Townsend, 16 Jur. 736 V. C. K.

It is, however, only where the case turns upon a question of law, upon which the opinion of the Court may be fairly taken, that the unsuccessful party will be excused the payment of costs: if there is a decided objection to the case set up, the party setting it up will be compelled to pay them. Thus, where a vendor sells an estate, his title to which is clearly bad, the Court will dismiss his bill with costs;[8] and this it will do, even where the defect has been occasioned by an accident: as where the title deeds were burnt, after the contract.[9]

*1403 It seems also, that if there is one substantial * objection to the plaintiff's case, which prevails, the circumstance that the defendant has taken others which have failed, will not relieve the plaintiff from his costs. Thus, where a purchaser obtained an issue upon a question of pedigree, in which the vendor failed in establishing his title, the bill was dismissed with costs, although the purchaser had taken several objections, and had only succeeded in the one relating to the pedigree: the Court observing, that, although the objections were overruled, they might have been very properly made, though an answer was given to them, or they were removed.[1]

The rule upon this subject formerly was, that, if a purchaser made the suit necessary by a frivolous objection to the title, he must bear the costs which he had improperly occasioned; but if he stated a serious objection, as to which it was reasonable that he should have the title fortified by the opinion of the Court, the Court would not compel him to pay costs, although the objection failed.[2] The principle was the same with respect to the purchaser's suggestion of doubt as to matters of fact. The present practice, however, is generally to make the costs follow the result.[3]

If the Court thinks an objection groundless, although it is supported by the opinion of counsel upon which the purchaser has acted, yet the party taking it will be compelled to pay the costs: for the Court cannot allow the mistaken advice of a third person to operate, to the disadvantage of the party who is clearly in the right.[4]

And where one of the objections of a purchaser to a title arose from the circumstance, that, on an abstract which had been made use of on a former occasion, a certain observation appeared, implying a doubt whether a title could be made unless a particular appointment should be executed, and suggesting certain possibilities and probabilities which, if true, would render the title objectionable, Lord Eldon, being of opinion that a good title was made, said, that he should very reluct-

[8] Playford *v.* Hoare, 3 Y. & J. 175.

[9] Bryant *v.* Busk, 4 Russ. 1, 5. In that case, the Court seemed inclined to make an order, that the plaintiff should concur with the defendant in giving an order to the auctioneer to return the deposit paid by the defendant, at the sale of the estate. *Ib.* 6.

[1] Edwards *v.* Harvey, G. Coop. 40; see Townsend *v.* Champernowne, 3 Y. & C. Ex. 505, 527.

[2] Thorpe *v.* Freer, 4 Mad. 466; see also Aislabie *v.* Rice, 3 Mad. 256, 260.

[3] Carver *v.* Richards, 6 Jur. N. S. 667, M. R.; see, however, Malden *v.* Fyson, 9 Beav. 347; Sugd. V. & P. 646; Lawes *v.* Gibson, L. R. 1 Eq. 135, 139; 11 Jur. N. S. 873, V. C. S.

[4] Maling *v.* Hill, 1 Cox, 186; see also Vancouver *v.* Bliss, 11 Ves. 458, 463.

antly lay down that a notice from opinions in an abstract, or any thing that appears upon a deed, that there may by any possibility be reason to suspect (what he could not know, and might not be true) that the title was bad, was such a notice as would affect the purchaser, and that, if the objection was no more than a question of title, he should act hardly by the purchaser by not giving the title the credit of making him pay the costs: "for it would help the title."[5]

*In most of the cases before stated, the Court in withholding *1404 the costs of the suit from the successful party, has been influenced by his conduct with reference to the suit or the subject-matter of it. There are, however, many cases in which the Court, without any reference to the good or bad conduct of any party, has refrained from awarding costs to be paid by the unsuccessful party, solely from consideration of the peculiar hardship of the individual case; it is, however, useless to state them fully, since they involve no general principle.[1]

As a general rule, no order is made as to costs, in the case of a suit between husband and wife;[2] and where a husband and wife, although living apart from each other, severed in their defence, and appeared by different solicitors, only one set of costs was allowed between them.[3]

Where a suit for specific performance is rendered necessary by the act of God: such as the lunacy of the vendor, or his dying intestate, the decree is generally made without costs;[4] but where, after the contract for sale, the vendor makes a strict settlement of the property,[5] or devises it, so that it becomes vested in infants, his estate must bear the costs of the suit.[6]

In the cases in which Courts of Law have assumed a concurrent jurisdiction with Courts of Equity, but the latter have not relinquished their jurisdiction over the subject, the Court of Chancery will not compel the party who seeks relief under its jurisdiction to pay the costs of his proceeding. Thus, where a bill was filed by one partner against another, to enforce contribution, and the Court allowed the case to stand over, in order that an action might be tried at Law, which was decided against the plaintiff, the Court, although it dismissed the bill, did so without costs: being of opinion that, although the question was more proper to be tried at Law, the plaintiff was very well justified in

[5] M'Queen *v.* Farquhar, 11 Ves. 467, 482.

[1] See Shales *v.* Barrington, 1 P. Wms. 481; Drybutter *v.* Bartholomew, 2 P. Wms. 127; Coppin *v.* Coppin, *ib.* 291, 297; Forbes *v.* Taylor, 1 Ves. J. 99; Brodie *v.* St. Paul, *ib.* 326, 334; Mosely *v.* Virgin, 3 Ves. 184, 187; Dickenson *v.* Lockyer, 4 Ves. 36, 45; Everett *v.* Backhouse, 10 Ves. 94, 101.

[2] Vansittart *v.* Vansittart, 4 K. & J. 62; see, however, S. C. 2 De G. & J. 249, 258; Walrond *v.* Walrond, John. 18; 4 Jur. N. S. 1099; *Re* Wills, 3 N. R. 107, V. C. W.; Rotherham *v.* Battson, 2 Sm. & G. Ap. 8; and see Morgan & Davey, 260.

[3] Garey *v.* Whittingham, 5 Beav. 268, 270; 6 Jur. 545; *ante*, pp. 729, 730.

[4] Cresswell *v.* Haines, 8 Jur. N. S. 208; 10 W. R. 121, V. C. W.; Hanson *v.* Lake, 2 Y. & C. C. C. 328; Hinder *v.* Streeten, 10 Hare, 18; Purser *v.* Darby, 4 K. & J. 44; Scott *v.* Scott, 11 W. R. 766, V. C. K.; see 11 Jur. N. S. 480; Barker *v.* Venables, *ibid.*; 13 W. R. 803, V. C. W.; and see Morgan & Davey, 186; Hall *v.* Bushill, 1 W. N. 92; 12 Jur. N. S. 243, M. R.

[5] Wortham *v.* Lord Dacre, 2 K. & J. 437.

[6] Per V. C. Wood, in Purser *v.* Darby, *ubi sup.*; Sanderson *v.* Chadwick, 2 N. R. 414, V. C. S.

coming for a contribution; for certainly the Court of Chancery had never given up its jurisdiction.[7]

On the other hand, in the cases in which, after a bill dismissed, the plaintiff would have had a right to try the question over again *1405 *at Law, the Court, for the purpose of putting an end to litigation, has frequently dismissed the bill without costs, upon the plaintiff's waiving his right to try the question at Law: a rule which has been usefully applied to suits for specific performance.[1]

The general rule of the Court is, that the successful party, although he may, as we have seen, be deprived of his costs, never pays them. Thus, it was held, in *Lewis* v. *Loxham*,[2] that when a bill is dismissed, it is against the principle of the Court to order the defendant to pay the plaintiff his costs. The case was ordered to stand over, in order to enable the plaintiff's counsel to search for precedents the other way; but he did not produce any. It seems, however, from a note of the learned reporter, that in a case before Sir Thomas Plumer V. C., his Honor doubted, and seemed to think that a bill might be dismissed, and the defendant at the same time made to pay the costs.[3]

Where it is necessary that a bill should be filed by some person, the Court may order the costs to be paid out of the fund, although the bill is dismissed;[4] and if, through the exertions of a plaintiff, the Court is enabled to distribute a fund, or if it makes a declaration of rights necessary for its administration, there, although the plaintiff may fail in his claim, the Court will not permit the other parties to carry off the fruit of his exertions, without defraying his costs out of the fund.[5]

There are also some cases in which the successful party has, under peculiar circumstances, been made to pay the costs: thus, where the bill was filed for specific performance of an agreement to renew a

[7] Wright *v.* Hunter, 5 Ves. 792, 794.

[1] Harnett *v.* Yielding, 2 Sch. & Lef. 560; see also Lawrenson *v.* Butler, 1 Sch. & Lef. 13, 21; Buxton *v.* Lister, 3 Atk. 383, 387; Underwood *v.* Hithcox, 1 Ves. S. 279; Leman *v.* Alie, Amb. 163; Attorney-General *v.* Owen, 10 Ves. 555, 561.

[2] 3 Mer. 429; see also Wykham *v.* Wykham, 18 Ves. 395, 423; Attorney-General *v.* Oglender, 1 Ves. J. 246; Cooth *v.* Jackson, 6 Ves. 41; Dixon *v.* Parker, 2 Ves. S. 219, 223; Tidwell *v.* Ariel, 3 Mad. 403, 409; Dufaur *v.* Sigel, 4 De G., M. & G. 520, 525.

[3] Springfield *v.* Ollett, cited 3 Mer. 430, n. Indeed, it appears, from the same note, that, according to the decree in Lewis *v.* Loxham, Reg. Lib. 1816, B. 1059, the defendant was ordered to pay to the plaintiff his costs of a second reference as to title, and of the report thereon, but not of the former proceedings. In Brooks *v.* Byam, 2 Story, 554, it was remarked by Mr. Justice Story, "In the ordinary course of practice, if a bill be dismissed, the most that is done is, in proper cases, to dismiss the bill without costs to the defendant. I do not say that a case may not be put, in which the Court might go further, and allow costs to the plaintiff, even upon the dismissal. But it must be a very extraordinary case; such, for example, as where the defendant has, by his own fraud, in misrepresenting himself to be the proper and sole party to be sued, as executor, or heir, or devisee, induced, nay invited, the plaintiff to bring the suit, and then has put in a plea, and established the fact that he is not executor, or heir, or devisee." — "But on this, I give no opinion. The present is not such a case." See Sutton Harbor Improvement Co. *v.* Hitchens, 15 Beav. 161.

[4] Cranch *v.* Brissett, cited in Wheldale *v.* Partridge, 5 Ves. 398; Thomason *v.* Moses, 5 Beav. 77, 81; 6 Jur. 403; Hay *v.* Bowen, 5 Beav. 610, 615; Lynn *v.* Beaver, T. & R. 63, 69; Windham *v.* Graham, 1 Russ. 331, 347; Boreham *v.* Bignall, 8 Hare, 131; Merlin *v.* Blagrave, 25 Beav. 125; and see Westcott *v.* Culliford, 3 Hare, 274; 8 Jur. 166; Lee *v.* Delane, 4 De G. & S. 1, 6; 14 Jur. 861; Morgan & Davey, 67; [Garth *v.* Townsend, L. R. 7 Eq. 220; Cooper *v.* Pitcher, 4 Hare, 485].

[5] Wedgwood *v.* Adams, 8 Beav. 103, 105.

lease, and the agreement proved by one witness was * different *1406
from that stated in the bill, whilst the defendants, by their answer, set forth an agreement different both from that proved and that set up by the bill, specific performance was decreed according to the agreement stated in the answer, with costs against the plaintiff.[1] And where, at the suit of the grantee, an annuity, in the payment of which no default had been made, was declared charged on the real estate of the grantor, the plaintiff was ordered to pay the costs of the suit.[2]

Another instance of departure from the rule, that the successful party is to pay no costs, may be found in the case of a *cestui que trust* making his trustee a defendant, to a suit instituted by him against a third party: in that case, the *cestui que trust*, although he obtains a decree against his trustee, must pay his costs, unless the trustee has been applied to, to join in the suit as co-plaintiff, and has refused.[3] The proper course to be pursued, by a *cestui que trust* who intends to file a bill against a stranger relative to the trust property, is to apply to the trustee to become a co-plaintiff; indemnifying him against costs; and then, if he refuses, he must bear his own costs as a defendant.[4]

If a suit is occasioned by the misconduct or obstinacy of a trustee, he may be compelled to pay the whole costs of it. Thus, where a bill for specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance, Lord Thurlow was of opinion that the trustee ought to pay all the costs of the suit, and accordingly directed the plaintiff to pay to the other defendants all their costs of the suit, and recover them over, together with his own costs, from the defendant the trustee.[5]

In the case last referred to, the Registrar appears to have doubted whether, according to the practice of the Court, the plaintiff, having been successful against the other defendants, and obtained against them a decree for specific performance, could, in point of form, be ordered to pay them their costs; but the Lord Chancellor thought that the decree was correct, according to the course of the Court. In fact, under ordinary circumstances, no other method exists, by which a defendant, who has by his conduct occasioned the suit, can be made to pay the whole costs of it: for the delinquent defendant cannot be decreed to pay the costs of a co-defendant to that defendant himself, as that * would in effect be a decree between co-defend- *1407
ants. The only method, therefore, of effecting the object of compelling the delinquent defendant to pay the costs of the other

[1] Mortimer *v.* Orchard, 2 Ves. J. 243; see observations on this case in Beames on Costs, p. 112; see also Edwards Wood *v.* Majoribanks, 3 De G. & J. 329; 5 Jur. N. S. 181; Affd. 7 H. L. Ca. 806; 6 Jur. N. S. 1167. So where a purchaser brings his bill for a conveyance of land, when he ought to have tendered, but has failed to tender the purchase-money, he will be entitled to a conveyance on the payment of the purchase-money, but he will be decreed to pay all costs. Lee *v.* Bickley, 6 Litt. 290.

[2] Norman *v.* Johnson, 29 Beav. 77; 6 Jur. N. S. 905; Burrell *v.* Delavante, 30 Beav. 550; 8 Jur. N. S. 205.

[3] Reade *v.* Sparkes, 1 Moll. 8.

[4] *Ibid.*; and see Pakington *v.* Benbow, 5 W. R. 670, V. C. W.

[5] Jones *v.* Lewis, 1 Cox, 199.

defendant, is to order the plaintiff to pay them, and then permit him to receive them again from the defendant, whose delinquency has given rise to the litigation.[1] In suits, however, in which the Attorney-General is plaintiff,[2] and in interpleader suits, costs may be ordered to be paid by one defendant to another.[3]

Where a defendant has the same interest as the plaintiff, but disapproves of the suit, he should distinctly repudiate it: if he does not do so, the bill may, in the event of the plaintiff not succeeding, be dismissed without costs as against him.[4]

In deciding the question of costs, the Court will frequently apportion them, so as to cause the costs of one part of the suit to fall upon one party, and those of another part to fall upon the other party.[5] Thus where a plaintiff claims several matters by his bill, and succeeds in establishing his right to a portion only of what he so claims, the Court will sometimes grant him a decree for that part of his case in which he is successful, with costs to be paid by the defendant; and dismiss the remainder of his bill with costs, to be paid by himself.[6] So also, where there are several issues, and some are found for the plaintiff and others for the defendant, the parties may be allowed costs on issues found in their favor, and must pay on those against them.[7]

In tithe suits where there are several defences, the Court will apportion the costs between the defendants; but if there is a common defence, they must be paid by the defendants generally.[8]

Sometimes, where no part of the bill is dismissed, but a decree is made upon the whole of it, the Court will order the costs of the suit, up to a certain period, to be borne by one party, and the remainder by another. Thus, in suits for specific performance, where a vendor does not deliver a complete abstract or make out his title until after *1408 the bill is filed, he will be liable to pay the * costs of the suit, up to the time when he showed a good title.[1] And so, where the

[1] See Weymouth *v.* Boyer, 1 Ves. J. 416, 426; Parkes *v.* White, 11 Ves. 209, 238; Phillips *v.* Davies, 7 Jur. 52, M. R.; Man *v.* Ricketts, 7 Beav. 93, 104; Popple *v.* Henson, 5 De G. & S. 318. For form of order, see Seton, 86, No. 3.

[2] Attorney-General *v.* Corporation of Chester, 14 Beav. 338.

[3] Seton, 967; and see *post*, Chap. XXXIV. § 3, *Bills of Interpleader*.

[4] Winthrop *v.* Murray, 14 Jur. 302, 304. The report of S. C., in 8 Hare, 214, incorrectly states that the bill was dismissed with costs.

[5] 1 Seton Dec. (3d Eng. ed.) 94, 95, 96; Platt *v.* Squire, 5 Cush. 551; Jones *v.* Morehead, 3 B. Mon. 377. Where the main question in a bill is decided against the plaintiff, though he succeed in obtaining a decree, the defendant is entitled to his costs up to the time of the decision of the main question. M'Connell *v.* M'Connell, 11 Vt. 290.

[6] Preece *v.* Seale, 3 Jur. N. S. 711, V. C. W.; Clinan *v.* Cooke, 1 Sch. & Lef. 22, 43. For form of order see Seton, 1133; and see *ib.* 88, 89, 94.

[7] Prevost *v.* Benett, 2 Pri. 272; see Thomas *v.* Fred. Co. School, 9 Gill & J. 115; Dupont *v.* Johnson, 1 Bailey Eq. 279. [And a successful party may be ordered to pay the costs of, and occasioned by unfounded and unsupported allegations in his pleadings. Blest *v.* Brown, 4 De G., F. & J. 367, 378.] Where the whole merits of the suit are decided against one party, he will not be entitled to costs of an issue out of the Court, decided in his favor. Stewart *v.* Famler, 1 Harp. Ch. 261.

[8] Esdaile *v.* Peacock, Johns. 216.

[1] *Ante*, p. 990; Sugd. V. & P. 648; Townsend *v.* Champernowne, 3 Y. & C. Ex. 505, 527; Harford *v.* Purrier, 1 Mad. 532, 538; Seton, 616; Wilson *v.* Allen, 1 J. & W. 611, 624; Wynn *v.* Morgan, 7 Ves. 202, 206; —— *v.* Collinge, 3 V. & B. 143, n.; Lewin *v.* Guest, 1 Russ. 325, 328; Wilkinson *v.* Hartley, 15 Beav. 183, 188; Wilson *v.* Williams, 3 Jur. N. S. 810, V. C. W.; Grove *v.* Bast-

vendor established his title after a contest, upon a different ground from that in the abstract delivered, the Court decreed the cost of the inquiries as to the title, to be paid by the vendor ;[2] but if new objections are taken, after the institution of the suit, the Court does not necessarily make the vendor pay the costs of the suit, up to the time of their removal.[3]

In matters of account, also, the Court will frequently apportion the costs between the plaintiff and defendant.[4] Thus, where a plaintiff took a decree for an account against an executor, who had in his answer stated an account, which was found to be correct, the Court gave the costs of the suit up to the decree to the plaintiff, and the costs of the subsequent proceedings to the defendant : the reason of the distinction, apparently, being, that the executor had, before the bill was filed, been applied to for an account, but gave none,[5] and so had rendered the suit necessary ; but it was at the plaintiff's own risk that he proceeded with it, after the defendant had rendered a correct account by his answer. And where one of several residuary legatees carried on the suit against the wish of the others, after correct accounts had been rendered, the Court ordered all the costs subsequent to the hearing to be borne by his share.[6]

In like manner, where a bill is totally dismissed, the Court will sometimes apportion the costs to be paid by the plaintiff. Thus, in *Bruce* v. *Bainbridge*,[7] where a bill was filed by a seller, for specific performance of the contract for sale, and the Master's report was in favor of the title, a case was sent to the Court of Common Pleas ; and the certificate being against the title, the bill was dismissed with costs, only from the date of the Master's report.

Where costs are payable and receivable by the same party, the Court will, on motion, direct them to be set off one against the other ;[8] and where, in a cause, the costs are apportioned between * the *1409 plaintiffs and the defendants, the Court will generally so arrange them, that they may be set off one against the other, and that the balance only shall be paid by the party from whom, upon setting off such costs, it shall appear to be due.[1] The Court will, also, where

ard, 1 De G., M. & G. 69, 79 ; Offen *v.* Harman, 6 Jur. N. S. 487 ; 8 W. R. 129, L. JJ. ; Winne *v.* Reynolds, 6 Paige, 407 ; Platt *v.* Squire, 5 Cush. 551.

[2] Fielder *v.* Higginson, 3 V. & B. 142 ; see, however, Carrodus *v.* Sharp, 20 Beav. 56.

[3] Scoones *v.* Morrell, 1 Beav. 251, 258 ; Sidebotham *v.* Barrington, 5 Beav. 261 ; Freer *v.* Hesse, 4 De G., M. & G. 495, 505 ; Bridges *v.* Longman, 24 Beav. 27.

[4] See Burnham *v.* Dalling, 1 C. E. Green (N. J.), 310.

[5] Anon., 4 Mad. 273 ; and see Beames on Costs, 7.

[6] Thompson *v.* Clive, 11 Beav. 475, 480.

[7] Sugd. V. & P. 648.

[8] Cattell *v.* Simons, 6 Beav. 304, 308 ; Bryan *v.* Metropolitan Saloon Omnibus Company, 4 Drew. 546 ; [Robarts *v.* Bull, 8 Ch. Div. 198]. There is no set-off where the parties to the proceeding are not the same. Jenner *v.* Morris, 11 W. R. 943, V. C. K.

[1] See, for forms of orders, Seton, 88, 89 ; and see *ib.* 95 ; Taylor *v.* Popham, 15 Ves. 72. Upon exceptions to a Master's report, each party is entitled to the costs of the hearing, as to the exceptions decided in his favor ; which costs may be set off against each other. Richards *v.* Barlow, 1 Paige, 325. Thus, where part of the exceptions are allowed, and the rest disallowed, the costs to which the respective parties are entitled may be set off, or a proportionate share of the costs only may be allowed to the party who succeeds as to a majority of the exceptions. Norton *v.* Woods, 5 Paige, 260 ; see Simpson *v.* Brewster, 9 Paige, 245.

there are sums of money to be paid, as well as costs, arrange the demands of each, so as to do justice to all.[2] Thus, in *Fell* v. *Lutwidge*,[3] where the costs of the suit were thrown upon a trustee, on the ground of fraud, Lord Hardwicke allowed him to set off those costs against the premiums and other charges he had been at in obtaining a policy of insurance.

So, in a suit for the administration of assets, in which, according to the common course of the Court, all the parties are entitled to have their costs out of the fund, a party who is a debtor to the estate, is not allowed to receive payment of them, whilst his debt remains unsatisfied; but the costs due to him will be ordered to be set off, *pro tanto*, against the debt due from him.[4] And where a bill was dismissed with costs, so far as it sought to charge the separate estate of a married woman, who had not separately defended the suit, such costs were ordered to be set off against an amount found due from her husband.[5]

It is not the practice of the Court to set off costs of one suit, against the costs, or costs and duty, due to the party to pay them from the person who is to receive them in another:[6] unless the two suits are consolidated, so that one order can be made in both;[7] and defendants who have been dismissed, and to whom costs are due from the plaintiff, have no lien for them on a fund in Court belonging to him.[8]

Where a party is entitled to his costs, but it has not been decided who ought ultimately to bear them, payment is often directed to be made out of a fund in Court, or by one of the parties to the proceedings, "without prejudice to the question how the same are ultimately to be borne."[9] The absence, however, of these words, or words *1410 of a like meaning, from an order directing payment of * costs out of a fund in Court, does not necessarily imply that the Court has decided that the fund out of which the costs are paid is that which must ultimately bear them; and costs paid out of a fund, under an order from which those words are omitted, may be directed to be recouped out of another fund which is primarily liable for that purpose.[1] If the party ordered to pay the costs without prejudice, in the manner before described, neglects, at the proper time, to apply with respect to such costs, he will not be allowed to reopen the question afterwards.[2]

Where a party is entitled to costs, he should take care and apply for them at the hearing, or at any rate before the decree has been passed:

[2] Taylor *v.* Topham, *ubi sup.*; see Battle *v.* Griffin, 5 Pick. 167.

[3] Barnard. 319.

[4] Harmer *v.* Harris, 1 Russ. 155, 157; Nicholson *v.* Norton, 7 Beav. 67; Holworthy *v.* Allen, 2 Bro. C. C. 17; 1 Cox, 202; and see as to setting off costs of bankrupt executor, debtor to estate, Samuel *v.* Jones, 2 Hare, 246; Cotton *v.* Clark, 16 Beav. 134; 16 Jur. 879.

[5] Wright *v.* Chard, 4 Drew. 702.

[6] Wright *v.* Mudie, 1 S. & S. 266; Collett *v.* Preston, 15 Beav. 458.

[7] Budge *v.* Budge, 12 Beav. 385.

[8] Miller *v.* Pridden, 3 Jur. N. S. 78, V. C. K. But *semble*, if the order is registered, a charging and stop order may be made. Wells *v.* Gibbs, 22 Beav. 204.

[9] Seton, 87, 93.

[1] Sheppard *v.* Sheppard, 33 Beav. 129, 130.

[2] Whalley *v* Ramadge, 8 L. T. N. S. 499, V. C. K.

as, after a decree has been passed, the Court will not give the costs of the suit to a party, although he was a mere trustee, and as such would have been entitled to them as a matter of course, if asked for at the hearing.[3]

When costs are ordered to be taxed simply, it means as between party and party. If the costs are to be taxed as between solicitor and client, or if any costs, charges, and expenses, not strictly costs of suit, are to be allowed on the taxation, or any variation from a taxation as between party and party, is to be allowed, it should be expressed in the decree.[4]

Where costs are payable out of a fund in Court, they are ordered to be paid to the solicitor of the party; but in other cases, they are always ordered to be paid to the parties themselves.[5]

Where it is intended that the costs of persons appearing at the hearing who are not parties to the record should be paid, their names must be specifically mentioned in the order: for a direction to pay the costs of all parties, only includes the costs of the persons parties to the record.

Section III. — *Costs out of the Fund.*

In the last section, some of the principles have been pointed out by which the Court is governed in awarding the costs of a suit, in cases in which, the subject of litigation not being a fund or estate under the administration of the Court, the costs must necessarily be paid by one party to another. It is now proposed to consider those cases in which an estate, whether real or personal, being the subject of litigation, the Court will order the costs * of the suit, or those of some *1411 of the parties to it, to be defrayed out of the fund or estate.[1]

As a general rule, wherever an estate or fund is administered by the Court, the costs of all necessary and proper parties to the proceedings are a first charge; and must be defrayed thereout, before the claims of the persons beneficially entitled thereto are satisfied.[2] But the costs only of those proceedings which were, in their origin, properly directed for the benefit of the estate, will be directed to be thus paid; and the costs of any unnecessary and useless proceedings must be paid by the person at whose instigation they were taken.[3]

It may be mentioned here, that costs of a litigation in the Court of Probate will be postponed to the costs of administration in the Court of Chancery.[4]

[3] Colman *v.* Sarell, 2 Cox, 206; Travis *v.* Waters, 1 John. Ch. 85; S. C. 12 John. 500; Temple *v.* Lawson, 19 Ark. 148; see also Norris *v.* Norris, 1 Cox, 183; Kendall *v.* Marsters, 2 De G., F. & J. 200; but see Viney *v.* Chaplin, 3 De G. & J. 282.

[4] Seton, 92.

[5] *Ibid.* For form of order, see *ib.* 90.

[1] See Peck *v.* Stimpson, 20 Pick. 312; Frost *v.* Belmont, 6 Allen, 164, 165.

[2] Hare *v.* Rose, 2 Ves. S. 558; Ford *v.* Earl of Chesterfield, 21 Beav. 426; Barnwell *v.* Ironmonger, 1 Dr. & Sm. 255, 258; and see Attorney-General *v.* Lawes, 8 Hare, 32. As to costs, generally, in suits for administration of assets, see Morgan & Davey, 109 *et seq.*

[3] Bartlett *v.* Wood, 9 W. R. 817, L. C.; and see Westover *v.* Chapman, 1 Coll. 181, 183.

[4] Major *v.* Major, 2 Drew. 281.

Trustees,[5] agents, and receivers, accounting fairly, and paying their money into Court, are entitled to their costs out of the estate, as a matter of course;[6] and the same rule extends to personal representatives;[7] to whom, as they can only obtain complete exoneration by having their accounts passed in the Court,[8] the Court will give every opportunity of exonerating themselves, by passing their accounts at the expense of the estate. The rule is not confined to cases in which they are brought before the Court as defendants: it being a general principle, that a trustee has a right to the protection of the Court, in the execution of his trust; he is, therefore, entitled to his costs, whether he comes before the Court as plaintiff or defendant, unless the act required to be done leads to no responsibility, or his motive is obviously vexatious.[9]

*1412 *A trustee, fairly instituting a suit for the direction of the Court, with regard to the trust, will not only be entitled to his own costs, but any person made a party to the suit, for his protection, will also be ordered his costs from the fund. Thus, where a bill was filed by trustees, for the direction of the Court, as to the application of a trust fund, in the course of which a dispute arose between the two defendants, whether one of them was illegitimate, and it was found that he was legitimate, the other was allowed his costs out of the trust fund.[1] The Court considers a trustee entitled to its protection and direction in the execution of his trusts, and will not only never call upon him to pay the costs, unless he refuses to act merely from caprice or obstinacy,[2] but will give him his costs out of the trust property, although it appears, in the result, that he might safely have acted without suit.[3] In *Low* v. *Carter*,[4] Lord Langdale M. R. said: "I cannot conceive that any thing could be more hard, than that executors, who are called on to administer estates, where there are doubtful questions arising on the will, and

[5] As to costs of trustees generally, see Lewin on Trusts, 663 *et seq.*; Hill on Trustees, 571 *et seq.*; and of trustees, executors, and administrators, Morgan & Davey, 288 *et seq.* [And as to costs of trustees of separate estate of a married woman in a suit to establish a claim against it. Chubb *v.* Stretch, L. R. 9 Eq. 555; Picard *v.* Hine, L. R. 5 Ch. App. 274.]

[6] Attorney-General *v.* City of London, 1 Ves. J. 243, 246; 3 Bro. C. C. 171; Courand *v.* Hanmer, 9 Beav. 3.

[7] Rashley *v.* Masters, 1 Ves. J. 205; Samuel *v.* Jones, 2 Hare, 246; 7 Jur. 845; Decker *v.* Miller, 2 Paige, 149; Knox *v.* Picket, 4 Desaus. 199; Connolly *v.* Pardon, 1 Paige, 291; Floyd *v.* Barker, 1 Paige, 480. The rule applies to the executors of a defaulting trustee who account fairly. Haldenby *v.* Spofforth, 9 Beav. 195; Horne *v.* Shepherd, 3 Jur. N. S. 806, V. C. S.; but see Lyse *v.* Kingdon, 1 Coll. 184, 189; 8 Jur. 418.

[8] See Knatchbull *v.* Fearnhead, 3 M. & C. 122; Hay *v.* Bowen, 5 Beav. 610, 616; 6 Jur. 1119; [Bigelow *v.* Morong, 103 Mass. 287].

[9] Curteis *v.* Candler, 6 Mad. 123; Poole *v.* Pass, 1 Beav. 600, 604; Holford *v.* Phipps, 3 Beav. 434, 440; 4 Beav. 475; Whitmarsh *v.* Robertson, 1 Y. & C. C. C. 716, 717; 6 Jur. 921, 923; Noble *v.* Meymott, 14 Beav. 471; Hosack *v.* Rogers, 9 Paige, 461; Chase *v.* Locherman, 11 Gill & J. 185. A trustee is not entitled to his costs on the mere ground that he acted on the opinion of counsel. See Devey *v.* Thornton, 9 Hare, 232; King *v.* King, 1 De G. & J. 663, 666, 671, 674; 4 Jur. N. S. 721; *Re* Knight's Trusts, 27 Beav. 45, 49; 5 Jur. N. S. 326; see, however, as to costs of a bankrupt executor or trustee, Samuel *v.* Jones, 2 Hare, 246; 7 Jur. 845; Cotton *v.* Clark, 16 Beav. 134; 16 Jur. 879; Turner *v.* Mullineux, 9 W. R. 252, V. C. W.

[1] Hicks *v.* Wrench, 6 Mad. 93.

[2] *Re* Woodburn's Trusts, 1 De G. & J. 333; 3 Jur. N. S. 799; *Re* Cater, 25 Beav. 361; *Re* Knight's Trusts, *ubi sup.*; *Re* Foligno, 32 Beav. 131.

[3] Henley *v.* Philips, 2 Atk. 48; see also Taylor *v.* Glanville, 3 Mad. 176.

[4] Low *v.* Carter, 1 Beav. 426, 430.

who can be exonerated only by having their accounts passed in a Court of Equity, should be deterred from coming to this Court, by being visited with the costs of the proceedings." [5]

Where, however, the act required to be done by a trustee, leads to no responsibility, or his motive is obviously vexatious,[6] he will not be allowed his costs. Thus, where trustees under a will refused to pay a legacy to the assignees of a bankrupt, merely because the bankrupt himself had set up a claim to it, Sir John Leach M. R. refused them their costs of the suit, because the case was too clear to admit of a doubt; but, as they might have acted from mere ignorance, and not from any improper motive, he would not make them pay the costs of the plaintiff, although he deprived them of their own costs.[7] So, where a person having in his hands a sum of money belonging to an infant, instituted a suit, to have that sum secured for the benefit of the infant, though there was a trustee of a settlement to whom it ought to have been paid, and who was willing to receive it, * Lord Gifford *1413 M. R. refused to allow him his costs out of the fund.[1]

Although trustees, and other persons standing in that character, are, as we have seen, generally held entitled to their costs out of the estate, yet they will not be permitted unnecessarily to burden the fund, by costs which they might have avoided: they must, therefore, as a general rule, institute or defend a suit jointly: and if they sever, they will be allowed only one set of costs: [2] except in some cases where there is a special reason justifying their severance; [3] but where the severance is occasioned by the default or misconduct of one of two trustees, and only one set of costs is allowed, it is usually ordered to be paid to the innocent trustee.[4] Where the whole of the costs are not given to one trustee, the apportionment is in general left to the Taxing Master.[5] Upon the same principle, a trustee will, where he might have paid the trust fund into Court, under the Trustee Relief Acts, be

[5] Knox *v.* Picket, 4 Desaus. 199; Morrell *v.* Dickey, 1 John. Ch. 153; Moses *v.* Murgatroyd, 1 John. Ch. 473; Dunscomb *v.* Dunscomb, 1 John. Ch. 508; Goodrich *v.* Pendleton, 3 John. Ch. 520; Warden *v.* Burts, 2 M'Cord Ch. 76; Wright *v.* Wright, 2 M'Cord Ch. 191; Delafield *v.* Colden, 1 Paige, 139; Pritchard *v.* Hicks, 1 Paige, 270; Hosack *v.* Rogers, 9 Paige, 461; Armstrong *v.* Zane, 12 Ohio, 287. [*Infra*, 1431.]

[6] Curteis *v.* Candler, 6 Mad. 123.

[7] Knight *v.* Martin, 1 R. & M. 70; and see Angier *v.* Stannard, 3 M. & K. 566, 572; Campbell *v.* Home, 1 Y. & C. C. C. 664, 670; 7 Jur. 365; *Re* Primrose, 23 Beav. 590; 3 Jur. N. S. 899.

[1] Ellis *v.* Ellis, 1 Russ. 368. In general, where a trustee, through his neglect or obstinacy, occasions the suit, he will be ordered to pay the costs of it. See *post*, pp. 1416, 1417. Where heirs, executors, or administrators bring groundless or vexatious suits, they will be ordered to pay costs. Getman *v.* Beardsley, 2 John. Ch. 274.

[2] Farr *v.* Sheriffe, 4 Hare, 528; 10 Jur. 630; Hodgson *v.* Cash, 1 Jur. N. S. 864; and see Woods *v.* Woods, 5 Hare, 229, 231; Attorney-General *v.* Cuming, 2 Y. & C. C. C. 139, 156; and *ante*, p. 730.

[3] Reade *v.* Sparkes, 1 Moll. 8; Nicholson *v.* Falkner, *ib.* 555; Gaunt *v.* Taylor, 2 Beav. 346; 2 Hare, 413, n.; Aldridge *v.* Westbrook, 4 Beav. 212; Wiles *v.* Cooper, 9 Beav. 298; Kampf *v.* Jones, C. P. Coop. 13; Cummins *v.* Bromfield, 3 Jur. N. S. 657, V. C. W.; Shaw *v.* Johnson, 9 W. R. 629, V. C. K.; and see, on this subject, Lewin on Trusts, 650; Hill on Trustees, 573; Morgan & Davey, 88.

[4] Webb *v.* Webb, 16 Sim. 55; Hughes *v.* Key, 20 Beav. 395; Prince *v.* Hine (No. 2), 27 Beav. 345; and see Birks *v.* Micklethwait, 33 Beav. 409; 10 Jur. N. S. 303, where two sets of costs had been allowed.

[5] Course *v.* Humphrey, 26 Beav. 402; 5 Jur. N. S. 615; Attorney-General *v.* Wyville, 28 Beav. 464.

allowed only the costs to which he would have been entitled, if that course had been adopted.[6] He may, however, institute a suit, where the circumstances of the case are such that he is entitled to a complete discharge from the trusteeship.[7]

Trustees ought not to place themselves in such a position that their interests conflict with their duty:[8] therefore, where a solicitor is a trustee or executor, he will only be allowed his costs out of pocket;[9] and will not, in the absence of any express provision in the instrument creating the trust, be entitled to charge for professional business *1414 transacted on behalf of the trust;[10] and even *such a clause will not entitle him to charge for business which falls to the duty of an executor or trustee to transact.[1]

The partner of a solicitor, who is a trustee, is also only entitled to his costs out of pocket, for business transacted by him on behalf of the trust:[2] unless he has acted for his own benefit alone.[3]

It is no part of the business or employment of a trustee to assist other parties in suits relative to the trust property: if, therefore, the trustee acts as solicitor for such other parties, such business or employment is not any business or employment of the trustee, and the rule that a solicitor who is a trustee is to be allowed only his costs out of pocket, does not apply; and where he acts both as solicitor for himself and for other parties, his costs will be disallowed to the extent only to which they have been increased by his being a party.[4] The exception however, only applies to business done by the solicitor trustee in prosecuting or defending proceedings in Court.[5]

A similar rule applies to the case of an auctioneer: who, if a trustee, will not be allowed his commission for selling part of the trust estate.[6]

[6] Wells *v.* Malbon, 31 Beav. 48; 8 Jur. N. S. 249.

[7] Barker *v.* Peile, 2 Dr. & Sm. 340; 11 Jur. N. S. 436.

[8] Per Lord Cranworth, in Broughton *v.* Broughton, 5 De G., M. & G. 160, 164; 1 Jur. N. S. 965; S. C. 2 Sm. & G. 422; 1233; see also Crosskill *v.* Bower, 32 Beav. 86; 9 Jur. N. S. 267.

[9] Robinson *v.* Pett, 3 P. Wms. 249; Moore *v.* Frowd, 3 M. & C. 45, 51; New *v.* Jones, 1 M'N. & G. 668, n. (*d*); York *v.* Brown, 1 Coll. 260; 8 Jur. 567; Broughton *v.* Broughton, *ubi sup.*; Sclater *v.* Cottam, 3 Jur. N. S. 630, V. C. K.; Pollard *v.* Doyle, 1 Dr. & Sm. 319; Gomley *v.* Wood, 3 Jo. & Lat. 678, 688; Lincoln *v.* Windsor, 9 Hare, 158; Pince *v.* Beattie, 9 Jur. N. S. 1119; 11 W. R. 979, V. C. K.; 1233.

[10] Broughton *v.* Broughton, *ubi sup.*; *contra*, Moore *v.* Frowd, *ubi sup.*; *Re* Sherwood, 3 Beav. 338, 341; and see *ante*, p. 1233; Lewin on Trusts, 216; Hill on Trustees, 599; Seton, 770; Morgan & Davey, 279 *et seq.*; see also Price *v.* M'Beth, 10 Jur. N. S. 579; 12 W. R. 818, V. C. S., as to costs of a solicitor mortgagee. [See, also, Matter of Bank of Niagara, 6 Paige, 213; Mayer *v.* Gallu-chat, 6 Rich. Eq. 1. But see, *contra*, Fulton *v.* Davidson, 3 Heisk. 615; Wendell *v.* French, 19 N. H. 210; Carmichael *v.* Wilson, 2 Molloy, 537, and the comment of Lord Cottenham on the last case in Cradock *v.* Piper, 1 M. & G. 678.]

[1] Harbin *v.* Darby, 28 Beav. 325; 6 Jur. N. S. 906.

[2] Collins *v.* Carey, 2 Beav. 128; Christophers *v.* White, 10 Beav. 523; Lyon *v.* Baker, 5 De G. & S. 622. As to costs of the town agent of the trustee, see Burge *v.* Brutton, 2 Hare, 373, 379; 7 Jur. 988.

[3] Clack *v.* Carlon, 7 Jur. N. S. 441; 9 W. R. 558, V. C. W.

[4] Cradock *v.* Piper, 1 M'N. & G. 664, 679; Fraser *v.* Palmer, 4 Y. & C. Ex. 515; Broughton *v.* Broughton, Pince *v.* Beattie, Lincoln *v.* Windsor, and Harbin *v.* Darby, *ubi sup.*; 1234, 1235.

[5] Lincoln *v.* Windsor, and Broughton *v.* Broughton, *ubi sup.*

[6] Kirkman *v.* Booth, 11 Beav. 273; Matthison *v.* Clarke, 3 Drew. 3. An auctioneer trustee may, however, be allowed commission under the terms of the deed creating the trust. Douglass *v.* Archbutt, 2 De G. & J 148; 4 Jur. N S. 315.

The rule, however, is not inflexible; and, under very special circumstances, the trustee may be allowed compensation for his time and trouble: in addition to his costs out of pocket.[7]

It has been said that trustees and personal representatives brought into Court, will not be deprived of their costs, although they make a claim for their own benefit and fail, provided they do so "by way of submission;"[8] but where a trustee has a private interest of his own, separate and independent from the trust, and obliges the *cestui que trust* to come into this Court, merely to have the point relating to his own private interest determined at the expense of the trust: this is such vexatious behavior, on his part, that he will be decreed * to *1415 pay the whole costs of the suit.[1] Upon this ground, where on a bill filed for a residue, the defendant, the executor, by his answer stated declarations of the testatrix that her legatees should have no more than their express legacies, and hoped to prove that the surplus was intended for himself as executor, he was made to pay the costs for thus insisting upon the surplus.[2]

As the Court will not allow trustees to take advantage of the rule of the Court in their favor, to obtain a determination upon their own rights, so it will not tolerate their attempting to defeat the claims of their *cestui que trust*, by setting up an improper defence. Therefore where the trustees of an estate, bequeathed to them in trust for a charity, insisted that the plaintiffs had, under a clause in the will of the founder (by which it was declared that, if the heirs-at-law should dispute the will, they should forfeit certain annuities thereby bequeathed to them), forfeited their annuities by filing the bill, which prayed that the trust for the charity might be declared a resulting trust, or in the alternative, that they might have the arrears of their annuity, Lord Talbot ordered them to pay the costs out of their own pockets, and not out of the trust estate.[3] And so, if a trustee states a trust to be different to what it actually is, the Court will deprive him of his costs, although he does it not to benefit himself, but another. Thus, where the defendant, who was the trustee of a marriage settlement, upon a question between the husband and wife whether the wife, who was separated from her husband and lived in a state of adultery, was entitled, under the settlement, to the dividends of a sum of stock to her separate use, insisted, contrary to the fact, that it was the intention of the parties that a provision

[7] Bainbrigge *v.* Blair, 8 Beav. 588, 597; 9 Jur. 765; and see Marshall *v.* Holloway, 2 Swanst. 452, 453; Seton, 770; Lewin on Trusts, 216.

[8] Rashley *v.* Masters, 1 Ves. J. 205. Thus, where an executor, who is indebted to the estate, has the right to ask the aid and protection of the Court in paying over the money due by him, he will be entitled to his costs out of the fund. Decker *v.* Miller, 2 Paige, 149. So, if the executor, who was a creditor of the estate, had a right of preference over other creditors, and was compelled to come into Chancery, to obtain such preference, his costs will be paid out of the fund. *Ibid.*

[1] Henley *v.* Phillips, 2 Atk. 48; Dupont *v.* Johnson, 1 Bailey Eq. 279; Gardner *v.* Gardner, 6 Paige, 455; Hunn *v.* Norton, 1 Hopk. 344.

[2] Bayly *v.* Powell, Prec. in Ch. 92; S. C. *nom.* Bayley *v.* Powell, 2 Vern. 361; Bruin *v.* Knott, 12 Jur. 616, V. C. E.

[3] Loyd *v.* Spillet, 3 P. Wms. 344, 346; and see S. C. *nom.* Lloyd *v.* Spillet, 2 Atk. 148.

for the separate use of the wife should be introduced into the settlement, Lord Rosslyn thought there was ground to deprive the trustee of her costs.[4]

Trustees will, also, be deprived of their costs if they claim more than they are entitled to: therefore, where the trustees of a charity insisted, by their answer, that there was 800*l.* due to them from the charity, but it was found that 180*l.* only was due to them, Lord Cowper refused them their costs, though the balance was in their favor.[5]

It may be noticed, however, that a disallowance of credit, honestly claimed by an executor, though he is mistaken, is not enough to disentitle him to costs: therefore, where an executor's account *1416 was *surcharged by the amount of a credit taken for the proportion of an annuity, payable by the testator, during his life, to the executor, but which was not apportionable, the mistake was not considered by Sir Anthony Hart L. C. as a ground to deprive the executor of his costs.[1]

If persons, standing in the situation of trustees, by their neglect and misconduct occasion the suit, they will be deprived of their costs out of the estate:[2] although the trust instrument contain the usual clause authorizing the trustees to reimburse themselves any expenses they may incur;[3] but mere neglect of duty, as, for instance, the omission to invest balances, if unaccompanied by fraud, is not such misconduct as to disentitle them to their general costs of the suit: although it may subject them to the costs of so much of the suit as was occasioned by neglect.[4] Although, in general, a trustee committing a breach of trust, which may render an application to the Court necessary, will be deprived of his costs, yet where the breach of trust consisted of the improper application of a small part of the trust fund, which was promptly offered to be restored, and the suit was for other purposes of the trust, there being no imputation against the trustee, he was held not to be disentitled to his costs.[5]

In the cases above referred to, the Court has contented itself with

[4] Ball *v.* Montgomery, 2 Ves. J. 191, 199.

[5] Attorney-General *v.* Brewers' Company, 1 P. Wms. 376; Dawson *v.* Parrot, 3 Bro. C. C. 236.

[1] Bennett *v.* Going, 1 Moll. 529.

[2] O'Callaghan *v.* Cooper, 5 Ves. 117, 128; England *v.* Downes, 6 Beav. 279; Howard *v.* Rhodes, 1 Keen, 581; Fyfe *v.* Arbuthnot, 3 Jur. N. S. 651, L. C.; Aylmer *v.* Winterbottom, 4 Jur. N. S. 19, V. C. W.; and see Legg *v.* Mackrell, 2 De G., F. & J. 551; 1 Giff. 165; 5 Jur. N. S. 1154; see also Lewin on Trusts, 666; Hill on Trustees, 575 *et seq.* Where the necessity for a sale arose from an administrator's ill conduct, he was held responsible for the costs. Blevins *v.* Sympson, 2 B. Mon. 463, 464. And so where the necessity for filing the bill was occasioned by the misconduct of the defendants as executors, in omitting to inventory, and in refusing to account for moneys which were due the estate, no costs will be allowed them out of the estate. Post *v.* Stevens, 2 Beasley (N. J.), 233.

[3] Hide *v.* Haywood, 2 Atk. 126; Hill on Trustees, 593.

[4] Heighington *v.* Grant, 1 Phil. 600, 604; Tebbs *v.* Carpenter, 1 Mad. 290, 307; Bennett *v.* Atkins, 1 Y. & C. Ex. 247, 249; Fozier *v.* Andrews, 2 Jo. & Lat. 199; Cotton *v.* Clark, 16 Beav. 134; 16 Jur. 879; Holgate *v.* Haworth, 17 Beav. 259; Knott *v.* Cottee, 16 Beav. 77; 16 Jur. 752; Bate *v.* Hooper, 5 De G., M. & G. 338; and see *contra*, Parrot *v.* Treby, Prec. in Ch. 254; Seers *v.* Hind, 1 Ves. J. 294; Rocke *v.* Hart, 11 Ves. 58, 61; Moseley *v.* Ward, *ib.* 581; Ashburnham *v.* Thompson, 13 Ves. 402, 404.

[5] Fitzgerald *v.* Pringle, 2 Moll. 534; see also Hewett *v.* Foster, 7 Beav. 348; Royds *v.* Royds, 14 Beav. 54.

marking its disapprobation of the conduct of the trustee or personal representative, by withholding from him his costs, to which he would otherwise have been entitled out of the fund. It frequently happens, however, that the Court will go further, and will not only deprive the trustee or representative of his costs, but will compel him to pay the costs of the suit out of his own pocket; and it may be stated, as a general rule, that, if any particular instance of misconduct or a general dereliction of duty in a trustee, or even his mere caprice and obstinacy, is the immediate cause of *a suit being instituted, *1417 the trustee, on the charge being substantiated against him, must pay the costs of the proceedings his own improper behavior has occasioned.[1] Upon this principle, where an executor, directed to lay out the testator's personalty in the funds, unnecessarily kept large balances in his hands, and resisted the payment of debts by false pretences of outstanding demands, he was charged with the costs.[2] And where an executor retained a balance in his hands longer than it was necessary to answer contingencies, he was ordered to pay interest and costs: although it appeared that he always kept a sum ready at his bankers to defray the amount.[3] A trustee who has occasioned the suit by refusing or neglecting to furnish proper accounts when requested, will be ordered to pay the costs of the suit;[4] and where an executor obtained from a legatee a release from a legacy, for which no consideration was given, he was ordered to pay the costs of the suit instituted to set aside such release.[5]

It has also been held that if executors make an unfair appraisement, and otherwise misbehave themselves in their trust, they will be liable to costs.[6] And where trustees kept possession of an estate from their *cestui que trust*, whom they considered a lunatic (but who, although eccentric when he was drunk, was not insane), upon a bill filed by the

[1] Attorney-General *v.* Hobert, Rep. t. Finch, 259; Haberdashers' Company *v.* Attorney-General, 2 Bro. P. C. ed. Toml. 370; Pinfold *v.* Bouch, 4 Hare, 271; Thorby *v.* Yeats, 1 Y. & C. C. C. 438; Lyse *v.* Kingdon, 1 Coll. 184, 189; Hampshire *v.* Bradley, 2 Coll. 34, 41; Attorney-General *v.* Gibbs, 1 De G. & S. 156, 161; Firmin *v.* Pulham, 2 De G. & S. 99, 101; Marshall *v.* Sladden, 4 De G. & S. 468; Warter *v.* Anderson, 11 Hare, 301; Attorney-General *v.* Murdoch, 2 K. & J. 571; Price *v.* Loaden, 21 Beav. 508; Springett *v.* Dashwood, 2 Giff. 521; Dobson *v.* Pattinson, 3 Jur. N. S. 1202, V. C. S.; Wroe *v.* Seed, 4 Giff. 425; Smith *v.* Bolden, 33 Beav. 262; Getman *v.* Beardsley, 2 John. Ch. 274; Blevins *v.* Sympson, 2 B. Mon. 463, 464; cited *ante*, 1416, note (2). Where executors litigate their own private interests, they will be ordered to pay costs. Dupont *v.* Johnson, 1 Bailey Eq. 269; see Gardner *v.* Gardner, 6 Paige, 445; Hunn *v.* Norton, 1 Hopk. 344.

[Where an executor had been guilty of a technical breach of trust, without any wrong intent and with no danger to the fund, as by keeping the funds in his own hands without investing them, he was charged with interest and all costs. Lathrop *v.* Smalley, 8 C. E. Green, 192. So, executors who have caused great and unwarrantable delay in the final settlement of accounts must pay all costs. Egerton *v.* Egerton, 2 C. E. Green, 419. So must trustees who have been guilty of vexatious conduct. Talbot *v.* Marshfield, L. R. 4 Eq. 661; 3 Ch. App. 622. And, generally, where interest is given against a trustee as a remedy for a breach of trust, costs follow as of course. Warbass *v.* Armstrong, 2 Stockt. 266.]

[2] Crackelt *v.* Bethune, 1 J. & W. 586; see also Moseley *v.* Ward, 11 Ves. 581; Picty *v.* Stace, 4 Ves. 620, 623.

[3] Franklin *v.* Frith, 3 Bro. C. C. 433; Tickner *v.* Smith, 3 Sm. & G. 42.

[4] Boynton *v.* Richardson, 31 Beav. 340; Kemp *v.* Burn, 4 Giff. 348; *Re* King, Gilbert *v.* Lee, 13 W. R. 1012, M. R.; 34 Beav. 574.

[5] Horsley *v.* Chaloner, 2 Ves. S. 83, 85.

[6] Sheppard *v.* Smith, 2 Bro. P. C. ed. Toml. 372.

supposed lunatic they were ordered to pay the costs of the suit: although it did not appear that they had acted from any corrupt motive, but were merely, as they considered, protecting the property for the benefit of those in remainder.[7]

So also, where the suit has been occasioned by a breach of trust, the trustees will be compelled to pay the costs: thus, where trustees, with the privity of the wife, sold out stock which had been settled to her separate use, and paid the proceeds to the husband, taking his *1418 bond of indemnity, and the husband afterwards died * insolvent, whereupon the trustees replaced the stock: upon a bill filed by the widow and children to have the fund secured, the trustees were considered as having caused the suit by their breach of trust, and were ordered to pay the widow the amount of the dividends from the husband's death, with the costs of the suit.[1]

In like manner, where a trustee, mistaking his power, sold stock without authority, and, with the produce, purchased land, without having the power to do so, he was ordered to replace the stock and to pay the costs.[2] And where, by mistake, the fund had been distributed among the wrong persons, the trustee was ordered to pay the costs of a suit to compel him to replace it:[3] although the distribution had been made under the advice of counsel;[4] and where the trustee of a legacy, which had been invested in stock, authorized another person, who was supposed to be entitled to the management of it, to sell it out and receive the proceeds, it was held that the trustee was answerable for the stock, and he was ordered to pay the costs: although the legatee, not knowing that the legacy had ever been invested or sold out, had dealt with such other person as the person accountable for the money.[5]

It seems that, in order to constitute such misconduct as will induce the Court to visit trustees with costs, it is not necessary that there should have been misfeasance on the part of the trustee: simple nonfeasance, where it has been productive of mischief to the trust estate, will be sufficient. Thus, where the trustees of a charity, although they were not guilty of any corruption, had been extremely negligent in their trust, Lord King held, that they ought to be punished with some of the costs.[6] So, also, where an executor omitted to bring an action to recover a bond debt, he was ordered to pay the costs of taking the accounts.[7] And where two executors had kept money of their testator in their hands

[7] Brown *v.* How, Barnard. 354: and see Caffrey *v.* Darby, 6 Ves. 488, 497; Curtis *v.* Robinson, 8 Beav. 242; see Warbass *v.* Armstrong, 2 Stockt. (N. J.) 263.

[1] Whistler *v.* Newman, 4 Ves. 129, 145.

[2] Earl Powlet *v.* Herbert, 1 Ves. J. 297.

[3] Eaves *v.* Hickson, 30 Beav. 136; 7 Jur. N. S. 1297.

[4] Boulton *v.* Beard, 3 De G., M. & G. 608, 611; and see Devey *v.* Thornton, 9 Hare, 232; Foster *v.* Dawber, 6 W. R. 47, V. C. K.; Bullock *v.* Wheatley, 1 Coll. 130, 135; and *ante*, p. 1411, note (9).

[5] Adams *v.* Clifton, 1 Russ. 297, 300.

[6] East *v.* Ryal, 2 P. Wms. 284; see also Haberdashers' Company *v.* Attorney-General, 2 Bro. P. C. ed. Toml. 370; Attorney-General *v.* Hobert, Rep. t. Finch, 259; Gray *v.* Thompson, 1 John. Ch. 82; Tiernan *v.* Wilson, 6 John. Ch. 411; Knox *v.* Picket, 4 Desaus. 199; see Black *v.* Blakeley, 2 M'Cord Ch. 9; Sorrel *v.* Proctor, 4 Hen. & M. 431.

[7] Lowson *v.* Copeland, 2 Bro. C. C. 156.

longer than the exigencies of the affairs required, and were consequently ordered to pay the amount with interest, and one became insolvent, the Court held each of them to be liable for the whole costs.[8]

In many cases, also, if there is misconduct on the part of a trustee or personal representative in the course of the cause, the Court will compel him to pay the costs of the suit out of his own pocket. Thus, a trustee will be fixed with costs if he persists in proceeding * with the suit after it has become unnecessary ;[1] or if he wilfully *1419 mistakes the accounts ;[2] or if, being indebted to the trust estate, he resists the account, and claims a balance ;[3] or if, by chicanery, he keeps the *cestui que trust* from a true knowledge of the accounts, or even if he has kept the accounts in a very confused manner.[4] An executor, also, will be liable to costs, if he denies assets and the contrary is proved against him.[5] Where, however, he was the executor of an executor, and the estates of the two testators had been so blended as to create confusion, he was not ordered to pay costs : though it appeared he had assets sufficient to pay the plaintiff's debt.[6] And wherever the answer of an executor or other trustee is falsified by proof, and he appears to have acted from fraudulent motives, he will be made to pay the costs.[7] So, if a corporation, being trustees for a charity, suppress or conceal evidence relating to the charity, they will be held liable to the costs of the suit.[8] And if a trustee, by his answer, sets up objections to his performance of his trust, which he does not substantiate, he will be made to pay the costs.[9]

Although a personal representative, or other trustee, who misconducts himself in his trust, will be liable to pay the costs of the suit, the rule will be qualified where, though his conduct has been irregular, no loss has been incurred to the estate, and his motive has not been corrupt.[10]

It has also been held, that a slight instance of misconduct, in one particular point, will not fix a trustee with the costs : thus, where, by an order, made by consent several years before, a trustee had been ordered to pay 200*l.* into Court, but had not done it, and, as an excuse for his disobedience, alleged that the plaintiffs did not serve him with the order, or take any step to have it executed, and that he understood they were dissatisfied with it, and intended to try to have it varied, the

[8] Littlehales *v.* Gascoyne, 3 Bro. C. C. 73; Wroe *v.* Seed, 4 Giff. 425.

[1] Campbell *v.* Campbell, 2 M. & C. 25, 30.

[2] Sheppard *v.* Smith, 2 Bro. P. C. ed. Toml. 372; and see Flanagan *v.* Nolan, 1 Moll. 84.

[3] Eglin *v.* Sanderson, 3 Giff. 434; 8 Jur. N. S. 329.

[4] Avery *v.* Osborne, Barnard. 349; Norbury *v.* Calbeck, 2 Moll. 461.

[5] Sandys *v.* Watson, 2 Atk. 80; Lodge *v.* Pritchard, 4 Giff. 294; 9 Jur. N. S. 982.

[6] Sandys *v.* Watson, *ubi sup.*

[7] Vaughan *v.* Thurston, Colles P. C. 175; see also Mallabar *v.* Mallabar, Ca. t. Talb. 78.

[8] Borough of Hertford *v.* Poor of Hertford, 2 Bro. P. C. ed. Toml. 377; Attorney-General *v.* East Retford, 2 M. & K. 35, 40.

[9] Willis *v.* Hiscox, 4 M. & C. 197, 202; but see Low *v.* Carter, 1 Beav. 426, 430.

[10] Baker *v.* Carter, 1 Y. & C. Ex. 250; Royds *v.* Royds, 14 Beav. 54; see also White *v.* Jackson, 15 Beav. 191; but see Springett *v.* Dashwood, 2 Giff. 521; 7 Jur. N. S. 93; Kemp *v.* Burn, 4 Giff. 348; 9 Jur. N. S. 375; *ante*, pp. 1416, 1417.

Court charged him with interest on the 200*l.*, but was of opinion that it was not a case to deprive the defendant of his costs.[11]

In *Hall* v. *Hallet*,[12] Lord Thurlow said, that the rule, that exec- *1420 utors * are to be exempt from paying costs, holds even in cases where great delays and difficulties have been occasioned by the executor: for the Court will overlook these circumstances if it can. And although an executor or other trustee, who grossly misconducts himself in the execution of his trust, will be made to pay the costs occasioned by his misconduct, it does not, therefore, follow that he must, in all cases, pay the costs of the whole suit. If the suit is proper for other purposes, and the executor or trustee is a necessary party, he will not be compelled to pay all the costs: though, in the course of the suit, it should appear that he has misconducted himself. Thus, where a suit was necessary to determine what construction was to be given to a will, whether the residue was to be divided between nine or between six claimants, and, in the course of the suit, it appeared that the executors had improperly permitted rents to be in arrear, and retained balances in their hands, as to which inquiries were directed, and they were charged with interest, Sir Thomas Plumer V. C. gave the executors the costs of the suit out of the fund, except only the costs of the inquiries as to the arrears of rent and balances: which, being solely occasioned by their breach of trust, he directed to fall upon them.[1] So, where trustees for sale purchased the trust estate at an undervalue, though without fraud and by auction, relief as to a resale was given against them with costs, but as to other parts of the case, namely, as to accounts which must have been taken, they were allowed their costs: as they would have been entitled to them in the ordinary way.[2]

In such cases, the Court frequently, instead of giving any direction with regard to costs, will content itself with making no order upon the subject: thereby leaving it to each party to pay his own costs.[3] Thus, where a trustee, instead of accumulating a fund, as directed by the will, had improperly kept the balance in his hands, yet, as the costs of the suit had in a great measure been occasioned by inquiring what rule the Court ought to adopt with respect to the computation of interest, it was thought hard, under the circumstances, to fix the executor with costs, even relatively to the breach of trust, and, therefore, the Court gave no costs.[4]

If a suit has been occasioned by the mistake or some slight neglect

[11] Sammes *v.* Rickman, 2 Ves. J. 36; see also Fitzgerald *v.* Pringle, 2 Moll. 534.

[12] 1 Cox, 134, 141; see also Bennett *v.* Atkins, 1 Y. & C. Ex. 247.

[1] Tebbs *v.* Carpenter, 1 Mad. 290, 308; and see Heighington *v.* Grant, 1 Phil. 600, 604; Attorney-General *v.* Gibbs, 1 De G. & S. 156, 161; Pride *v.* Fooks, 2 Beav. 430, 437; Hewett *v.* Foster, 7 Beav. 348; see, however, Knott *v.* Cottee, 16 Beav. 77; 16 Jur. 752.

[2] Sanderson *v.* Walker, 13 Ves. 601, 604, see also Pocock *v.* Reddington, 5 Ves. 794, 800.

[3] Newton *v.* Bennett, 1 Bro. C. C. 359, 362; Norton *v.* Steinkopf, 18 Jur. 720, V. C. W.; Harper *v.* Munday, 7 De G., M. & G. 369, 375; 2 Jur. N. S. 1197; Aylmer *v.* Winterbottom, 4 Jur. N. S. 19, V. C. W.

[4] Raphael *v.* Boehm, 13 Ves. 590, 592.

of the trustee, the Court will sometimes content itself with not giving * him costs;[1] and in some cases, where the conduct of *1421 trustees has not been wilful or perverse, the Court has permitted them to have them, although there has been loss to the estate. Thus, where trustees, who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, 6600*l.* for the estate and afterwards sold it for 3600*l.*, the Court, although it charged them with the loss, gave them their costs, as their conduct had not been wilful nor perverse.[2]

In general, where several defendants are involved in a breach of trust, the Court, in decreeing relief in respect of it, orders them to pay the costs of the suit jointly, without regard to their relative degrees of culpability: in order to give the plaintiff security for the payment;[3] but where trustees had made payments to the wrong persons, in consequence of forged certificates, the costs were primarily thrown upon the persons who had profited by the forgery, and ultimately upon the trustees.[4]

When it is said that personal representatives, and others bearing the character of trustees, are entitled to their costs out of the fund or estate which is the subject of the suit, the rule must be understood as applying strictly between themselves and their *cestui que trusts*. In suits between them and those who are strangers to the trust, the ordinary rules as to costs prevail:[5] though, if a trustee or personal representative institutes or defends a suit in respect of his trust estate, he may reimburse himself, out of that estate, any sums he may have expended properly in such suit. Thus, where a trustee for sale filed a bill for a specific performance, which was dismissed, it was dismissed with costs: the defendant being considered as having nothing to do with the character in which the plaintiff sued.[6]

Costs also are given against assignees personally, and not *quâ* assignees: they are to pay them, and then may be allowed to draw them out of the estate: but the opposite party is not to be exposed to the hazard, whether the estate is capable of bearing the costs or not: if it is not, it is the misfortune of the assignees.[7] So also, an executor plaintiff cannot be distinguished, with respect to costs, from the party whom he represents;[8] and if he revives a suit in which his testator was a party, he will incur his testator's liability * to costs. *1422 Thus, where an executor, after a bill by his testator had been dismissed with costs, revived the suit, alleging that he intended to appeal, he was ordered to pay the costs of the whole suit.[1]

[1] O'Callaghan *v.* Cooper, 5 Ves. 117, 128; Heighington *v.* Grant, and Harper *v.* Munday, *ubi sup.*; Beer *v.* Tapp, 10 W. R. 277, L. JJ.; but see *ante*, pp. 1416, 1417.

[2] Taylor *v.* Tabrum, 6 Sim. 281; and see Flanagan *v.* Nolan, 1 Moll. 84; Traverse *v.* Townsend, *ib.* 496.

[3] Lawrence *v.* Bowle, 2 Phil. 140; Byrne *v.* Norcott, 13 Beav. 336, 346.

[4] Eaves *v.* Hickson, 30 Beav. 136; 7 Jur. N. S. 1297; and for the order, see Seton, 634, No. 2.

[5] *Ante*, p. 1382. And see Jones *v.* Jones, 2 De G., J. & S. 294.

[6] Edwards *v.* Harvey, G. Coop. 40.

[7] Poole *v.* Franks, 1 Moll. 78.

[8] Westley *v.* Williamson, 2 Moll. 458.

[1] Horlock *v.* Priestley, 8 Sim. 621; Lyon *v.* McKenna, 2 Moll. 460; [Boynton *v.* Boynton, 9 Ch. Div. 250]. So where a plaintiff,

Where a bill was filed for the purpose of raising legacies charged on real estate, there being no personal estate, it was held, that the executor, taking out probate in such a case, could get no costs;[2] and the rule is the same in the case of the executor of an insolvent mortgagor.[3] The case is, however, said to be different with respect to an administrator *ad litem:* who will be entitled to his costs out of the fund;[4] or, if that is deficient, from the plaintiff.

If an executor who has neither proved nor acted, although he has not renounced, is made a party to a suit, for the purpose of raising charges by the sale of real estate, the personal estate being insufficient, the costs of such executor cannot be paid out of the fund, but must be borne by the plaintiff: as he was not a necessary party.[5]

In suits by a creditor against a personal representative for payment of his own debt only, and not for general administration, if the creditor succeeds in establishing his demand, the Court directs his costs, as well as the amount of his debt, to be paid to him out of the estate;[6] but the Court makes no order with regard to the payment of the costs of the personal representative: upon the principle that he may reimburse himself those costs out of the personal estate.[7] Where, however, the suit is instituted, either by creditors or by legatees, for a general administration of assets, so that the whole estate of the deceased must necessarily come under the direction of the Court, the practice is different, and the costs of the personal representatives are always provided for; and even where there is a deficiency of assets to pay the whole of the testator's debts, the costs constitute the first charge upon the fund arising from the personal estate.[8] And this principle will be acted *1423 * upon, where the testator is a defaulting trustee, and his estate is not sufficient to satisfy the breach of trust;[1] but the assignees in bankruptcy, *pendente lite*, of a defaulting administrator, will not be allowed their costs.[2]

who has been ordered to pay the costs of a proceeding in the suit, becomes bankrupt, and the suit is revived by his assignee, the Court will stay proceedings until the payment of the costs which the plaintiff has been ordered to pay. Cook *v.* Hathaway, L. R. 8 Eq. 612.

[2] Nash *v.* Dillon, 1 Moll. 236; but see Makings *v.* Makings, 1 De G., F. & J. 355, 359, L. C.

[3] Nicholson *v.* Falkiner, 1 Moll. 555.

[4] *Ibid.*

[5] *Ibid.*

[6] Davy *v.* Seys, Mos. 204.

[7] Humphrys *v.* Moore, 2 Atk. 108. Courts of Law, in giving judgment in favor of a creditor, direct the costs to be paid by the executor, *de bonis testatoris;* and if there be none, *de bonis propriis;* Jefferies *v.* Harrison, 1 Atk. 468. In Equity, however, the rule is different; for if the assets are not sufficient to pay both debt and costs, the executor will not be decreed to pay costs: Uvedale *v.* Uvedale, 3 Atk. 119; Twistleton *v.* Thelwel, Hardres, 165; unless he has misconducted himself, by having satisfied simple contracts, in preference to debts upon specialty; Jefferies *v.* Harrison, *ubi sup.* It may be suggested here, that, as an admission of assets by a representative is considered to be an admission of assets sufficient to pay costs as well as the principal demand: Philanthropic Society *v.* Hobson, 2 M. & K. 357; such admission should not be made, unless the party is satisfied that the assets will cover debt and costs; and see Roch *v.* Callen, 6 Hare, 531, 534.

[8] Bennett *v.* Going, 1 Moll. 529; Young *v.* Everest, 1 R. & M. 426; Gaunt *v.* Taylor, 2 Hare, 413, 420; Ottley *v.* Gilby, 8 Beav. 602, 605; Tanner *v.* Dancey, 9 Beav. 339, 342; see, however, Davy *v.* Seys, Mos. 204; Adair *v.* Shaw, 1 Sch. & Lef. 280.

[1] Haldenby *v.* Spofforth, 9 Beav. 195.

[2] Carr *v.* Henderson, 11 Beav. 415; Morrison *v.* Morrison, 7 De G., M. & G. 214, 224, 226.

The right of the personal representative to his costs, in such cases, may be defeated by his collusion, or by some of those circumstances which have been already pointed out as disentitling a trustee from his right to the costs, out of the fund; but where there are no circumstances of that nature, the costs of the personal representative constitute the primary charge:[3] and he is entitled to immediate payment of them: even though he may be indebted to the testator in a sum payable on a future day.[4]

Where a suit for the administration of an estate has been properly instituted, the costs of the plaintiff and all necessary parties are considered as expenses in administering the estate; and are the first charge upon it;[5] and if the estate is insufficient for the payment of all the costs, the executor's costs are the first charge; then the plaintiff's: and then those of the other parties.[6] Where the plaintiff's claim fails, or the estate is exhausted by prior demands, so that he does not obtain payment of his demand, he is nevertheless entitled to his costs, if the Court has been enabled to administer the estate through his exertions.[7] Where the costs of all parties were ordered to be taxed and paid, as between solicitor and client, on the assumption that the fund was sufficient to pay them all, and it subsequently appeared that the fund was * insufficient, the Court rectified the order, by giv- *1424 ing the executors their costs in priority.[1]

Where a creditor institutes a suit, knowing that the estate has been wholly exhausted, or that there are no assets available for the payment of his claim,[2] or is informed thereof, before or after the institution of the suit, by the executor, or by creditors having prior claims, and such information turns out to be correct, he will be ordered to pay the whole of the costs, or the costs from the time he received such infor-

[3] Although a plaintiff is entitled to file his bill for an account and distribution, yet where all the charges of fraud, collusion, and misconduct on the part of the defendants, which formed the main ground of the suit, were proved to be false, unjust, and vexatious, the bill was dismissed with costs, as to the defendants not liable to account, and the defendant who was accountable as trustee, was allowed all his taxable costs, extra charges, and expenses, out of the fund, before distribution. Minuse *v.* Cox, 5 John. Ch. 441.

[4] Stevens *v.* Pillen, 12 Jur. 282, V. C. W.; but see Leedham *v.* Chawner, 4 K. & J. 458; where a trustee's expenses, of an attempted premature sale, were held not a primary charge.

[5] Loomes *v.* Stotherd, 1 S. & S. 458, 461; Larkins *v.* Paxton, 2 M. & K. 320; Barker *v.* Wardle, *ib.* 818; Bennett *v.* Going, 1 Moll. 529; Lechmere *v.* Brazier, 1 Russ. 72, 80; Tanner *v.* Dancey, 9 Beav. 339, 342. Where an executor is only entitled to priority for a portion of his costs, see Blenkinsop *v.* Foster, 3 Y. & C. Ex. 207; Seton, 145. A creditor, who came in after the Master had filed his report, and obtained leave to prove his debt, without stipulating to contribute to the costs of the suit brought by other creditors against the executors — the assets not being sufficient to pay all the debts proved — was not allowed his costs out of the fund. Mason *v.* Codwise, 6 John. Ch. 183.

[6] Tipping *v.* Power, 1 Hare, 405, 411; 6 Jur. 134; Tanner *v.* Dancey, *ubi sup.*; Sanderson *v.* Stoddart, 9 N. S. 1216, M. R. As to cases where plaintiff is entitled to costs as between solicitor and client, see *post*, p. 1436; and as to costs of creditors coming in under a decree, see *ante*, p. 1212; but see Wetenhall *v.* Dennis, 33 Beav. 285; S. C. *nom.* Wettenhall *v.* Davis, 9 Jur. N. S. 1216, where a plaintiff legatee's priority over the other parties, was confined to his costs of getting in and realizing the estate.

[7] Wedgwood *v.* Adams, 8 Beav. 103, 105; Seton, 145.

[1] Gaunt *v.* Taylor, 2 Hare, 413, 420; see *contra*, Swale *v.* Milner, 6 Sim. 572.

[2] Egan *v.* Baldwin, 1 Moll. 539.

mation ;[3] or be disallowed all his costs, or his costs incurred after the notice.[4]

Where, however, in a case in which there were no residuary or pecuniary bequests, the next of kin of the testator instituted a suit for the administration of the estate, and the debts exhausted the residue, it was held that the plaintiff must bear his own costs ; but that the executor must have his out of the specific legacies.[5]

Where, in a creditors' suit, the creditors, who had signed an undertaking to contribute their proportion of the costs, had been paid in full, they were, on the assets subsequently proving deficient to pay the costs, ordered, on the petition of the plaintiff, to contribute to the plaintiff's costs ; and, for that purpose, to repay proportional parts of what they had received.[6]

In suits by *puisne* incumbrancers or general creditors, for the administration of assets, it is not usual to make persons having prior specific charges parties to the suit, as they will be untouched by a decree for sale ;[7] and may therefore, if they are made parties, insist upon having the bill, as against them, dismissed with costs. They may, however, adopt the suit, and consent to a sale, and to receive payment of their principal and interest out of the proceeds : in which case, although the decree is for the payment of all parties, according to their priorities, as they have adopted the suit the costs of all parties must, in the first instance, come out of the fund.[8]

*1425 * The right of a creditor, who files a bill for an administration of assets, to be paid his costs out of the fund in Court, does not affect the personal representative's right of retainer for satisfaction of a debt due to himself ; and even where part of the personal estate had been paid into Court by an administrator, and another part of it remained in his hands, but there was a debt due to him from the intestate, greater than the amount of both funds, and no other assets to

[3] Bleuett *v.* Jessop, Jac. 240, 242 ; King *v.* Bryant, 4 Beav. 460, 462 ; Fuller *v.* Green, 24 Beav. 217.

[4] Robinson *v.* Elliott, 1 Russ. 599 ; Loomes *v.* Stotherd, 1 S. & S. 458, 461 ; Attorney-General *v.* Gibbs, 1 De G. & S. 156, 161 ; Sullivan *v.* Bevan, 20 Beav. 399.

[5] Newbegin *v.* Bell, 23 Beav. 386.

[6] Thompson *v.* Cooper, 2 Coll. 87 ; *ante*, p. 1213.

[7] *Ante*, p. 214.

[8] Brace *v.* Duchess of Marlborough, Mos. 50 ; White *v.* Bishop of Peterborough, Jac. 402 ; Egan *v.* Baldwin, 1 Moll. 539 ; Kenebel *v.* Scrafton, 13 Ves. 370 ; Armstrong *v.* Storer, 14 Beav. 535, 538 ; and see *ante*, p. 1390 ; see also Ford *v.* Earl of Chesterfield, 21 Beav. 426 ; Wright *v.* Kirby, 23 Beav. 463 ; Dighton *v.* Withers, 31 Beav. 423 ; Ward *v.* Mackinlay, 10 Jur. N. S. 1063 ; 13 W. R. 65, L. JJ. ; 2 De G., J. & S. 358 ; *ante*, p. 284, note, as to the present practice in suits concerning mortgages. Where a mortgagee brought a bill to foreclose, and subsequent incumbrancers answered and disclaimed as to him, it was held that they were entitled to the costs of their answers, out of the fund, although, as between themselves, they contested the right to the surplus. Mackie *v.* Cairnes, 5 Cowen, 547 ; Catlin *v.* Harned, 3 John. Ch. 61. Where the widow was necessarily made a party to a bill of foreclosure, she was held entitled to her costs out of two-thirds of the surplus in Court, without prejudice to her claim of dower out of the gross amount of the surplus. Tabele *v.* Tabele, 1 John. Ch. 45. Where a defendant disclaims, he is ordinarily entitled to costs. Usher *v.* Jouitt, 5 Litt. 32 ; Ford *v.* Chesterfield, 16 Beav. 520 ; Bellamy *v.* Brickenden, 4 K. & J. 670 ; Gurney *v.* Jackson, 1 S. & G. 97 ; Hiorns *v.* Holton, Jur. (52) 1077, R. ; S. C. 16 Beav. 259 ; Ward *v.* Shakeshaft, 1 Dr. & S. 269 ; 1 Seton, Dec. (3d Eng. ed.) 378 ; McKinnon *v.* McDonald, 4 Jones Eq. (N. C.) 1.

satisfy the general body of creditors, or even to pay the costs of the plaintiff, Sir John Leach M. R. was of opinion that the administrator's right of retainer was not affected by the circumstance of his having paid the money into Court, and that the plaintiff was not entitled to have his costs satisfied out of a fund to which the right of retainer extended.[1] But although a personal representative may retain for the amount of his own debt, in preference to the claim of the plaintiff for the costs of the suit, the same thing cannot be done by a devisee of real estates, which are subject to the payment of debts. If, however, a devisee gives notice that his right of retainer will exceed the assets, after such notice the plaintiff may be considered as proceeding at the peril of costs.[2]

Where a bill was filed to raise legacies charged on real estate, and the estate was insufficient to provide for payment of the legacies and the costs of suit in full, the devisees of the estate were held entitled to their costs out of the fund, in priority to those of the legatees.[3]

The above rules apply to cases where there is a deficiency in the fund realized by the suit to answer all the claims upon it: but, where this is not the case, the general rule is, that, wherever it is necessary to come to the Court, to establish a demand upon the property of persons deceased, the costs of such proceedings must be borne out of the assets.[4] Therefore, if a bill be filed by a creditor for his debt, or by a legatee for his legacy, the costs of the suit must be paid out of the testator's estate: so, also, must the costs of a suit, to obtain the benefit of a *donatio mortis causâ*. The expenses of a suit, also, by residuary legatees, or next of kin, for an account and distribution of an estate, must be defrayed out of the general estate. In such suits, the circumstance * that *1426 the defendant has offered to the plaintiff a full inspection of his account, makes no difference: a plaintiff, in such a case, is not bound to receive and acquiesce in the mere unsupported statement of the accounting party; he has a right to have the account of the estate taken with the sanction of oaths, and all other guards against deception which a Court of Equity can supply.[1] The circumstance, that the plaintiff himself, besides being a residuary legatee, is a co-executor with the defendants, will not make any difference in the application of the rule: though, if he files his bill in the character of creditor as well as legatee, and fails in establishing his claim as creditor, he will have to bear any additional costs which may have been occasioned by his unfounded claims.[2] Where, however, the executor had truly stated the condition of the estate, a residuary legatee, who filed a bill to take the

[1] Chissum *v.* Dewes, 5 Russ. 29; Langton *v.* Higgs, 5 Sim. 228; Hall *v.* Macdonald, 14 Sim. 1; and as to right of retainer, see Fox *v.* Garrett, 28 Beav. 16; Boyd *v.* Brookes, 13 W. R. 419, L. C.

[2] Loomes *v.* Stotherd, 1 S. & S. 458; Hall *v.* Macdonald, *ubi sup.*

[3] Woollatt *v.* Woollatt, 4 Jur. N. S. 1292, V. C. S.

[4] See Hampson *v.* Brandwood, 1 Mad. 381, 394; Gardner *v.* Parker, 3 Mad. 184. For the principles on which such costs will be taxed, see *post*, pp. 1436, 1437.

[1] Sharples *v.* Sharples, M'Lel. 506; 13 Pri. 745.

[2] *Ibid.*

accounts, was ordered to pay the costs of the suit out of his own share.[3]

Where a bill is brought to secure and have the benefit of a contingent interest devised over, the costs must be paid out of the general assets of the testator who, by his will, occasioned the difficulty;[4] and it is invariably held, that if, in the course of a suit for the administration of an estate, a difficulty arises upon the construction of the will, the costs occasioned by such difficulty must be defrayed out of the assets:[5] even though the difficulty has arisen from parol evidence, introduced on the part of the defendant.[6]

When it is said, that a legatee, filing a bill for his legacy, will be entitled to his costs out of the estate, it must be understood only as applying to those cases in which he is successful in the suit. If a person claims as legatee, and his bill is dismissed, he will not, in general, be allowed his costs out of the testator's estate, notwithstanding there is an ambiguity in the will, which renders it necessary to apply to *1427 the Court for its construction.[7] * In such cases, the Court will usually, if the case involves considerable difficulties, occasioned by conflicting decisions or the acts of the testator, or the plaintiff has a fair ground for making his claim, make each party bear his own costs, by ordering the dismissal to be without costs. Therefore, where a bill was filed, by the next of kin of a testator against the executors, for the undisposed-of residue, and the next of kin failed, the bill was dismissed without costs: because the Court thought there was some excuse for their litigating the executor's right to it.[1] And where, after a verdict upon an issue, finding against the legitimacy of a person claiming a legacy as a legitimate child, a question arose as to the costs, the Court refused to give costs against him: as he had always borne the name of the family, and been received in it.[2] Where, however, the bill is not simply dismissed, but a declaration of right is made, the plaintiff, though unsuccessful, is often given his costs.[3]

[3] Mackenzie *v.* Taylor, 7 Beav. 467; Thompson *v.* Clive, 11 Beav. 475, 480; and see Attorney-General *v.* Gibbs, 1 De G. & S. 156, 161.

[4] Studholme *v.* Hodgson, 3 P. Wms. 303.

[5] [Maxwell *v.* Maxwell, L. R. 4 H. L. 506; Bateman *v.* Bateman, 9 C. E. Green, 70. *Infra*, 1427, n. 6.] This rule applies only to cases arising under wills; it does not apply where difficulties arise upon the construction of deeds: in which cases, although, if the deed which gives rise to the suit be so darkly framed as to occasion fair doubts as to its construction, the Court will excuse the unsuccessful parties their costs, it will not compel the successful party to pay them out of the estate. Hampson *v.* Brandwood, 1 Mad. 381, 394; see also Earl of Orford *v.* Churchill, 3 V. & B. 59, 71, where the costs of an unsuccessful claim, set up on behalf of an infant, to a share of a fund under a settlement, were charged, not upon the general fund, but upon that portion of the fund to which the infant was held to be entitled. See also Collett *v.* Collett, 14 W. R. 446, M. R.

[6] Nourse *v.* Finch, 1 Ves. J. 344, 362; see King *v.* Strong, 9 Paige, 94; Smith *v.* Smith, 4 Paige, 271; Rogers *v.* Ross, 4 John. Ch. 608; Irving *v.* De Kay, 9 Paige, 521.

[7] Lister *v.* Sherringham, cited 1 Newl. Pr. 592; see, however, Lynn *v.* Beaver, T. & R. 63, 69; Windham *v.* Graham, 1 Russ. 331, 347; Lee *v.* Delane, 4 De G. & S. 1, 6; 14 Jur. 861.

[1] Brasbridge *v.* Woodroffe, 2 Atk. 69.

[2] Forbes *v.* Taylor, 1 Ves. J. 99.

[3] Merlin *v.* Blagrave, 25 Beav. 125, 135, 136; Lynn *v.* Beaver, T. & R. 63, 69; Thomason *v.* Moses, 5 Beav. 77, 81; Wedgwood *v.* Adams, 8 Beav. 103; Johnston *v.* Todd, *ib.* 489; Cooper *v.* Pitcher, 4 Hare, 485; Boreham *v.* Bignall, 8 Hare, 131; Turner *v.* Frampton, 2 Coll. 331; Lee *v.* Delane, 4 De G. & S. 1; 14 Jur. 861; Hodgson *v.*

It may be noticed here, that in a case where a bill was filed for a legacy, which had been bequeathed to an infant, and which had been more than satisfied by advances made for the infant's benefit, during his minority, and by a larger legacy bequeathed to the infant by the executor, the Court decreed in favor of the legatee, though there had been no demand for ten years after he came of age; but as it considered the demand very ungracious, it gave the legatee no costs.[4] So also, where the legatee persisted in useless litigation, no costs were allowed.[5]

It is necessary, here, to advert to an important distinction with regard to the portion of the testator's estate out of which the costs are to be paid: for the rule is, that where any doubt or ambiguity arises under a will, with reference to any bequest or devise, which renders an application to the Court necessary, the costs occasioned by such application are to be paid, not out of the property with respect to which the doubt arises, but out of the general assets not otherwise disposed of.[6] In other words, they are * payable out of what is usually termed *1428 the residuary personal estate: although, perhaps, the term may not be quite correct, inasmuch as the residuary estate is, strictly speaking, that part of the estate which remains after payment of all legal and testamentary claims upon the estate, whether for debts, legacies, or costs;[1] and this rule applies, although the testator charges his debts, funeral, and testamentary expenses, upon a specific fund.[2] Where, however, a testator charged a specific part of his estate with his debts, and the costs of executing the trusts of his will,[3] or with his debts, funeral, and testamentary expenses, in exoneration of the residue,[4] or in substitution for the residue, which failed,[5] the costs of the suit were held to be payable out of the part so charged.

When next of kin, or persons claiming as a class under the will of a testator, succeed in establishing their title under a decree for the admin-

Clarke, 1 De G., F. & J. 394; and *ante*, p. 1404. [Garth *v.* Townsend, L. R. 7 Eq. 220; Thacker *v.* Key, L. R. 8 Eq. 408.]

[4] Lee *v.* Brown, 4 Ves. 362, 369.

[5] Ottley *v.* Gilby, 8 Beav. 602, 605; Thompson *v.* Clive, 11 Beav. 475, 480.

[6] Studholme *v.* Hodgson, 3 P. Wms. 308; Jolliffe *v.* East, 3 Bro. C. C. 25, 27; Baugh *v.* Reed, *ib.* 193; 1 Ves. J. 257, 265; Attorney-General *v.* Hurst, 2 Cox, 364, 366; S. C. *nom.* Attorney-General *v.* Winchelsea, 3 Bro. C. C. 375, 381; Barrington *v.* Tristram, 6 Ves. 345, 349; Howse *v.* Chapman, 4 Ves. 542; Pearson *v.* Pearson, 1 Sch. & Lef. 12; Bagshaw *v.* Newton, 9 Mod. 283; Nisbett *v.* Murray, 5 Ves. 149, 158; Wilson *v.* Brownsmith, 9 Ves. 180, 182; Wilson *v.* Squire, 13 Sim. 212; Handley *v.* Davies, 5 Jur. N. S. 190, V. C. S.; [Wilkinson *v.* Lindgren, L. R. 5 Ch. App. 570;] Smith *v.* Smith, 4 Paige, 271; King *v.* Strong, 9 Paige, 94; Irving *v.* De Kay, 9 Paige, 521; Sawyer *v.* Baldwin, 20 Pick. 378, 388; Rogers *v.* Ross, 4 John. Ch. 608; Bowditch *v.* Soltyk, 99 Mass. 136, 141; [Deane *v.* House for Aged Colored Women, 111 Mass. 132. But see Bigelow *v.* Morong, 103 Mass. 287. *Ante*, 1426, n. 5].

[1] Eyre *v.* Marsden, 4 M. & C. 231, 243; Ripley *v.* Moysey, 1 Keen, 578; Pickford *v.* Brown, 2 K. & J. 426; 2 Jur. N. S. 781, 783; Sanders *v.* Miller, 25 Beav. 154; Stringer *v.* Harper (No. 2), 26 Beav. 585; 5 Jur. N. S. 401; Maddison *v.* Chapman, 1 J. & H. 470; Joliffe *v.* Twyford, 4 Jur. N. S. 1165, M. R.

[2] Browne *v.* Groombridge, 4 Mad. 495, 502; Linley *v.* Taylor, 1 Giff. 67; Stringer *v.* Harper, *ubi sup.*; and see Gilbertson *v.* Gilbertson, 34 Beav. 354, where the costs of a special case were held not to be testamentary charges.

[3] Alsop *v.* Bell, 24 Beav. 451; see, however, Lord Brougham *v.* Lord Poulett, 19 Beav. 119; 1 Jur. N. S. 151.

[4] Morrell *v.* Fisher, 4 De G. & S. 422, 424.

[5] Wilson *v.* Heaton, 11 Beav. 492, 494.

istration of the estate, it is usual for them to be allowed their costs: not their costs incurred out of doors in collecting information as to the pedigree of the party: not the costs of private inquiry; but the costs incurred in the Judge's Chambers, and generally of proceedings in the suit;[6] and the rule prevails, whether they are made parties to the suit, or the fund is administered, without formally bringing them before the Court upon the record.[7] In such cases, if the residuary estate has ultimately to be divided amongst different classes of persons, the practice is for the costs of all the claimants to be paid out of the general estate, before any apportionment is made: even though the effect of such a mode of payment is to diminish the fund of one class of claimants, to an extent materially greater than the amount of costs due to that particular class.[8]

Moreover, where the particular fund which has occasioned the litigation is no part of the residue, the general rule is, that the residuary estate should bear the costs of administering the estate. Thus, where it was necessary to have the decision of the Court, as to whether *1429 a legacy of 10,000*l.*, given to two sisters, was a joint * bequest or in common, the costs were ordered to be paid, not out of the legacy, but out of the general assets.[1] So, where a bill was brought to secure and have the benefit of a contingent interest devised over, the costs were ordered to be paid out of the residuary estate; and where the question was, whether a legacy was specific or not, the costs of determining that question were ordered out of the general estate, in preference to the specific legacy, although the general estate was made the subject of a residuary bequest.[2] Upon the same ground, it was formerly held, that by giving a legacy to an infant, the testator made it necessary to come into Court for directions how to lay it out; and that, therefore, the costs of a bill by an infant legatee, to have the legacy secured for his benefit, must be paid out of the residue.[3] Such applications have, however, been rendered unnecessary, by the 36 Geo. III. c. 52, § 32, which, in the case of an infant, authorizes the executor to pay the legacy into Court; and in *Whopham* v. *Wingfield*,[4] the Court said that, in future, the costs would not be given in such a case. In the application of the rule, that the costs of suit are payable out of the general residue, no distinction exists between the cases in which it is disposed of, and those in which it is not;[5] and where there are specific bequests and pecuniary legacies, which exhaust the whole estate, so that there is no residue, the costs occasioned by the

[6] Shuttleworth *v.* Howarth, C. & P. 228, 232; and see S. C. 4 M. & C. 492; 5 Jur. 2; *Re* Taylor, Daubney *v.* Leake, L. R. 1 Eq. 495, M. R.; Hubbard *v.* Latham, 1 W. N. 105; 14 W. R. 553, V. C. K; Wragg *v.* Morley, 14 W. R. 949, V. C. W.

[7] Hutchinson *v.* Freeman, 4 M. & C. 490; 3 Jur. 694, Swift *v.* Swift, 1 De G., F. & J. 160; see *ante*, pp. 437, 1213.

[8] Shuttleworth *v.* Howarth, *ubi sup.*

[1] Joliffe *v.* East, 3 Bro. C. C. 25, 27.

[2] Nisbett *v.* Murray, 5 Ves. 149, 158.

[3] Anon., Mos. 5.

[4] 4 Ves. 630; see *ante*, p. 81.

[5] Eyre *v.* Marsden, 4 M. & C. 244; Nisbett *v.* Murray, *ubi sup.*; Howse *v.* Chapman, 4 Ves. 542, 550; Cookson *v.* Bingham, 17 Beav. 262, 266.

specific bequests will be thrown upon the general fund, out of which the pecuniary legacies are payable. Thus, in *Barton* v. *Cooke*,[6] where there were specific and pecuniary legacies, and the personal estate, after setting apart the specific legacies, was not sufficient to pay all the pecuniary legacies, so that an abatement amongst them became necessary, the costs were ordered to be paid out of the personal estate not specifically bequeathed. The rule will also prevail, where property intended to be disposed of has, in the result, been declared undisposed of: there the costs will not be thrown upon the property so declared to be undisposed of, but, as in other cases, upon the general estate. Thus, in *Howse* v. *Chapman*,[7] where some of the bequests in favor of the City of Bath, which were specific, were held to be void under the Statute of Mortmain, the costs were ordered, in the first instance, to be paid out of the residue undisposed of, that is, out of the property not specifically given; but, in case of a deficiency, the remainder of the costs were to be defrayed out of the property specifically bequeathed, and to the payment thereof the property well given, and the property * intended *1430 to be given, but which had been held to be undisposed of, were to contribute *pro ratâ*.

So, where a legacy given by a will has lapsed by the death of the legatee in the lifetime of the testator, the costs will be paid out of the general fund, and not out of the lapsed legacy;[1] and the same rule applies, where the intestacy, as to part, does not arise from lapse, but from revocation of a bequest: as in *Cresswell* v. *Cheslyn*,[2] as explained in the note to *Skrymsher* v. *Northcote*;[3] and in the latter case itself, in which the question was argued, that the costs of the suit ought to be paid out of the part undisposed of, and not out of the general estate, Sir Thomas Plumer M. R. decided that the costs should be apportioned.[4]

It makes no difference whether the property undisposed of (whether from lapse or from any other cause) was given as a specific or pecuniary bequest, or as a share of the residue: in either case, the costs of the suit will not fall on the undisposed of share, but on all the shares. Thus, in *Ackroyd* v. *Smithson*,[5] the costs were paid *pro ratâ* out of the shares of the residue which the legatees took, and those shares which had lapsed; and, in cases where part of the property given to a charity becomes undisposed of, from being within the Mortmain Act, it has been long settled that the costs are paid *pro ratâ* out of the property so undisposed of, and the property well bequeathed to the charity.[6]

[6] 5 Ves. 461, 464; [Milly *v.* Harrison, 7 Coldw. 191].

[7] 4 Ves. 542, 551.

[1] Roberts *v.* Walker, 1 R. & M. 752, 767; [Trethewy *v.* Helyar, 4 Ch. Div. 53; Fenton *v.* Wills, 7 Ch. Div. 33; Blann *v.* Bell, 7 Ch. Div. 382].

[2] 2 Eden, 123.

[3] 1 Swanst. 571, n. (*d*).

[4] See Eyre *v.* Marsden, 4 M. & C. 231, 245.

[5] 1 Bro. C. C. 503. The printed report, however, is silent as to costs, but the direction as to costs is shown by the Registrar's book: see 4 M. & C. 245; see also Maddison *v.* Pye, 32 Beav. 658.

[6] Per Lord Cottenham, in Eyre *v.* Marsden, *ubi sup.*; and see Attorney-General *v.* Lord Winchelsea, 3 Bro. C. C. 373, 380; Attorney-General *v.* Hurst, 2 Cox, 364, 366; Howse *v.* Chapman, 4 Ves. 542, 550; Taylor *v.* Bogg, 5 Jur. N. S. 137, V. C. S.

The cases above referred to, establish the principle that, where an intestacy as to part of the personal estate arises from the intention of the testator being defeated by the happening of some event, or by the operation of the law, the part thus falling to the next of kin, is, in his hands, subject to the same liability as to costs, and no more, that it would have been subject to, if the gift had taken effect; and the principle has been extended to cases where accumulations directed by a will have been declared absolutely null and void, under the Thellusson Act (39 & 40 Geo. III. c. 98). Thus, in *Eyre* v. *Marsden*,[7] where Lord Langdale M. R.,[8] having declared that a direction for the accumulation of the produce of the testator's freehold and personal
*1431 estate was void under * the above Act, and that such parts of the accumulation as arose from the real estate belonged to the heir, directed the costs of the suit to be paid *pro ratâ* by the heir and personal representatives, out of the accumulations devolving upon them: Lord Cottenham, upon appeal, varied the decree, by directing the costs to be paid out of the general estate of the testator.[1]

But although the rule is, that the costs of a litigation, in the course of administering a will, are given out of the general assets, in preference to the particular fund, yet, if the particular fund has been severed from the residue, and the question is merely between the persons claiming to be entitled to it, the costs must come out of the particular fund.[2] Thus, it is the ordinary course of the Court, where there is some legacy clearly payable, but it is uncertain who is entitled to it, to order the legacy to be paid into Court to a separate account, with liberty for any person interested in it to apply, and to proceed to a distribution of the residue of the testator's estate: in such case, any costs which may afterwards be incurred, in inquiring who is entitled to such legacy, must come out of the particular fund: for the Court will never postpone the distribution of the residue, to answer the costs of such inquiry.

Where the question was, whether certain legacies were specific or not, and inquiries had been directed as to the appointment of a guardian and maintenance for a specific legatee, who was an infant, the costs of the suit, except as to the inquiries with respect to the guardian

[7] 4 M. & C. 231; and see Elborne *v.* Goode, 14 Sim. 165, 179; 8 Jur. 1001; Barrett *v.* Buck, 12 Jur. 771, V. C. W.; Holgate *v.* Haworth, 17 Beav. 259; Oddie *v.* Brow, 4 De G. & J. 179, 198; 5 Jur. N. S. 635, 637; Green *v.* Gascoyne, 11 Jur. N. S. 145; 13 W. R. 371, L. C.; Combe *v.* Hughes, 2 De G., J. & S. 657, 662, 664. [When costs are thrown upon real estate descended. Row *v.* Row, L. R. 7 Eq. 414.]

[8] 2 Keen, 564, 578, 580.

[1] 4 M. & C. 248.

[2] Jenour *v.* Jenour, 10 Ves. 562, 573; see also Shaw *v.* Pickthall, Dan. 92; Duke of Manchester *v.* Bonham, 3 Ves. 61, 64; King *v.* Taylor, 5 Ves. 806, 810; Wilson *v.* Squire, 13 Sim. 212; Dugdale *v.* Dugdale, 12 Beav. 247, 251; Governesses' Institution *v.* Rusbridger, 18 Beav. 467; Richardson *v.* Rusbridger, 20 Beav. 136; Attorney-General *v.* Lawes, 8 Hare, 32, 43; see also Pennington *v.* Buckley, 6 Hare, 451, 455. [So, where the bill of the personal representative for instructions was limited to part of the estate, the costs will be charged on that part. Bigelow *v.* Morong, 103 Mass. 287.] Costs of taking out administration to a share were allowed, under circumstances, out of the general estate. Cotton *v.* Penrose, 13 Jur. 761, V. C. K. B. If the devisee of real estate, charged with the payment of a legacy, refuses to pay the same, the costs of the legatee's suit to recover it will be a charge upon the real estate. Birdsall *v.* Hewlett, 1 Paige, 82.

and maintenance, were ordered to be paid out of the general assets, and the costs as to the guardian and maintenance were directed to be paid by sale of a sufficient part of the specific legacy.[3] So, also, the costs of the Bank of England, made a party for the security of a legacy, the right to which was under discussion, were paid out of the legacy;[4] and if the plaintiffs, in a suit relating to the construction of a will, unnecessarily mix up other questions with the questions arising under the will of the testator, the costs of such part of the suit only as relate to the construction of the will, will be paid out of the general assets. Thus, where a doubt arose under a will, whether a legacy given by the testator was undisposed of, and a suit was instituted by the residuary legatees of one of the next of kin of the testator, instead of *his personal representative, in the course of which questions *1432 arose between them, the costs of so much only of the suit as related to the decision upon the will were ordered to be paid out of the general assets of the original testator.[1]

It may be remarked that, where a party entitled, either to a legacy or share of a residue, incumbers his legacy or share, or by any act of his own occasions additional expense in respect of it, beyond what is necessary for the due administration of the estate, the additional expense will be thrown upon the particular fund or portion; and only one set of costs will be allowed out of the estate to the party entitled and his incumbrancers, and such costs will in general be made payable to the first incumbrancer.[2]

A similar rule will be applied, in the case of a bankrupt legatee and his assignees;[3] of a trustee and his *cestui que trust;*[4] and of a husband and wife, living apart, and improperly severing in their defence.[5]

Where different funds are the subject of distribution or discussion, in the same suit, the costs of the suit are generally apportioned *pro ratâ* between the different funds.[6]

In *Leacroft* v. *Maynard*,[7] where the testator charged his legacies upon his real estate, and then bequeathed a legacy to a charity, the amount of which he altered by his codicil, whereupon a bill was filed for the general administration of the testator's estate, and another bill was also unnecessarily filed by the heir-at-law to have the legacy bequeathed to the charity declared void under the Statute of Mortmain, and to have

[3] Barton *v.* Cooke, 5 Ves. 461, 464.

[4] Hammond *v.* Neame, 1 Swanst. 38.

[1] Skrymsher *v.* Northcote, 1 Swanst. 566, 572. [See, as to costs of legatee's suit, where residue paid to residuary legatee. Spencer *v.* Ward, L. R. 9 Eq. 507.]

[2] Greedy *v.* Lavender, 11 Beav. 417, 420; Seton, 162, No. 12, 167, where form of order is given; Remnant *v.* Hood (No. 2), 27 Beav. 613; Ward *v.* Yates, 1 Dr. & Sm. 80; and see Bassevi *v.* Serra, 3 Mer. 674, 676; 14 Ves. 313, 317; see also Mocatta *v.* Lousada, cited 3 Mer. 676; 14 Ves. 317. [See Perceval *v.* Perceval, L. R. 9 Eq. 386, 394.]

[3] Brace *v.* Ormond, 2 J. & W. 435; Garey *v.* Whittingham, 5 Beav. 268, 270; 6 Jur. 545.

[4] Remnant *v.* Hood, *ubi sup.*; Farr *v.* Sheriffe, 4 Hare, 528; 10 Jur. 630.

[5] Garey *v.* Whittingham, *ubi sup.*

[6] Heighington *v.* Grant, 1 Beav. 228, 231; Johnston *v.* Todd, 8 Beav. 489, 492; Hopkinson *v.* Ellis, 10 Beav. 169, 176; Sanders *v.* Miller, 25 Beav. 154; Elborne *v.* Goode, 14 Sim. 165, 179; 8 Jur. 1001; Christian *v.* Foster, 2 Phil. 161, 166; and see Attorney-General *v.* Lawes, 8 Hare, 32.

[7] 1 Ves. J. 279; 3 Bro. C. C. 233.

the real estate conveyed to him discharged of it: the Court directed that the costs of the suits, so far as they related to the personal estate, should come out of the personal estate, and that the costs which related to the real estate should be borne by the real estate; so that the costs of the bill filed by the heir should fall upon the real estate. So, also, the costs have been apportioned between the appointed and unappointed parts of a fund,[8] according to the different values of the appointed parts;[9] and between several charities, where one scheme was set-
*1433 tled for them all.[10] So, also, where there were no debts or * personal estate, the costs were thrown ratably on devised and descended realty.[1] Similar decrees, for an apportionment of costs between real and personal estates, appear to have been made in *Jones* v. *Mitchell*,[2] and *Dixon* v. *Dawson*.[3]

Where the suit was for the administration of the estate of a testator, but it also involved the execution of the trusts of a settlement, the costs occasioned by that portion of the suit relating to the settlement were directed to be borne by the settlement fund;[4] and in *King* v. *Taylor*,[5] where the question was whether a legacy of stock and a share of the residue under a will went to the husband of a married woman who was dead, or to her brother, and the Court decided that the legacy went to the husband, and the share of the residue to the brother, the costs were ordered to be borne by each fund in moieties.

In suits to rectify settlements, in which no blame is imputable to either side, the costs will, in general, be made payable out of the settled property.[6]

It may be mentioned, in this place, that where a *cestui que trust*, having a life-interest only, is declared entitled to his costs out of the trust estate, the Court will not content itself with merely giving him a lien upon the *corpus* of the estate by the decree, leaving him to enforce it by subsequent proceedings, but it will direct an immediate sale of a sufficient part of the estate to raise the costs; and it appears that the omission of such a provision in the decree may be the subject of a rehearing.[7] A life-interest will not be valued, for the purpose of charging costs upon it.[8]

In the case of costs, the Court will take any fund which, in the ab-

[8] Trollope *v.* Routledge, 1 De G. & S. 662, 671.

[9] Warren *v.* Postlethwaite, 2 Coll. 116, 123.

[10] *Re* Stafford Charities, 26 Beav. 567.

[1] Bagot *v.* Legge, 2 Dr. & Sm. 259; 10 Jur. N. S. 1092.

[2] 1 S. & S. 290, 295.

[3] 2 S. & S. 327, 340; see also 1 Bro. C. C., ed. Belt, 265, n. (3); Walter *v.* Maunde, 19 Ves. 424, 429; Bunnett *v.* Foster, 7 Beav. 540, 544; Johnston *v.* Todd, 8 Beav. 489, 492; Hopkinson *v.* Ellis, 10 Beav. 169, 176; Sanders *v.* Miller, 25 Beav. 154; and see Seton 247.

[4] Irby *v* Irby, 24 Beav. 525.

[5] 5 Ves. 806, 810. [See, as to mortgagee's costs in suit to execute trusts of surplus proceeds of mortgaged estates, Habergham *v.* Ridehalgh, L. R. 9 Eq. 395.]

[6] Stock *v.* Vining, 25 Beav. 235.

[7] Burkett *v.* Spray, 1 R. & M. 113, 115; Mandeno *v.* Mandeno, Kay Ap. 2, 4. It seems, however, that in such a case, the party entitled to the costs, instead of appealing, may apply by motion to have them raised by sale. See Cannell *v.* Beeby, Beames on Costs, Ap. No. 7.

[8] Coombe *v.* Hughes, 13 W. R. 700. L. JJ.; S. C. *nom.* Combe *v.* Hughes, 2 De G., J. & S. 657, 664.

sence of all others, is liable to costs, and apply it for that purpose. If the fund is not ultimately to bear the costs, it is usual and more proper to add to the order the words, "without prejudice to the question how the same are ultimately to be borne," or words to a similar effect; but the absence of such words does not, necessarily, imply that the Court has decided that the fund out of which the costs are directed to be paid is the fund which must ultimately bear them; nor does their absence prevent any error from being set right, at any future period.[9]

*Section IV. — *The Principles of Taxation.*[1] *1434

It has been stated,[2] that the Court of Chancery makes a distinction, with regard to the principle upon which the officer of the Court is to proceed in the taxation of costs; and that this distinction is marked by the terms of: "costs as between party and party," and "costs as between solicitor and client:" the Court in the latter case, permitting a larger proportion of actual expenditure to parties holding particular characters, than it allows in the former case. No definite rules can be laid down, with respect to the difference between the costs allowed upon one principle of taxation, and those allowed upon the other. In general, however, in taxations as between party and party, only those charges will be allowed which are strictly necessary for the purposes of the prosecution of the litigation, or are contained in the tables of fees annexed to the general orders and regulations of the Court:[3] while in taxations as between solicitor and client, the party will be allowed as many of the charges which he would have been compelled to pay his own solicitor, as being costs of suit, as fair justice to the other party will permit.[4]

It must not, however, be supposed that, in taxations, between solicitor and client, the party, whose costs are to be taxed, will be allowed every thing which his own solicitor might claim against him upon the taxation of his bill: for regard will be had to the position of the par-

9 Sheppard *v.* Sheppard, 33 Beav. 129, 130, 131; Seton, 87, 93.

1 See Smith Ch. Pr. (2d Am. ed.) 636 *et seq.*; 2 Barb. Ch. Pr. 336 *et seq.*; as to what costs are or are not to be allowed, see Frost *v.* Belmont, 6 Allen, 164, 165.

2 *Ante*, p. 1377.

3 For tables of fees, see Vol. III.

4 See Forster & Davies, 11 W. R. 813, M. R.; Morgan & Davey, 1; 32 Beav. 624. In Frost *v.* Belmont, 6 Allen, 164, 165, Chapman J., said: "In the taxation of costs, the plaintiffs claim that they should be allowed to charge upon the fund in controversy the whole amount which has been charged to them by their solicitors, including their charges as counsel. . . . It has been the practice of the Court to allow charges of this character, including charges for counsel fees as well as those which are strictly fees of solicitors, but not to allow the full amount which it may sometimes be proper for counsel to charge to clients. . . . The standard to which we have been accustomed to refer as a general guide is the compensation paid to public officers for services of a similar character. This reference cannot furnish an exact rule, and leaves room for the exercise of discretion as to each case, a discretion which shall take into consideration, among other things, the amount in controversy, and which will prevent the fund from being entirely or in great part absorbed by counsel fees."

[In Tennessee, costs are purely statutory, and in the absence of express provision cannot be adjudged. Williams *v.* Adkins, 6 Coldw. 615; State *v.* Wormick, 1 Lea, 559.]

ties, and the fund out of which the costs are to be paid; and a distinction is made: First, where such costs are payable out of a fund belonging to other parties; secondly, where such costs are payable out of a common fund, in which the party entitled to costs, has only a limited interest; and, thirdly, where such costs are payable out of a fund belonging exclusively to such party himself.[5] These distinctions, however, are not made in the order directing the taxation, but only *1435 when the order is acted upon * by the Taxing Master; and, if it is intended that the party, whose costs are to be paid out of a general fund, should be fully indemnified against all expenses, or against any expenses not strictly costs of suit, care must be taken to have it so expressed in the ordinary order: as the direction, that the costs are to be taxed as between solicitor and client, will not, in such a case, be sufficient.[1]

The above observations will suffice to convey a general outline of the distinction between costs as between party and party, and as between solicitor and client. We will now proceed to inquire, in what cases the Court will direct the costs of a suit to be taxed upon either principle; or rather, in what cases the Court will direct the costs of a party to be taxed as between solicitor and client: the general rule of the Court being, that all costs are to be taxed as between party and party, except where they are specially directed to be taxed as between solicitor and client: whence it follows, that, where the direction is simply to tax the costs of the suit, it is always construed to mean as between party and party.[2]

It may be here mentioned, that where the Court has once adopted the principle of taxation as between solicitor and client, in favor of a particular individual, or of a particular class, it will, in its future proceedings, wherever it becomes necessary to direct a further taxation of costs, direct it to be made upon the footing of the former taxation. Thus, if, upon the original hearing, the costs of a party, have been ordered to be taxed as between solicitor and client, the Court will, at the hearing upon further consideration, direct the subsequent costs of the same party to be taxed in the same manner: even though a different state of circumstances should appear from the certificate, from that which was supposed to exist at the original hearing; it is only, however, where the former direction for taxation has been made at a hearing of the cause, either original or upon further consideration, that the Court will consider itself bound by it, at the subsequent hearing.

It appears to be the general rule of the Court, that, when personal representatives and other trustees are entitled to costs out of the fund, such costs will be directed to be taxed as between solicitor and client. It is, however, in general, only in cases in which there is a fund under the control of the Court that such a direction will be given: where there

[5] Seton, 92, 93.
[1] See Seton, 92.
[2] *Ante*, p. 1410; Seton, 92; Morgan & Davey, 1.

is no such fund, or a bill against the trustee is dismissed, the costs awarded to the trustee will be only the ordinary costs.[3] Thus, where a testamentary paper was held void for uncertainty, and the bill was dismissed with costs, it was * suggested that some of the *1436 defendants, being trustees, should receive their costs, as between solicitor and client; but the Court, on the ground that they were trustees of a nullity, and that there was no fund out of which such costs could come, refused to allow them their costs as between solicitor and client; and dismissed the bill, with costs as between party and party.[1] Under special circumstances, however, costs have been given, in such cases, as between solicitor and client.[2]

Where a trustee disclaims, he will only be allowed his costs as between party and party;[3] and this rule will be observed, even where the plaintiff continues him as a party to the suit, up to the hearing, although he has disclaimed by his answer;[4] and where a bill was dismissed against a person who was named in a deed as a trustee, but had not executed the deed, or in any manner accepted the trust, and had, by his answer, altogether declined it, he was held not to be entitled to have it dismissed with costs as between solicitor and client, but only with the ordinary costs between party and party.[5]

It has been already stated,[6] that, in a charity case, where an heir-at-law was made a defendant, pursuant to an order of the Court, he was allowed his costs as between solicitor and client, although there was no resulting trust in his favor;[7] and it seems that, in general, in charity cases, the heir will, if he makes no improper point, be awarded his costs as between solicitor and client. This rule was acted upon in *Currie* v. *Pye*;[8] and in *Moggridge* v. *Thackwell*:[9] in which latter case the heir-at-law, as well as the Attorney-General and all the other parties, were allowed their costs out of the fund, as between solicitor and client. The next of kin will also, in general, be allowed, in charity cases, their costs as between solicitor and client.[10]

It seems also, that, in general, where the object of a suit is to establish a charity, and the estate is ample, the costs of all parties will

[3] Saunders *v.* Saunders, 3 Jur. N. S. 727; 5 W. R. 479, V. C. K.; Edenborough *v.* Archbishop of Canterbury, 2 Russ. 93, 112; Seton, 767.

[1] Mohun *v.* Mohun, 1 Swanst. 201, 203.

[2] Edenborough *v.* Archbishop of Canterbury, *ubi sup.*, where the Court, on the authority of Townshend *v.* Bishop of Norwich, which occurred in 1824, gave costs, as between solicitor and client, to the Archbishop and Bishop of London, who had been made parties to the suit for the purpose of restraining the induction of an incumbent to a living, or from availing themselves of any lapse which might occur pending the suit. See also Poole *v.* Pass, 1 Beav. 600, 605; Attorney-General *v.* Cuming, 2 Y. & C. C. C. 139, 155, 159.

[3] Bulkeley *v.* Earl of Eglinton, 1 Jur. N. S. 994, V. C. W.; Heap *v.* Jones, 5 W. R. 106, V. C. K.

[4] Bray *v.* West, 9 Sim. 429.

[5] Norway *v.* Norway, 2 M. & K. 278; overruling Sherratt *v.* Bentley, 1 R. & M. 655.

[6] *Ante*, p. 1383.

[7] Attorney-General *v.* Haberdashers' Company, 4 Bro. C. C. 178; and see *ib.* ed. Belt's n. (2); Beames on Costs, Ap., No. 18.

[8] 17 Ves. 462, 468.

[9] 1 Ves. J. 464, 475; 7 Ves. 36, 88; see, however, Whicker *v.* Hume, 14 Beav. 509, 528.

[10] Gaffney *v.* Hevey, 1 Dr. & Wal. 12, 25; Carter *v.* Green, 3 K. & J. 591; 3 Jur. N. S. 905, 907.

be taxed as between solicitor and client;[11] and in *Attorney-General*
*1437 * v. *Carte*,[1] where the decree had merely ordered that the parties should be paid their costs, to be taxed by the Master, out of the estate, without giving any direction as to the principle of taxation, in consequence of which the Master refused to tax the costs otherwise than as between party and party, the Court entertained a petition for an order that the taxation of the costs should be as between solicitor and client.[2] There is not, however, any fixed rule of the Court in this respect.[3]

Where a bill has been filed for the general benefit of creditors, and the estate has proved insufficient,[4] the Court will give the plaintiff his costs of the suit, out of the fund realized by his exertions, as between solicitor and client.[5] This rule equally applies, where the bill has been filed by a simple contract creditor, and the specialty creditors have proved debts to an amount exceeding the value of the assets received:[6] unless the specialty creditors have given the plaintiff notice of the insufficiency of the estate, and not to proceed with the suit.[7]

A similar rule has been adopted in the case of suits by legatees, where the estate, although sufficient to pay the debts, has proved insufficient to pay the legacies in full.[8] If, however, in a suit instituted by a legatee, the fund is insufficient for the payment of the debts and costs,[9] or, if in a suit instituted by a residuary legatee, the fund is insufficient for the payment of the debts, legacies and costs,[10] the plaintiff will only be allowed his costs as between party and party.[11]

Where, in an administration suit by the heir-at-law, the realty and personalty were insufficient, the heir had his costs as between solicitor and client.[12]

*1438 * But it is only where the fund is insufficient, that the plain-

[11] Moggridge *v.* Thackwell, *ubi sup.*; Currie *v.* Pye, *ubi sup.*; and see Attorney-General *v.* Carte, Beames on Costs, Ap., No. 2; 1 Dick. 113; Bishop of Hereford *v.* Adams, 7 Ves. 324, 332; and see Osborne *v.* Denne, 7 Ves. 424.

[1] *Ubi sup.*

[2] See *ante*, p. 15.

[3] Aria *v.* Emmanuel, 9 W. R. 366, M. R.; Whicker *v.* Hume, 14 Beav. 509, 528.

[4] See Sutton *v.* Doggett, 3 Beav. 9.

[5] Turner *v.* Turner, cited 2 R. & M. 687; Hood *v.* Wilson, *ibid.*; Brodie *v.* Bolton, 3 M. & K. 168; Stanton *v.* Hatfield, 1 Keen, 358, 362; Tootal *v.* Spicer, 4 Sim. 510; Sutton *v.* Doggett, 3 Beav. 9; Thomas *v.* Jones, 1 Dr. & Sm. 134; 6 Jur. N. S. 391; overruling Young *v.* Everest, 1 R. & M. 426; Rowlands *v.* Tucker, *ib.* 635; and see Seton, 145, 146; Morgan & Davey, 136; Henderson *v.* Dodds, L. R. 2 Eq. 532, V. C. K. [See Whitsett *v.* City Building Association, 3 Tenn. Ch. 526.]

[6] Larkins *v.* Paxton, 2 M. & K. 320; Barker *v.* Wardle, *ib.* 818; *ante*, p. 1423; Richardson *v.* Jenkins, 17 Jur. 446; not reported on this point in 1 Drew. 477.

[7] *Ante*, p. 1424; Morgan & Davey, 137. [See Henderson *v.* Dodds, L. R. 2 Eq. 532.]

[8] Burkitt *v.* Ransom, 2 Coll. 536; Cross *v.* Kennington, 11 Beav. 89; Waldron *v.* Frances, 10 Hare, Ap. 10; Thomas *v.* Jones, *ubi sup.*; Bisset *v.* Burgess, 23 Beav. 278, 281.

[9] Weston *v.* Clowes, 15 Sim. 610; Wetenhall *v.* Dennis, 33 Beav. 285; S. C. *nom.* Wettenhall *v.* Davis, 9 Jur. N. S. 1216. As to the costs of plaintiffs in a next-of-kin suit, where residue is exhausted in debts, see Newbegin *v.* Bell, 23 Beav. 386; and see Horne *v.* Horne, 14 W. R. 957, V. C. K., where the fact of a plaintiff legatee being also a creditor was held not to affect the principle.

[10] Wroughton *v.* Colquhoun, 1 De G. & S. 357.

[11] See, however, Wroughton *v.* Colquhoun, *ubi sup.*, and Newman *v.* Hatch, cited Seton, 165, as to the allowance of special costs in addition.

[12] Tardrew *v.* Howell, 2 Giff. 530; 7 Jur. N. S. 937; Shittler *v.* Shittler, 4 N. R. 475, M. R.

tiff, in suits of this description, will be entitled to have his costs taxed in so favorable a manner: where the fund is sufficient to pay all the debts or legacies, and to leave a surplus for the residuary legatee, the plaintiff will only have his costs as between party and party.[1] Where, however, in a creditor's suit, a fund had been realized by the diligence of the plaintiff, and the assets were more than sufficient for the payment of the debts, Lord Langdale M. R. considering it a hardship that creditors not parties to the suit should come in and reap the benefit of it, without contributing to the plaintiff's extra costs, made an order, by which it was directed that the plaintiff's costs, as between party and party, should be paid out of the fund, and that his extra costs should be paid, *pro ratâ*, by all the creditors who partook of the benefit of the suit.[2]

It frequently happens that, in suits to which the trustees or personal representatives are parties, either as plaintiffs or defendants, and which do not involve any account, they have incurred expenses which it is very right they should be reimbursed, but which do not fall under the denomination of costs of the suit, even when directed to be taxed as between solicitor and client. Of this nature are cases laid before counsel, for their opinion preparatory to the institution of the suit, and many other charges of that description, to which, where there is a decree directing an account, a trustee would be considered entitled, under the head of just allowances,[3] but which, where there is no decree for an account, and consequently no opportunity of claiming just allowances, a trustee would be in danger of losing: especially in cases where the suit does not involve property out of which they can be retained, or disposes of the whole of the trust fund. The Court will, therefore, in such cases, upon the statement that such charges have been incurred, extend the order for the taxation of costs, as between solicitor and client, to the costs, charges, and expenses properly incurred by the trustee.[4] Under such a direction as this, the trustee may obtain all such expenses as he has properly incurred, relating to the trust property, in, or in connection with the suit: although they are not properly costs in the cause; and under it he may be allowed the costs of litigation conducted by him strictly as trustee, whether successfully or unsuccessfully, and although he may not have been allowed such costs in the suits in which they have been incurred.[5]

Where the costs are to be paid out of the party's own fund, the * direction to tax as between solicitor and client, may prop- *1439
erly include his costs of or relating to the suit or proceeding, and consequent thereon.[1]

[1] Brodie *v.* Bolton, 3 M. & K. 168; Thomas *v.* Jones, *ubi sup.*

[2] Stanton *v.* Hatfield, 1 Keen, 358, 362; Sutton *v.* Doggett, 3 Beav. 9; Goldsmith *v.* Russell, 5 De G., M. & G. 547, 556.

[3] *Ante*, p. 1235; Ord. XXIII. 16.

[4] Seton, 768; Morgan & Davey, 2. For form of order, see Seton, 767.

[5] Graham *v.* Wickham, 11 Jur. N. S. 168; 13 W. R. 396, L. JJ.; 2 De G., J. & S. 497; but see Payne *v.* Little, 27 Beav. 83.

[1] Seton, 93.

Except in the cases above pointed out, it is not the practice to give a party his costs, charges, and expenses. Where, however, a defendant put in four insufficient answers, and was committed till he was examined upon interrogatories, he was, after putting in his examination, ordered to be discharged, on payment of the plaintiff's costs, charges, and expenses.[2] And where an answer was ordered to be taken off the file, because it was evasive and illusory, the defendant who had filed it was ordered to pay all the costs and expenses occasioned by it.[3] Where also, the suit, though ostensibly for specific performance, was, in the opinion of the Court, collusively filed for a different object, the bill was dismissed with all costs, charges, and expenses properly incurred by the defendant in reference to the suit.[4]

Under the former practice of the Court, there were many expenses necessarily incurred in the prosecution of the suit which were not allowed in taxations as between party and party; but now, in such taxations, the Taxing Master may allow to the party, entitled to receive such costs, all such just and reasonable expenses as appear to have been properly incurred: in the service and execution of writs, and the service of orders, notices, petitions, warrants, and summonses: in advising with counsel on the pleadings, evidence, and other proceedings in the cause: in procuring counsel to settle and sign pleadings, and such petitions as may appear to be proper to have been settled by counsel: in procuring consultations of counsel: in procuring the attendance of counsel in the Judge's Chambers, where the Judge has certified the case to be proper for counsel to attend: in procuring evidence by deposition or affidavit, and the attendance of witnesses: and in supplying counsel with copies of, or extracts from, necessary documents; but, in allowing such costs, the Taxing Master is not to allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice, or for defending his rights, or which appear to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.[5]

Expenses incurred in consequence of affidavits being prepared or settled by counsel, can be allowed only when the Taxing Master shall, in his discretion, and on consideration of the special circum-
*1440 stances * of each case, think such expenses properly incurred; and in such case, he is at liberty to allow the same, or such part thereof as he may consider just and reasonable: whether the taxation be between solicitor and client, or between party and party.[1]

Where two counsel appear for the same party, upon the hearing of any cause or matter, and it appears to the Taxing Master to have been

[2] Farquharson *v.* Balfour, T. & R. 184, 206; *ante*, p. 773.
[3] Read *v.* Barton, 3 K. & J. 166; S. C. *nom.* Reid *v.* Barton, 3 Jur. N. S. 263; *ante*, p. 785.
[4] Simpson *v.* Malherbe, 13 W. R. 887, V. C. S.; and see Cooke *v.* Cooke, 11 Jur. N. S. 533; 13 W. R. 697, L. C.
[5] Ord. XL. 32.
[1] Ord. XL. 17; *ante*, p. 901; and see Davies *v.* Marshall (No. 2), 1 Dr. & Sm. 564.

necessary or proper for such party to retain two counsel to appear, the costs occasioned thereby will be allowed, although both of such counsel may have been selected from the outer bar.[2]

* Section V. — *Method of Taxation.* *1441

Originally, all references for the taxation of costs were made to the Master in Ordinary: who used to be attended for that purpose by the Clerks in Court of all parties. In consequence, however, of the multi-

2 Ord. XL. 20. See, as to the following — Brief to a second and third counsel: Downing College Case, 3 M. & C. 474; Cockburn *v.* Raphael, 7 Jur. 246, L. C.; Wastell *v.* Leslie, 8 Jur. 1001, V. C. E.; Lucas *v.* Peacock, 8 Beav. 1, 12; Sturge *v.* Dimsdale, 9 Beav. 170; 10 Jur. 277; Smith *v.* Earl of Effingham, 10 Beav. 378, 388; Stephens *v.* Newborough, 11 Beav. 403, 412; Friend *v.* Solly, 10 Beav. 329; Cooke *v.* Turner, 12 Sim. 649; Carter *v.* Barnard, 16 Sim. 157; 12 Jur. 322; Green *v.* Briggs, 7 Hare, 279; Attorney-General *v.* Munro, 1 M'N. & G. 213; Midland Railway Company *v.* Brown, 10 Hare Ap. 44; 17 Jur. 969; Davis *v.* Earl Dysart, 8 De G., M. & G. 33; 21 Beav. 124; Pearce *v.* Lindsay, 1 De G., F. & J. 573; Johns. 702; Betts *v.* Clifford, 1 J. & H. 74; Flockton *v.* Peake, 12 W. R. 1023, V. C. W.; Wentworth *v.* Lloyd, L. R. 2 Eq. 607; 12 Jur. N. S. 581, M. R. [Costs of three counsel: Kirkwood *v.* Webster, 9 Ch. Div. 239.] Consultations: Lucas *v.* Peacock, 8 Beav. 1, 12; Smith *v.* Earl of Effingham, 10 Beav. 328, 385, 389; *Re* Catlin, 18 Beav. 516; Ernest *v.* Partridge, 11 W. R. 715, V. C. W.; Forster *v.* Davies, 32 Beav. 624; 11 W. R. 813. Quantum of fees: Attorney-General *v.* Lord Carrington, 6 Beav. 454; Parkinson *v.* Hanbury, 11 Jur. N. S. 474; 13 W. R. 1056, L. JJ. Special fees: Nichols *v.* Haslam, 15 Sim. 49; Smith *v.* Earl of Effingham, 10 Beav. 370, 384, 385; Green *v.* Briggs, 7 Hare, 279. Refreshers: 1 Grant Pr. 253, 467; and *ante*, p. 997, note (6). Brief to the Attorney-General, in a charity case: Attorney-General *v.* Drapers' Company, 4 Beav. 305. Fees to counsels' clerks: *Re* Cotton, 9 Beav. 107, 110.

See, also, as to the costs of the following subjects — Accountants: Ord. in Bank. 19 May, 1855; 1 Jur. N. S. Pt. 2, 237; Deacon's Bank, 1395. Affidavits on interlocutory applications: Camille *v.* Donato, 11 Jur. N. S. 26; 13 W. R. 358, L. C. Amendment of bill: *ante*, pp. 422–426. Answers: *ante*, pp. 730, 777. Appearance by plaintiff for defendant: *ante*, p. 478. Attachment: *ante*, p. 471. Boundary suit: *ante*, p. 1165. Brief prematurely prepared: Friend *v.* Solly, 10 Beav. 329. Cause struck out: *ante*, p. 975. Contempts: *ante*, p. 507 *et seq.* Contribution to costs: *ante*, p. 1213. Costs in the cause: *ante*, p. 1378. Costs of the day: *ante*, p. 975. Creditors and other claimants: *ante*, pp. 1212–1214. Demurrer by witness: *ante*, p. 945. Demurrer to bill: *ante*, pp. 594, 599. Disclaimers: *ante*, pp. 706, 709. Dismissing bill, and staying proceedings: *ante*, p. 790 *et seq.* Dower suit: *ante*, p. 1166. Evidence taken abroad: *ante*, p. 919. Examination *de bene esse*: *ante*, p. 941. Examiners' fees: *ante*, p. 910, note. Exceptions to answer: *ante*, p. 773. Formal parties: *ante*, pp. 431, 432; Impertinent matter: *ante*, p. 350. Inspection and copies of documents: *post*, Chap. XLII. Interlocutory applications: *ante*, p. 1378. Interpreters: Earl of Shrewsbury *v.* Trappes, 8 Jur. N. S. 587; 10 W. R. 663, V. C. W. Issues: *ante*, pp. 1148, 1383. Journeys: Crossley *v.* Parker, 1 J. & W. 460, 466; Alsop *v.* Lord Oxford, 1 M. & K. 564, 566; Harlock *v.* Smith, 2 M. & C. 495, 523; Howell *v.* Tyler, 2 Y. & C. C. C. 284, 288; *Re* Price, 9 Beav. 234; *Re* Bevan, 20 Beav. 146; Clark *v.* Malpas (No. 2), 31 Beav. 554. Just allowances: *ante*, p. 1232. Motions: *ante*, p. 1368, and *post*, Chap. XXXV. § 2. New inquiry as to damages: *ante*, p. 1142. New trials: *ante*, pp. 1137, 1149. Observations for counsel: Davies *v.* Marshall (No. 2), 1 Dr. & Sm. 564, 567; Ernest *v.* Partridge, 11 W. R. 715, V. C. W. Parties attending under order: *ante*, p. 437. Partition suit: *ante*, p. 1162. Paupers: *ante*, pp. 43, 155. Pleas: *ante*, pp. 696, 698, 701, 704. Printed copies of bill: *ante*, p. 399. Printed copies of answer: *ante*, p. 758. Procuration fee: *Re* Bayley, 2 W. R. 404, M. R. Security for costs: *ante*, p. 28. Separate answers: *ante*, p. 730. Sequestration: *ante*, p. 1061. Short-hand writers' notes: Malins *v.* Price, 1 Phil. 590; Smith *v.* Earl of Effingham, 10 Beav. 378, 384, 386; *Re* London, Birmingham, & Bucks Railway, *Ex parte* Curzon, 6 W. R. 141, V. C. K.; Clark *v.* Malpas (No. 2), 31 Beav. 554; Flockton *v.* Peake, 12 W. R. 1023, V. C. W.; [Kirkwood *v.* Webster, 9 Ch. Div. 239.] Solicitor trustee: *ante*, p. 1413. Special examiner: *ante*, p. 906, note. Term fees: Davies *v.* Marshall (No. 2), 1 Dr. & Sm. 567. [View: Stockbridge Iron Co. *v.* Cone Iron Works Co., 102 Mass. 80.] Written bill: *ante*, p. 396. Written brief of bill, or of answer: *ante*, p. 997, note (6); and see *post*, Chap. XXXV., XLIV., and XLV.

For forms and precedents of bills of costs, see Morgan & Davey, 426 *et seq.*

plicity of business in the Master's offices, it gradually became the practice to leave all the details of the taxation to the Clerks of Court, and only to call upon the Master to decide any question of principle that happened to arise.[1] Upon the abolition of the office of Six Clerk, new officers, called Taxing Masters, were appointed[2] for this particular duty: who perform all the duties before that time performed by the Masters in Ordinary in relation to the taxation of costs; and have, in respect thereof, all the powers and authorities formerly vested in the Master in Ordinary, to administer oaths:[3] examine witnesses and parties: order the production and inspection of books, papers, and documents: proceed *de die in diem:* make separate reports and certificates: require that any party be represented by a separate solicitor: and direct and adopt all such other proceedings as might formerly be directed and adopted by the Masters in Ordinary, on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court.[4]

The Taxing Masters are assistant to each other; and in the discharge of their duties, and for the better despatch of the business of their respective offices, any Taxing Master may tax, or assist in the taxation of, a bill of costs which has been referred to any other Taxing Master for taxation, and for ascertaining what is due in respect of such costs; and, in such case, they certify accordingly.[5]

All references for the taxation of costs are made to the Taxing Master in rotation; or, if there has been any former taxation of *1442 * costs in the same cause or matter, then to the Taxing Master before whom such former taxation has taken place.[1] In the order directing the taxation, the words "The Taxing Master" are used; but by that expression is meant, the Taxing Master in rotation, or, in case any previous reference has been made, the Taxing Master to whom the cause or matter stands referred, as the case may be.[2]

Where a bill or petition is dismissed with costs, or a motion is refused with costs, or any costs are, by any general or special order, directed to be paid, the Taxing Master may tax such costs without any order referring the same for taxation: unless the Court, upon the application of the party alleging himself to be aggrieved, prohibits the taxation; and the costs, when certified by the Taxing Master, are recoverable by *subpœna*.[3] The Taxing Masters, however, do not in general act upon

[1] Mr. Mills's Evidence, Chan. Rep. (1826), App. B. No. 25, p. 557.

[2] Under 5 & 6 Vic. c. 103, § 4. There are at present seven Taxing Masters, each of whom has one Chief Clerk, and one assistant clerk, appointed under that Act. As to the salaries and pensions of the Masters, and their Chief Clerks, see 5 & 6 Vic. c. 103; 15 & 16 Vic. c. 87, §§ 40, 46–48, 50, 51, as to the salaries of the assistant clerks, see *Re* The Suitors of the Court of Chancery, 1 W. N. 287, L. C.

[3] And see 5 & 6 Vic. c. 103, § 7. A fee of 1*s.* 6*d.*, by either scale, is payable, in fee-fund stamps, for every oath, affirmation, or attestation upon honor. Regul. to Ord. Sched. 4.

[4] Ord. XL. 1.

[5] Ord. XL. 3.

[1] Ord. XL. 2.

[2] Ord. XXIII. 1; Seton, 86, 91.

[3] Ord. XL. 38.

this permission; and it is the practice to insert a direction for taxation in all decrees or orders, where costs are directed to be paid.[4]

The Taxing Masters cannot be required to take accounts, not connected with the bills referred to them for taxation;[5] but where an account consists in part of any bill of costs, or the Judge is authorized to fix the amount of costs to be allowed a creditor who has established his debt in the Judge's Chambers, the Taxing Master may be directed by the Judge to assist him in settling such costs; and the Taxing Master, on receiving such direction, will proceed to tax such costs, and has the same powers, and the same fees are payable in respect thereof, as if the same had been referred to the Taxing Master by an order; and he will return the same, with his opinion thereon, to the Judge by whose direction the same were taxed.[6]

Where, upon the taxation of any bill of costs, it appears to the Taxing Master that, for the purpose of duly taxing the same, it is necessary to inspect any documents relating to the cause or matter which are in the Chambers of any Judge, he may request the Chief Clerk of the Judge to cause the same to be transmitted to his office, and also to certify any proceedings in Chambers which may be comprised in the bill of costs under taxation; and in such cases, the Chief Clerk, at and for such times as the due transaction of the business at Chambers will permit, will direct such documents to be transmitted to the office of the Taxing Master for his use; and will certify the proceedings which have taken place in Chambers.[7] * When the Taxing Master has cer- *1443
tified the costs, he returns the documents to the Chambers of the Judge.[1]

When a document is transmitted from the Chambers of a Judge to the office of a Taxing Master, a memorandum of the transmission is signed by the Taxing Master or his clerk, and delivered to the Chief Clerk; and when the document is returned, a memorandum of the return is signed by the Chief Clerk, or by one of his clerks, and delivered to the Taxing Master.[2]

There are two scales regulating the fees of Court, and the fees which solicitors are entitled to charge: such scales being called, the Higher Scale, and Lower Scale.[3] The Lower Scale applies (unless the Court orders to the contrary) in the following cases: (1.) To all suits by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law or next of kin, in which the personal or real, or personal and real estate, which is the subject of the suit, is under the value of 1000*l.*; (2.) To all suits for the execution of trusts, in which the trust estate or fund is under the value of 1000*l.*; (3.) To all suits for foreclosure or redemption, or for enforcing

4 Seton, 92.

5 King *v.* Savery, 8 De G., M. & G. 311; 2 Jur. N. S. 431.

6 Ord. XL. 24, 25. As to costs of creditors, see *ante*, p. 1212 *et seq.* and notes. For form of direction, see Vol. III.

7 Ord. XL. 26.

1 Ord. XL. 26.

2 Ord. XL. 27.

3 For tables of fees of Court, and of fees and charges allowed solicitors, see Vol. III.

any charge or lien, in which the mortgage whereon the suit is founded, or the charge or lien sought to be enforced, is under the amount of 1000*l.*; (4.) To all suits for specific performance, in which the purchase-money or consideration is under the amount or value of 1000*l.*; (5.) To all proceedings under the Trustees Relief Acts, or under the Trustee Acts, in which the trust estate or fund is under the value of 1000*l.*;[4] (6.) To all proceedings relating to the guardianship or maintenance of infants, in which the property of the infant is under the value of 1000*l.*; and (7.) To all proceedings by special case, and all proceedings relating to funds carried to separate accounts, and to all proceedings under any railway or private Act of Parliament, or under any other statutory or summary jurisdiction, and generally to all other cases where the estate or fund to be dealt with is under the amount or value of 1000*l.*[5]

The Higher Scale applies in all other cases, unless the Court orders to the contrary, as to all or any of the parties.[6] The test is, whether the property is, at the time of the institution of the suit, of the *1444 actual value of 1000*l.*[7] Although the fund sought to * be recovered does not amount to 1000*l.*, the higher scale will apply, if the bill seek other and material relief.[1]

Where a solicitor or party institutes any proceeding, in respect of which he claims to pay the fees of Court according to the lower scale, he must file with the Clerk of Records and Writs a certificate that, to the best of his judgment and belief, the lower scale of fees is applicable to the case.[2] The Clerk of Records and Writs will, at the request of any solicitor, or party acting in person, mark a copy of the certificate; and on production of such copy, the officers of the Court will receive and file all proceedings in the suit or matter, bearing stamps according to the lower scale.[3]

If, in any case certified for the lower scale, it happens that the solicitor becomes entitled to charge and be allowed according to the higher scale, the deficiency in the fees of Court must be made good;[4] and if, in any case in which the fees of Court have been paid upon the higher scale, it happens that the solicitor becomes entitled to charge and be allowed only according to the lower scale, the excess of fees of Court

[4] In the preceding cases, and some others, the power and authority of the Court of Chancery may be exercised by the County Courts, where the property does not exceed 500*l.*; see 28 & 29 Vic. c. 99, §§ 1, 2; and see *post*, Chap. XLV., *Statutory Jurisdiction*.

[5] Regul. to Ord. II. 1. The rule applies to interpleader suits, where the fund is under 1000*l.*; Gibbs *v.* Gibbs, 4 Jur. N. S. 371; 6 W. R. 415, V. C. K.

[6] Regul. to Ord. II. 2; Reade *v.* Bentley, 3 K. & J. 271.

[7] Judd *v.* Plum, 29 Beav. 21; 7 Jur. N. S. 12. *Re* Reece, Gould *v.* Dummett, L. R. 2 Eq. 609; 12 Jur. N. S. 614, M. R. [But see *In re* Sanderson, 7 Ch. Div. 176, where the decision in *Re* Reece's case is explained.]

[1] Grimes *v.* Harrison, 27 Beav. 198; 5 Jur. N. S. 972; and see Flockton *v.* Peake, 12 W. R. 1023, V. C. W.

[2] Regul. to Ord. III. 3. For form of certificate, see Vol. III.

[3] Regul. to Ord. III. 3, 4.

[4] *Ib.* 5. This is usually done, by placing additional adhesive fee-fund stamps on the several documents issued on the lower scale, and causing such stamps to be cancelled by the proper officers, in the departments in which the former stamps were cancelled. The certificate may, also, be withdrawn; see Braithwaite's Pr. 7.

so paid may be allowed upon the taxation of costs, if the circumstances of the case, in the judgment of the Taxing Master, justify such an allowance.[5]

For the purpose of procuring a bill of costs to be taxed by the Taxing Master, the bill should be prepared,[6] and copied bookwise, on foolscap paper, with a clear margin on the left-hand side: in order that the taxed off amounts may be there placed by the Master, in taxing the bill; and the bill must be then left, together with a full copy of the decree or order, at the office of the proper Taxing Master.[7] The copy of the decree or order is also written on foolscap paper; and in the margin must be written a certificate, by the solicitor procuring the taxation, that it is a true copy of the original decree or order as passed and entered.[8] If there has been any previous taxation in the cause or matter, the bill of costs, and the copy of the decree or order, are taken at once to the office of the Master before whom the previous taxation took place.[9] If there has been no previous taxation, the solicitor must write a certificate to that * effect in the margin of the orig- *1445 inal decree or order, and of the copy;[1] and must take the decree or order to the office of the sitting Master:[2] who will insert the name of the Taxing Master in rotation, in a certificate prepared for him by the solicitor in the margin of the decree or order, and will sign such certificate.[3] A copy of this certificate must then be added to the copy of the decree or order: which is then left with the clerk of the Master in rotation.[4]

On leaving the bill of costs, a warrant which is underwritten to that effect, is taken out,[5] and must be served on the several parties entitled to attend the taxation; and an appointment to proceed with the taxation must also be obtained; but previously to doing so, the several papers and vouchers, in respect whereof charges are contained in the bill of costs, must be left with the Master's clerk.[6] A warrant, stating the time of the appointment, and underwritten with the object thereof, must be issued and served on the parties.[7]

[5] Regul. to Ord. III. 6. For tables of Court fees, see Vol. III.

[6] For forms and precedents of bills of costs, see Morgan & Davey, 426 *et seq.*; and see *ante*, p. 1440, note (2).

[7] Where the Judge requires the assistance of the Taxing Master, under Ord. XL. 25, the bill of costs produced as a voucher at Chambers is identified by the initials of the Chief Clerk, and left at the Taxing Master's office, together with the direction, signed by the Chief Clerk, to tax the same. For form of direction, see Vol. III.

[8] For form of certificate, see Vol. III.

[9] See Ord. XXIII. 1.

[1] For form of certificate, see Vol. III.

[2] The name of the Sitting Master will be found put up in the entrance hall of the Taxing Masters' offices.

[3] For form of certificate, see Vol. III.

[4] Where the bill to be taxed is sent from Chambers, under Ord. XL. 25, *ubi sup.*, the certificates mentioned in the text are written on the direction to tax.

[5] For form of warrant, see Vol. III.

[6] The papers and vouchers should be arranged in the order in which the charges occur in the bill.

[7] The warrants on leaving and to tax are usually obtained and served at the same time; but all the bills taxable under the decree or order are usually required to be left, before any appointment to tax will be given. Not more than one warrant can be issued on one bill or set of bills, unless the Taxing Master thinks it necessary to issue a new warrant. Regul. to Ord. Sched. 4. In practice, one warrant on leaving, and one warrant to tax each bill, or set of bills, are issued. A fee of 3*s.* higher scale, and 1*s.* lower scale, is payable for every warrant; *ibid.* For form of warrant to tax, see Vol. III.

The warrants must be served in the same manner as other proceedings not requiring personal service.[8]

On being served with the warrant on leaving, any party entitled to attend the taxation who requires a copy of the bill should make a written application for such copy, with an undertaking to pay the proper charges to the solicitor or party by whom the bill has been left.[9] Upon such application and undertaking, the copies are to be made by such solicitor or party:[10] who is to be answerable for the same being true copies.[11] The copies are to be made side for side, so as to correspond with the bills of costs left in the office:[12] the folios being numbered consecutively in the margin; and the name and address of the party or solicitor, by whom the same is made, being indorsed thereon;[13] and they are to be ready to be delivered at the expiration of forty-eight hours after the delivery of the request and undertaking, or within such other time as the Court may in any case direct; and are to be delivered accordingly on demand, upon payment of the proper charges.[14]

*1446 * The copies are to be written on paper of a convenient size,[1] with a sufficient margin, and in a neat and legible manner, similar to that which is usually adopted by law stationers; and unless so written, the parties or solicitors delivering them are not entitled to be paid for the same.[2]

Where any party or solicitor who is required to deliver any such copy, either refuses to deliver the same, or does not deliver the same within the time allowed for that purpose, the person making the application is at liberty to procure a copy from the office in which the original has been left: in the same way as if no such application had been made to the solicitor; and in such case, no costs are payable to the solicitor so making default, in respect of the copy so applied for;[3] and an addition of two clear days will be made to the period within which any proceeding which may have to be taken after obtaining such copy ought to be so taken: so that the person requiring such copy may be as little prejudiced as possible by such neglect.[4]

The Taxing Master will not allow any costs in respect of any such copy, unless the same appears to him to have been requisite, and to have been made with due care, both as regards the contents and writing.[5]

At the appointed time, the parties attend before the Master;[6] and

[8] Ord. III. 4, 6; XXXVII. 2; see *ante*, pp. 454, 455.
[9] Ord. XXXVI. 4.
[10] Ord. XXXVI. 5. For form of application and undertaking, see Vol. III.
[11] Ord. XXXVI. 8.
[12] Ord. XXXVI. 7.
[13] Ord. XXXVI. 8.
[14] Ord. XXXVI. 6. The charge is 4*d.* per folio; except in pauper cases, when it is 1½*d.* per folio. Regul. to Ord. IV. 1, 2, 3.

[1] Foolscap paper, bookwise, with a quarter margin, is usually adopted.
[2] Ord. XXXVI. 11.
[3] Ord. XXXVI. 12.
[4] Ord. XXXVII. 16.
[5] Ord. XXXVI. 13.
[6] In practice, the bills are usually gone through, and compared with the papers and vouchers, by the Master's principal clerk in the presence of the parties, at an appointment made for that purpose, prior to any attendance before the Master.

the taxation is proceeded with, and completed then, or at subsequent adjournments. The Master has power to determine what parties are to be allowed their costs of attending the taxation.[7] If any parties entitled to attend the taxation fail to attend, the Master will proceed in their absence, on proof by affidavit of the due service of the warrants on them. The affidavit is made before the Master, and indorsed on the original warrant.[8]

Where a bill of costs includes charges for business done in a Court of Law or other Court, the Taxing Master sometimes sends the bill to the proper officer of such Court, with a request to such officer to assist him in the taxation thereof;[9] and on receiving back the bill, with the opinion of such officer thereon as to how much ought to be allowed or disallowed, the Taxing Master makes * his certificate of the *1447 taxation, or otherwise disposes of the proceedings before him.

In a taxation as between party and party, the bill of costs may be amended at any time during the pendency of the taxation.[1]

When the taxation is completed, the Master signs the bill. If it is intended to enforce payment of the costs by any further proceedings, or evidence of the amount is required, the items taxed are added up, and the result of the taxation ascertained by the solicitors, and checked by the Taxing Master's clerk; and a certificate[2] of the taxation must be obtained from the Taxing Master, and filed in the Report office, and an office copy taken.[3]

Where any costs are directed to be taxed and paid out of any money in Court, the certificate of taxation is to state the total amount of the costs, without any direction for that purpose in the decree or order directing the taxation.[4]

Sometimes, the direction is to tax costs, in case the parties differ

[7] Stahlschmidt *v.* Lett, 7 Jur. N. S. 1271; 9 W. R. 830, V. C. S.

[8] Ord. XL. 1. A fee of 1*s.* 6*d.* is payable in a fee-fund stamp, for the oath. Regul. to Ord. Sched. 4. For form of affidavit, see Vol. III.

[9] See 6 & 7 Vic. 73, § 42; Regul. to Ord. Sched. 4. The Taxing Master in Chancery will also tax a bill, or part of a bill, on the request of a Common Law Master; but this Court will not entertain any application in respect of what is so done. See *Re* Lett, 10 W. R. 6, V. C. K.

[1] Davis *v.* Earl of Dysart, 21 Beav. 124; 1 Jur. N. S. 1153.

[2] Where the bill is taxed, on a direction from Chambers, under Ord. XL. 25, *ante*, p. 1444, note (7), no certificate of the taxation is required; but a memorandum of the Taxing Master's opinion thereon is written at the foot of the bill, and signed by him, and returned to the Chambers.

[3] A fee of 20*s.* higher scale, and 10*s.* lower scale, is payable on signing every report and certificate. A fee of 10*s.*, by each scale, is payable upon the taxation of every bill of costs, as taxed, where the amount does not exceed 20*l.*; and a like further fee upon every additional 20*l.*, or fractional part thereof. Regul. to Ord. Sched. 4. Where no certificate of the taxation is required, the *ad valorem* fee is nevertheless due; and is payable on the amount of the bill as taxed, or on such part thereof as may have been taxed; and the solicitor must, in such case, cause the proper stamp (the amount thereof to be fixed by the Taxing Master) to be impressed on or annexed to the bill; *ibid.* But if the officer of another Court, to whom a bill or part of a bill has been sent for taxation (*ante*, p. 1446), takes his fee thereon, the *ad valorem* duty above mentioned is not to be paid on that part of the bill so taxed and charged for by him; *ibid.* Where costs are directed to be paid out of a fund in Court, the fees of taxation are not payable by means of stamps, but are carried over by the Accountant-General to the credit of the Suitor's Fee Fund; and to that intent, the Taxing Master must, in such cases, certify the amount of such fees. Ord. XXXIX. 8.

[4] Ord. XL. 40. As to interest on costs, see 23 & 24 Vic. c. 127, § 27, *ante*, pp. 1380, 1381.

about the same. In this case, the party claiming the costs brings the bill of costs into the Taxing Master's office, and gives notice of his having so done to the other party; and, at any time within eight days after such notice, such other party may inspect the same, without fee, if he thinks fit; and at or before the expiration of the eight days, or such further time as the Taxing Master in his discretion allows, he must either agree to pay the costs or signify his dissent therefrom; and thereupon he is at liberty to tender a sum of money for the costs; but, if he makes no such tender, or if the party claiming the costs refuses to accept the sum so tendered, the Taxing Master proceeds to tax the costs; and where the taxed costs do not exceed the sum tendered, the costs of the taxation are to be borne by the party claiming the costs.[5]

*1448 * Where the decree or order directs a party to retain his costs, when taxed, out of the balance in his hands, and to pay the residue into Court: if he delays to get the costs taxed, the proper course is for the other party to move that he may bring in his bill of costs to be taxed, within a limited time.[1]

An order directing the costs of a suit to be taxed, warrants the taxation of subsequent costs;[2] and this it has been held to do, notwithstanding a reservation of subsequent costs not provided for by the decree: there being other costs by which these words might be satisfied.[3] Where subsequent costs are not intended to be given, the direction should be confined to costs up to the decree.[4]

An order directing the taxation or payment of costs by several parties, is joint and several; and, if one of them dies, the costs may nevertheless be taxed and recovered against the others.[5]

Plaintiffs or defendants who appear by the same solicitor are allowed only one bill of costs.[6] More than one bill of costs will, therefore, never be allowed on behalf of the plaintiffs; and a solicitor appearing for more than one defendant can only make out one bill of costs;[7] but if they are entitled to sever in their defence, he may charge for separate

5 Ord. XL. 39. The party claiming the costs need not give the other party a copy of his bill, before carrying it into the Master's office. Aubrey *v.* Hoper, 5 Russ. 1.

1 Newsome *v.* Shearman, 2 S. & S. 95. In this case the application was, that the defendant might pay the whole sum due from him into Court, but the motion was refused, as inconsistent with the order.

2 Quarrell *v.* Beckford, 1 Mad. 269, 286; and see Clutton *v.* Pardon, T. & R. 301, 304; *ante*, pp. 1368, 1376.

3 Quarrell *v.* Beckford, 1 Mad. 269, 286.

4 *Ibid.*; Seton, 57; *ante*, p. 1376.

5 Meredyth *v.* Hughes, 3 Y. & J. 188; Michel *v.* Bullen, 6 Pri. 87; *Ex parte* Bishop, 8 Ves. 333; Poole *v.* Franks, 1 Moll. 78; *Re* Colquhoun, 1 Sm. & G. Ap. 1; 17 Jur. 409; 5 De G., M. & G. 35; Seton, 94, 1228; and see *post*, p. 1453.

6 See Pratt *v.* Bacon, 11 Pick. 495; Davis *v.* McNeil, 1 Ired. Ch. 344; Houghton *v.* Barney, 2 Ired. Ch. 393.

7 Wendell *v.* Lewis, 8 Paige, 613; Miller *v.* Lincoln, 6 Gray, 556. Where the defendants in a suit were very numerous, and lived at some distance from each other, and some had joined in their answers, and others had filed separate answers, the main subject of the controversy, however, being the same, *viz.*, whether there was a partnership or joint liability between the plaintiffs and defendants, the Court directed, that in addition to one general bill of costs for the defendants, to be taxed as in an action at Law, a specific sum should be taxed for each distinct answer filed to the original bill and to the amended bill. Clark *v.* Reed, 11 Pick. 446. As to costs of separate answers, where the same solicitor is concerned, see *ante*, p. 729.

answers[8] of any of them; or for the employment of separate counsel on their behalf: even though they take the same line of defence.[9]

Where a London solicitor acts as agent for different country solicitors appearing for two defendants, or acts as the solicitor of one, and as agent for the solicitor of another defendant, these are two very different capacities, and involve different duties and different responsibilities, and carry the right to distinct remuneration; and, in such case, two bills of costs will be allowed.[10]

*Co-plaintiffs are jointly and severally liable to their solicitor *1449 for the whole of their costs: but defendants appearing by the same solicitor, can be charged only with their respective proportions of the general costs of proceedings taken on behalf of all.[1]

Where the costs of some or one only of the objects of the suit are given to any party, the Taxing Master allows, not only so much of the costs of the suit as relates exclusively to the particular objects, but also a portion of the costs of every general proceeding in the suit;[2] but where the costs occasioned by any particular proceeding in, or part of, the suit are given, the Taxing Master allows only the costs of such particular proceeding, or part of the suit.[3]

In taxing costs, the Taxing Master is the sole judge of the fact whether the business has been done, and of the proper charge to be made for it; and on these points his decision is final, and cannot be reviewed.[4] It is also his duty to inquire whether the business was required to be done: for, if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of the Taxing Master to protect the client from any charge in respect of such proceedings.[5]

If the Taxing Master has omitted to tax the costs which have been directed to be taxed, or if it is conceived that, in taxing them, he has adopted some general principle which cannot be supported, the dissatisfied party has a right to bring the point before the Court, or Judge at Chambers.[6]

If any party is dissatisfied with the allowance or disallowance by the

[8] As to costs of separate answers put in by the same solicitor, see *ante*, p. 729.

[9] Bainbrigge *v.* Moss, 3 Jur. N. S. 107; not reported on this point, 3 K. & J. 62; see also Deere *v.* Robinson, 7 Hare, 283.

[10] Bainbrigge *v.* Moss, 3 Jur. N. S. 107, V. C. W.

[1] *Re* Colquhoun, *ubi sup.*; Harmer *v.* Harris, 1 Russ. 155; and see Certificate of Mr. Follett, 5 De G., M. & G. 36 n.

[2] Seton, 94; Heighington *v.* Grant, 1 Beav. 228, 231; and see Certificate of Clerk in Court, *ib.* 231 n.; Hardy *v.* Hull, 17 Beav. 355; see, however, Attorney-General *v.* Carrington, 6 Beav. 454, 458; Proud *v.* Bates, 1 W. N. 22; 14 W. R. 306, V. C. W.

[3] Seton, 95; and for forms of orders, involving, and not involving, apportionment of the general charges, see *ib.* 88, 89. For mode of apportionment, where charges of fraud are dismissed with costs, see Heming *v.* Leifchild, 8 W. R. 352, V. C. W.; Affd. 9 W. R. 174, L. JJ.

[4] Alsop *v.* Lord Oxford, 1 M. & K. 564, 566; Holbecke *v.* Sylvester, 6 Ves. 417; Lucas *v.* Temple, 9 Ves. 299; Fenton *v.* Crickett, 3 Mad. 496; *Re* Congreve, 4 Beav. 87, 89; Attorney-General *v.* Lord Carrington, 6 Beav. 454, 460; Lucas *v.* Peacock, 8 Beav. 1, 5; *Re* Catlin, 18 Beav. 508; *Re* Hubbard, 23 Beav. 481; Turner *v.* Turner, 5 Jur. N. S. 839; 7 W. R. 573, V. C. K.

[5] Alsop *v.* Lord Oxford, *ubi sup.*; Wiggins *v.* Peppin, 2 Beav. 403, 408, n.

[6] Shewell *v.* Jones, 2 S. & S. 170, 172; Alsop *v.* Lord Oxford, *ubi sup.*; Attorney-General *v.* Drapers' Company, 4 Beav. 305, 307; Attorney-General *v.* Lord Carrington, *ubi sup.*; Friend *v.* Solly, 10 Beav. 329, 331.

Taxing Master, in any bill of costs taxed by him, of the whole or any part of any item or items, he should, before the certificate is signed, deliver to the other party interested therein, and carry in before the Taxing Master, an objection in writing to such allowance or disallowance: specifying therein, by a list in a short and concise form, the items or item or parts or part thereof objected to; and apply to the *1450 Taxing Master for a warrant to review * the taxation in respect of the same.[1] He cannot, however, make any objection which he has not previously made during the taxation.[2]

Upon the application for, or upon the return of, the warrant, the Taxing Master will reconsider and review his taxation upon the objection; and he may, if he thinks fit, receive further evidence in respect thereof; and, if so required by either party, he will state, either in his certificate of taxation or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.[3]

If any party is dissatisfied with the certificate of the Taxing Master, as to any item or part of an item which has been thus objected to, he must apply to the Judge, by a summons at Chambers, for an order to review the taxation.[4] The certificate of the Taxing Master is final and conclusive, as to all matters not objected to in the manner before pointed out.[5] The application to review the taxation will be heard and determined upon the evidence which has been brought in before the Taxing Master; and no further evidence will be received, unless the Court otherwise directs.[6] And where the Court communicates directly with the Taxing Master as to the proceedings before him, no further evidence on that point will be received.[7]

The summons is heard by the Judge, either in Chambers or by adjournment into Court;[8] and will then either be dismissed, or an order made thereon directing the taxation to be reviewed by the Taxing Master. In the latter case, the order is drawn up in the usual way, by the Registrar; and the matter is renewed in the Taxing Master's office.[9]

[1] Ord. XL. 33; see Hoffman *v.* Skinner, 5 Paige, 526. For forms of objection and warrant, see Vol. III.

[2] *Re* London, Birmingham, and Bucks Railway, *Ex parte* Curzon, 6 W. R. 141, V. C. K.

[3] Ord. XL. 34.

[4] Ord. 2 Aug., 1864, r. 4; *Re* London, Birmingham, and Bucks Railway, *Ex parte* Curzon, 6 W. R. 141, V. C. K. It was held that Ord. XL. 35, for which r. 3, *sup.*, has since been substituted, did not enable the Court to interfere with the discretion of the Taxing Master, as to the amount of any item. Turner *v.* Turner, 5 Jur. N. S. 839; 7 W. R. 573, V. C. K. If a party is dissatisfied with the decision of the taxing officer upon particular items of the bill of costs, he must bring the questions before the Court, by an application on his own part, although the other party applies for a retaxation as to other items. Rogers *v.* Rogers, 2 Paige, 458. As to the retaxation of costs, see, further, Andrews *v.* Ford, 2 Halst. Ch. 488.

[5] Ord. 2 Aug., 1864, r. 3.

[6] *Ib.* r. 4. If a party insists upon having items included in his bill, which are not legally taxable, he will be charged with the expense of a retaxation; but if the other party also objects to items properly taxed, each party may be left to bear his own costs upon the retaxation. Doe *v.* Green, 2 Paige, 347; see Lloyd *v.* Brewster, 5 Paige, 87. For the practice on summons, see *ante*, p. 1331.

[7] Sturge *v.* Dimsdale, 9 Beav. 170, 175.

[8] See *ante*, pp. 1337, 1338.

[9] Raymond *v.* Lakeman, M. R., 27 March, 1865, B. 1317.

*Section VI. — *Payment of Costs, how enforced.* *1451

When costs are directed to be paid by one person to another, and whether in a cause or in a matter, the payment may be enforced by *subpœna*;[1] or, after the lapse of one month[2] from the entry of the decree or order, by writ of *fieri facias* or *elegit*.[3]

The *subpœna* for costs will not be issued, where the costs are directed to be paid within a limited time after service of the Taxing Master's certificate: in such case, the amount is recovered, on proof of service of the order and certificate, and of non-payment, in the same manner as in the case of an order directing payment of a sum of money.[4]

The *subpœna* for costs is prepared by the solicitor,[5] and sealed at the Record and Writ Clerks' office;[6] and must be indorsed with the name and place of business of the solicitor by whom the writ is sued out, and of his agent, if any, or with the name and place of residence of a party suing out the writ in person, and, in either case, with the address for service, if any.[7] If the order directing payment of the costs specifies their amount, the *subpœna* will be sealed upon production of the order.[8] If the costs are directed to be taxed, an office copy of the Taxing Master's certificate must be produced.[9] At the time of issuing the *subpœna*, a *præcipe* must be delivered and filed at the Record and Writ Clerks' office.[10] The *subpœna* may contain three names, where necessary or required.[11]

In the interval between the suing out and service of the *subpœna*, the party suing out the same may correct any error in the names of the parties, and may have the writ resealed, upon leaving a corrected *præcipe* of such *subpœna*, marked with the words "altered and resealed," and signed with the name and address of the solicitor or solicitors suing out the same.[12]

*Where costs are ordered to be paid by a husband and wife, *1452 the *subpœna* may be directed to both: although an attachment can only be issued against the husband.[1]

[1] For form of *subpœna* for costs, see Ord. XXVIII. r. 2, and Sched. E., No. 4; and Vol. III.

[2] That is, twenty-eight days. Ord. XXXVII. 10.

[3] Ord. XXIX. 6; 1 & 2 Vic. c. 110, § 18, *ante*, p. 1033; and see *post*, p. 1456.

[4] Braithwaite's Pr. 261; and see *ante*, pp. 1042 *et seq.* An attachment issued in such a case was discharged, because the word "pounds" was omitted from the copy of the Taxing Master's certificate served. *Re* Reynolds, 10 W. R. 709, V. C. S.; and see Lord Huntingtower *v.* Sherborn, 5 Beav. 162.

[5] Ord. III. 1.

[6] 15 & 16 Vic. c. 87, §§ 27, 28; Ord. I. 37.

[7] Ord. III. 2, 5, *ante*, pp. 453, 454. For form of indorsement, see Vol. III.

[8] Braithwaite's Pr. 261.

[9] *Ibid.*; Ord. XXVIII. 1.

[10] Ord. XXVIII. 1. The *præcipe* must contain the name or firm, and the place of business or residence, of the solicitor or solicitors intending to sue out the same; and where he or they is or are agent or agents only, then also the name or firm and place of business or residence of the principal solicitor or solicitors, *ibid.*; and see Barnes *v.* Tweddell, C. P. Coop. 440. A fee of 5*s.*, in a fee fund stamp, affixed to the *præcipe*, is payable on issuing the *subpœna*; Regul. to Ord. Sched. 4. For form of *præcipe*, see Vol. III.

[11] Ord. XXVIII. 3.

[12] Ord. XXVIII. 5.

[1] Braithwaite's Pr. 262.

Where it is ordered that the costs of a defendant, when taxed, shall be paid by the plaintiff, and that another defendant shall repay to the plaintiff the amount of the first defendant's costs, together with the plaintiff's own costs, the plaintiff, before he can procure a *subpœna* for the amount of the costs he has paid the defendant, must produce, at the Record and Writ Clerks' office, the receipt given by the defendant for such costs.[2]

The service of the *subpœna* is effected by delivering a copy of the writ, and of the indorsement thereon, and at the same time producing the original writ;[3] and must, if not otherwise authorized by the Court, be personal on the person to pay the costs. If, however, he is resident abroad,[4] or not to be found, the Court will, on being satisfied that such is the case, make an order allowing substituted service, as in the case of a decree.[5]

The application for the order is made *ex parte*, and must be supported by affidavit, showing that the person is resident abroad, or that proper diligence has been used to effect due service, as the case may be. It may be made by summons, if the costs have been awarded in respect of proceedings originating in Chambers, or pending there: in other cases, it should be by motion.[6]

The time allowed for the service of a *subpœna* for costs is not, like a *subpœna* for any other purpose, limited to twelve weeks after the *teste* of the writ;[7] but the same must be effected within the jurisdiction of the Court, unless there is a special order of the Court to authorize its service elsewhere. Thus, in *Hawkins* v. *Hall*,[8] where a *subpœna* for costs were served upon the plaintiff at Boulogne, and he was afterwards arrested upon an attachment issued upon that service, Lord Langdale M. R. set the attachment aside for irregularity.

In the same case,[9] after the order to discharge the attachment was made, but before it could be drawn up and served, another *subpœna*, for the same costs, was served, and another demand made upon the plaintiff, whilst he was in custody upon the irregular attachment: upon which service and demand, another attachment for the same *1453 costs was issued, and executed in what is *termed the lobby of the prison. Upon another application being made to discharge the plaintiff out of custody, upon the grounds: 1st, That the *subpœna* for costs was irregularly served; and, 2dly, That he was privileged to leave the prison freely for the purpose of returning home: Lord Langdale M. R., without deciding upon the second ground, held that the

2 *Ib.* 263. For cases where such an order is made, see *ante*, pp. 1406, 1407.

3 Ord. XXVIII. 6.

4 Hawkins *v.* Hall, 1 Beav. 73, 75; and see S. C. 4 M. & C. 280; and *ante*, p. 449 *et seq.*

5 *Ante*, p. 1045; Hunter *v.* ——, 6 Sim. 429; Danford *v.* Cameron, 8 Hare, 329; Inglis *v.* Campbell, 2 W. R. 667, V. C. K.; Walrond *v.* Parker, 1 Giff. 315. For form of order, see Seton, 1213, No. 2.

6 Seton, 1212; Danford *v.* Cameron, *ubi sup.* For forms of summons and motion paper, see Vol. III.

7 Ord. XXVIII. 9; Braithwaite's Manual, 138.

8 1 Beav. 73, 75; and see Fernandez *v.* Corbin, 2 Sim. 544.

9 1 Beav. 73, 77; and note, *ib.* p. 78.

service of the second *subpœna* upon the plaintiff, whilst in custody upon an illegal process, issued by the same party, was irregular, and therefore discharged him; and his Lordship's decision was afterwards affirmed by Lord Cottenham.[1]

Where there is a joint order for payment of costs by two or more persons, the order is considered as joint and several: and if one of the persons to pay abscond, or cannot be served, a proceeding against the other or others will be good;[2] and so, also, if one of the parties to pay the costs dies before they are paid, or even before they are taxed, the survivors may be proceeded against: notwithstanding the parties to pay the costs were the plaintiffs, and the death of one of them has occasioned an abatement of the suit.[3]

The person serving the *subpœna*, whether he is the party entitled to the costs or the bearer, must, at the time of service, make a demand of the amount of the costs;[4] and as the *subpœna* directs the costs to be paid either to the person named or to the bearer, it is not necessary that the bearer should have any other authority to receive the costs than the writ itself.[5]

If the person refuse or neglect to pay the costs, an attachment may be issued against him, at any time after service of the *subpœna*.[6]

The writ will be sealed by the Record and Writ Clerk, without order, on his being satisfied by affidavit of the due service of the *subpœna*, and of the demand and refusal or neglect to pay the costs.[7] The affidavit must state when, where, and how the *subpœna* was served, and by whom the service was effected.[8] It need not be sworn immediately before the attachment is issued.[9]

The writ of attachment must bear an indorsement, stating that * it is issued for non-payment of the sum of costs there specified; *1454 and a *præcipe* must be filled up and entered with the Registrar, before it is issued.[1]

The writ is prepared, directed, made returnable, delivered, executed, and returned, and the return enforced, in the same manner as an attachment on mesne process.[2]

If the person refusing to pay the costs is taken under the attachment,

[1] 4 M. & C. 280; and see Lewis *v.* Evans, C. & P. 264; Woodward *v.* Conebeer, 1 Hare, 297.

[2] *Ex parte* Bishop, 8 Ves. 333; Poole *v.* Franks, 1 Moll. 78; Sangar *v.* Gardiner, C. P. Coop. 262, 265; Braithwaite's Pr. 261; Morgan & Davey, 362.

[3] Meredyth *v.* Hughes, 3 Y. & J. 188; and see Michel *v.* Bullen, 6 Pri. 87.

[4] Hawkins *v.* Hall, 4 M. & C. 280, 282; Braithwaite's Pr. 261; Seton, 1228; and see Andrewes *v.* Walton, 1 M'N. & G. 380, 383; where the service is on a substitute.

[5] Braithwaite's Pr. 262; Andrewes *v.* Walton, *ubi sup.*; Empringham *v.* Short, 12 L. J. Ch. 144, L. C.; and see form of writ, Vol. III.

[6] Braithwaite's Manual, 138. And such costs may be collected on execution. Dodge *v.* Griswold, 12 N. H. 578; Frost *v.* Belmont, 6 Allen, 152, 164.

[7] *Ibid.*; Braithwaite's Pr. 179. For the practice as to attachments, see *ante*, p. 1046; and for forms of affidavit and writ, see Vol. III.

[8] Ord. XXVIII. 8.

[9] Wroe *v.* Clayton, 16 Sim. 183; 12 Jur. 321, where the affidavit had been sworn fifteen months previously.

[1] *Ante*, pp. 465, 1046; Braithwaite's Pr. 168, 178. A fee of 5*s.*, in a fee-fund stamp, affixed to the writ, is payable on issuing the writ. Regul. to Ord. Sched. 4. For forms of indorsement and *præcipe*, see Vol. III.

[2] *Ante*, pp. 462–467.

he is committed to the county jail, or is detained in custody, if already in prison, and the sheriff returns accordingly;[3] and the person prosecuting the contempt may leave him there until he has cleared his contempt, by paying the costs for which he is attached, and the costs of the contempt.[4] If, however, the person prosecuting the contempt wishes to proceed to a sequestration, he must procure a writ of *habeas corpus* to bring up the person in contempt to the bar of the Court, that he may be turned over to Whitecross Street Prison,[5] or remanded to that prison if already imprisoned or detained there.[6] Upon being brought up, an order to turn him over or remand him to that prison is made;[7] and thereupon an order for a sequestration may be obtained, on an *ex parte* motion.[8]

If the sheriff return *non est inventus*, the party prosecuting the contempt is entitled, either to a commission of sequestration, or to an order for the Sergeant-at-Arms, and consequent proceedings, as before explained.[9]

The process of the Court to enforce obedience to *subpœna* for costs, against a party not entitled to privilege, like the process to enforce obedience to a decree for the payment of money, is not a bailable process:[10] although, it seems that, if the sheriff, after taking a person upon an attachment for costs, lets him out upon bail, and, before the return of the attachment, retakes him, his liability will not be enforced.[11]

Where the person served with the *subpœna* for costs is entitled to the privilege of peerage, or is a member of the House of Commons, *1455 the method of enforcing obedience is to obtain an order *nisi* * for a sequestration; and, upon affidavit of personal service thereof, an order absolute will be made.[1] Both orders are obtained on *ex parte* motions.[2]

Where a corporation aggregate has been served with the *subpœna* for costs, the course of proceeding is by *distringas*, and sequestration *nisi* and absolute, as in the case of non-obedience to an order or decree.[3]

The person prosecuting the contempt will not, by issuing the attachment, lose any lien or right to set off which he may possess, in respect of the costs.[4]

[3] Morgan & Davey, 365.

[4] See *ante*, p. 1047.

[5] 25 & 26 Vic. c. 104, § 2; see *ante*, p. 491. Section 2 provides, that no person shall be removed by *habeas* from any other prison to Whitecross Street Prison; and it has been doubted whether an order to turn over can now be made. See Davies *v.* Nixon, 11 W. R. 62, V. C. K.; Morgan & Davey, 366.

[6] For the practice as to the *habeas*, see *ante*, p. 491. For form of order for the writ, see Seton, 1222; and for form of motion paper, see Vol. III.

[7] Ord. XXIX. 3, *ante*, p. 1049. For form of order, see Seton, 1223, No. 1.

[8] For the practice as to a sequestration, see *ante*, pp. 1048 *et seq.* For form of order, see Seton, 1224; and for form of motion paper, see Vol. III.

[9] Braithwaite's Pr. 239, 240. For the practice as to a Sergeant-at-Arms, see *ante*, p. 1048.

[10] *Ante*, p. 1046.

[11] Collard *v.* Hare, 5 Sim. 10, 13; and see Oldfield *v.* Cobbett, 12 Beav. 91, 96.

[1] *Ante*, pp. 473, 496, 1066; Braithwaite's Pr. 262; Seton, 1228; *ib.* 1241, Table No. V.

[2] For forms of orders *nisi* and absolute, see Seton, 1225, 1226; and for forms of motion paper, see Vol. III.

[3] *Ante*, pp. 477, 497, 1067; Braithwaite's Pr. 262; Seton, 1228; *ib.* 1241, Table No. V. For form of order, see Seton, 1227; and for forms of motion paper, see Vol. III.

[4] Bawtree *v.* Watson, 2 Keen, 713, 718; Roberts *v.* Ball, 3 Sm. & G. 168; 1 Jur. N. S. 585; O'Brien *v.* Lewis, 4 Giff. 396; 9 Jur. N. S. 620; *ib.* 764; 11 W. R. 973, L. JJ.

The above methods of proceeding apply to all cases in which costs are to be recovered by *subpœna;* but it is to be observed, that some costs are not recoverable by *subpœna:* amongst these may be reckoned the costs of contempt. In the case of a contempt for not putting in an answer, the plaintiff may refuse to accept the answer until the costs of the contempt are discharged;[5] or, if the answer has been filed without payment of the costs, he may move to take it off the file for irregularity.[6] In other contempts, also, where the party is in custody, the detaining party should take care that the sheriff or other officer does not discharge the prisoner, or that he does not sanction his being discharged, until he has paid the costs of the contempt.[7] The costs of amending a bill must be paid before the bill can be regularly amended;[8] and the payment of the costs of exceptions submitted to, is a necessary part of the submission.[9]

It may be mentioned here, that, where a suit was instituted by a next friend, on behalf of an infant, and the defendant was ordered to pay the costs, but absconded to avoid the process, the Court (the next friend being very poor) ordered the costs to be raised and paid out of a fund which had been realized in the suit for the benefit of the infant: it is stated, however, that Lord King made the order with some reluctance.[10]

A *subpœna* for costs formerly issued only against persons who were parties to the record.[11] If costs were to be recovered against a person not a party to the record, the course of proceeding was, first to get an order *nisi* upon him to pay by a given day: and, if he did not pay by the day named, then to obtain an order that he * might *1456 pay by another day, or stand committed. We have seen, however, that now, the obedience of persons not parties to the record, is enforced in the same manner as in the case of persons not strictly parties.[1]

Besides the method of recovering costs by *subpœna*, the stat. 1 & 2 Vic. c. 110, has provided an additional remedy by writs of *fieri facias*, and *venditioni exponas*, and of *elegit:* by which costs, either alone, or together with a sum of money decreed or ordered to be paid by one party to another, may be recovered from the personal or real estate of the party to pay them.[2]

The method of preparing, issuing, executing, and returning these writs has been already pointed out.[3] It is, however, to be recollected, that the order or decree under which the costs are to be paid must state by and to whom they are to be paid;[4] and must be duly passed and entered, in the manner already pointed out, at least one month before a writ of *elegit* or of *fieri facias* can be issued upon it,[5] and that the date

[5] *Ante*, p. 755.
[6] *Ante*, p. 784.
[7] *Ante*, p. 507.
[8] *Ante*, p. 422.
[9] Ord. XL. 13, *ante* pp. 466, 467.
[10] Staines *v.* Maddox, Mos. 319.
[11] Anon., 14 Ves. 207.
[1] *Ante*, p. 1061.
[2] 1 & 2 Vic. c. 110, § 18; *ante*, p. 1033; but see *ante*, p. 1035; Hargrave *v.* Hargrave, 23 Beav. 484. For forms of writs, see Ord. Scheds. F. & G.; and Vol. III.
[3] *Ante*, pp. 1063 *et seq.*; Ord. XXIX. 6–13.
[4] *Ante*, p. 1063; Ord. XXIX. 6.
[5] *Ante*, p. 1063.

of such entry must be marked upon the order.[6] The decree or order directing the payment, or an office copy thereof, and an office copy of the Taxing Master's certificate, where the costs have been ascertained by taxation, must be produced to the Clerk of Records and Writs, at the time of issuing the writ.[7]

The above methods of procuring the payment of costs apply only where costs are payable from one party to another. Where they are payable out of the fund which is standing in the name of the Accountant-General, the party having the carriage of the order directing such payment bespeaks, at the Accountant-General's office, a check for the amount of the costs in favor of the solicitor entitled thereto: who can thereupon receive the check in person, or by attorney, in the manner hereafter pointed out.[8]

Where the costs are to be paid out of the fund not in Court, or out of the estate which is the subject of litigation, the costs, together with interest thereon, which is generally at the rate of 4*l.* per cent, may be declared to be a charge on the property, and the tenant for life directed to keep down the interest, or a sufficient part of the fund or estate, to satisfy such costs, will be ordered to be mortgaged or sold.[9] A direction to this effect, where none is contained in the decree, may be obtained on motion.[10] It is usual, however, to insert a direction *1457 for a sale or mortgage of the estate, for the * purpose of paying the costs, in the decree or order itself; and an omission to do so may be a ground for a rehearing or appeal.[1] Where a tenant for life of an estate is entitled to costs out of the estate, the Court will, as we have seen, direct an immediate sale or mortgage to raise the costs.[2]

Where the Court appoints one of the solicitors of the Court to be guardian *ad litem* of an infant, or person of unsound mind, the Court may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid, either by the parties, or some one or more of the parties, to the suit in which such appointment is made, or out of any fund in Court in which such infant or person of unsound mind may be interested; and may give directions for the repayment or allowance of such costs, as the justice and circumstances of the case may require.[3]

6 *Ibid.*; Ord. XXIX. 7.

7 Braithwaite's Pr. 196.

8 See *post*, Chap. XLI., *Payment out of Court*.

9 Cannon *v.* Beely, 1 Dick. 115; S. C. *nom.* Cannell *v.* Beeby, Beames on Costs, Ap. 7; and see Mandeno *v.* Mandeno, Kay Ap. 2. For forms of orders, see Seton, 96, p. 245.

10 Cannon *v.* Beely, *ubi sup.*

1 Burkett *v.* Spray, 1 R. & M. 113.

2 *Ibid.*; and *ante*, p. 1433.

3 Ord. XL. 4; see *ante*, pp. 163, note (10), 176; and see Ord. XXXV. 23. [The compensation of the guardian *ad litem* comes out of the estate of the infant. Matter of Howes, 2 Edw. Ch. 484; Union Ins. Co. *v.* Van Rensellaer, 4 Paige, 85. If no funds of the infant in Court, the compensation may, it seems, be charged in the bill of costs. Walker *v.* Hallett, 1 Ala. 379; Sutphen *v.* Fowler, 9 Paige, 280; *ex parte* Pearse, 1 Turn. & R. 325. The allowance in such case is, ordinarily, limited to the taxable costs. Fraser *v.* Thompson, 4 De G. & J. 663; Gott *v.* Cook, 7 Paige, 544. And see Yourie *v.* Nelson, 1 Tenn. Ch. 614; Bowling *v.* Scales, 1 Tenn. Ch. 618; Carter *v.* Montgomery, 2 Tenn. Ch. 455. But the intimation in these cases, that the compensation of guardian *ad litem* may be made a part of the taxable costs, has been overruled by the Supreme

It has been before stated, that where, after a bill has been dismissed, the plaintiff files another bill for the same purpose against the same defendant or his representative, the Court will stay the proceedings on the new bill till the costs of the former suit have been paid.[4] The same course will also be followed by the Court, where the original bill has been dismissed, without prejudice to the plaintiff's filing a new bill for the same matter.[5] It seems, however, that the Court will not make such an order, if the defendant takes any step in the new cause before applying for it.[6]

A defendant to a bill of discovery is, as we have seen, entitled, as of course, to an order for his costs, as soon as he has put in his answer, and the time for excepting has expired.[7] He may, however, be ordered to pay the costs of an unsuccessful opposition to a * mo- *1458
tion for an injunction, to stay the proceedings in an action in aid of the defence to which the bill is filed.[1] If the defendant has filed the bill of discovery in aid of his defence to a bill seeking relief against him, the costs of the bill of discovery will be costs in the original cause: unless the Court otherwise directs.[2] The Court will not depart from this rule because the defendant, although successful in the suit, has not availed himself of all the discovery sought by his bill.[3]

It is irregular to apply for the costs of the bill of discovery, suppressing all mention of its being a cross-suit: even though the original cause has been disposed of before the answer to the cross-bill has been put in.[4]

In the case of a bill to perpetuate testimony, the defendant may obtain, on motion of course, or on petition of course at the Rolls, an order for payment of his costs, as soon as the evidence is closed, upon an allegation that he did not examine any witnesses;[5] and where a bill was

Court of Tennessee in an unreported case. See also Staines *v.* Maddox, Mos. 319; Perkins *v.* Perkins, 9 Heisk. 95.]

[4] *Ante*, p. 796; Holbrook *v.* Cracroft, 5 Ves. 706, note; Pickett *v.* Loggon, 5 Ves. 702. The rule has its limitations. See Sears *v.* Jackson, 3 Stockt. 45; Budge *v.* Budge, 12 Beav. 385; Wild *v.* Hobson, 2 Ves. & B. 112; Corbett *v.* Corbett, 16 Ves. 410. For order in such case, see Updike *v.* Bartles, 2 Beasley, 231, 232.

[5] Ange *v.* Truelock, 2 Moll. 41.

[6] *Ibid.*

[7] *Ante*, p. 810; and see *post*, Chap. XXXIV. § 2, *Bills of Discovery*. For form of order, see Seton, 1270, No. 5. The general practice is, that a plaintiff, who comes merely for discovery and obtains it, shall pay the costs. Burnett *v.* Sanders, 4 John. Ch. 504; M'Elwee *v.* Sutton, 1 Hill Ch. 34; Weymouth *v.* Boyer, 1 Ves. J. 416; Hervey *v.* Talbutt, 1 Jac. & W. 197; Fulton Bank *v.* N. York & Sharon Canal Co., 4 Paige, 127; McCelvy *v.* Noble, 13 Rich. L. 330; Adams *v.* Porter, 1 Cush. 170. But a defendant, who has been previously applied to for the information sought by the bill, and has improperly refused to give it, is not entitled to costs, though he make the discovery when sought by the bill. King *v.* Clark, 3 Paige, 76; M'Elwee *v.* Sutton, 1 Hill Ch. 34; Dennis *v.* Riley, 21 N. H. 50. In a case where the defendant in a bill of discovery is entitled to costs, he may move for them as soon as the answer is perfected. King *v.* Clark, 3 Paige, 76; Dennis *v.* Riley, 21 N. H. 50. Where an officer of a corporation is necessarily made a party, for the purposes of discovery merely, if the plaintiff is compelled to pay the costs of such discovery, he may have a decree over against the other parties for such costs. Fulton Bank *v.* N. York and Sharon Canal Co., 4 Paige, 127.

[1] Lovell *v.* Galloway, 19 Beav. 643; see also Banbury *v.* ——, 9 Ves. 103; Anon., 8 Ves. 69.

[2] Ord. XL. 14; Heming *v.* Dingwall, 2 Phil. 212; S. C. *nom.* Dingwall *v.* Heming, 11 Jur. 177.

[3] Robinson *v.* Wall, 10 Beav. 73.

[4] Watts *v.* Penny, 11 Beav. 435, 437.

[5] Foulds *v.* Midgley, 1 V. & B. 138; and see Wright *v.* Tatham, 2 Sim. 459; Beavan *v.* Carpenter, 11 Sim. 22; *ante*, pp. 810, 860; and *post*, Chap. XXXIV. § 4, *Bills to perpetuate Testimony*. For form of order, see Seton, 1270, No. 5; and for forms of motion paper and petition, see Vol. III.

filed for discovery, as well as to perpetuate testimony, he was held entitled to his costs, so far as the suit was for discovery: although he had examined witnesses in chief.[6]

In all suits and proceedings instituted since the 14th of August, 1855,[7] by or on behalf of the Crown, in respect of the public revenue, the Attorney-General is entitled to recover costs, where judgment is for the Crown, in like manner as in proceedings between subject and subject; and such costs are to be paid into the Exchequer; and where judgment is given against the Crown, the defendant is entitled to recover costs, in like manner; and the Treasury is to pay such costs out of any moneys voted by Parliament.[8]

[6] Skrine *v.* Powell, 15 Sim. 81. [As to the costs of a bill for the appointment of a receiver *pendente lite*. Barton *v.* Rock, 22 Beav. 376.]

[7] Date when the 18 & 19 Vic. c. 90, came into operation. The Act is not retrospective. See Attorney-General *v.* Hanmer, 4 De G. & J. 205; 5 Jur. N. S. 693.

[8] 18 & 19 Vic. c. 90, §§ 1, 2. For form of order under these sections, see Seton, 351, No. 14. As to costs in petitions of right, see *ante*, p. 132; and generally as to the costs of the Attorney-General, where informant or defendant, see *ante*, p. 11 *et seq.*, 139; Morgan & Davey, 233 *et seq.*; Seton, 351, 363. As to revivor for costs, see *post*, Chap. XXXIII., *Revivor and Supplement*.

* CHAPTER XXXII. *1459

REHEARINGS AND APPEALS.

SECTION I. — *Generally.*

WHERE a party feels himself aggrieved by a decree or order of the Court, there are three modes by which he may seek to have it either reversed or varied: namely, 1. By a rehearing in the Court of Chancery; 2. By an appeal to the House of Lords; and 3. By a bill of review.[1]

A rehearing, by the Court of Appeal in Chancery, of a decree or order made by the Master of the Rolls or a Vice-Chancellor, is in fact an appeal;[2] and as many of the rules applicable to appeals to the House

[1] As to bills of review, see *post*, Chap. XXXIV. § 5.

[2] [The distinction between an appeal in Chancery and an appeal to the House of Lords is important, and should be borne in mind, for the effect of the appeal is different, and it is the latter class of appeals which prevails in the United States. An appeal in Chancery, from an order or decree of the Master of the Rolls, or Vice-Chancellor, to the Lord Chancellor or Court of the Lord Justices, is a rehearing, and the Appellate Court has power to deal with the whole case. *Ex parte* Kireton Coal Co., L. R. 7 Ch. App. 730. New evidence is sometimes admitted, as in the case of a rehearing by the original Court. *Infra*, 1486, 1487 and notes. And the Appellate Court may make a decree as upon a trial *de novo*. *Infra*, 1489. Thus, where only one of several defendants appeals, the bill may be dismissed as to all. Kent *v.* Freehold Co., L. R. 3 Ch. App. 493; Vaughn *v.* Halliday, L. R. 9 Ch. App. 561. So, where the plaintiff appeals from part of a decree, another part being in his favor, the bill may be dismissed *in toto*. Hunter *v.* Belcher, 2 De G., J. & S. 201. An appeal by one of several creditors of an estate, however, brings up the case only as to his claim. Pardo *v.* Bingham, L. R. 4 Ch. App. 735. So, an appeal by one party does not bring up the case as between the respondent and parties other than the appellant. Tasker *v.* Small, 1 Coop. temp. Cott. 61 n. (*b*). Upon appeal to the House of Lords, the respondent cannot argue, without a cross-appeal, that the decree below was too favorable for the appellants. Kellett *v.* Kellett, 3 H. L. Cas. 161; Yates *v.* University College, L. R. 7 H. L. 438; *infra*, 1488, 1489, notes.

In the United States, as a general rule, the appellee cannot be heard to assign error. Carey *v.* Brown, 92 U. S. 175; Chittenden *v.* Brewster, 2 Wall. 196; Mapes *v.* Coffin, 5 Paige, 296; Kelsey *v.* Weston, 2 N. Y. 505; Morse *v.* Smith, 83 Ill. 396; Mail Co. *v.* Flanders, 12 Wall. 135. In Mississippi, one party cannot prosecute an appeal after an affirmance of the decree upon the appeal of the other party. Caston *v.* Caston, 54 Miss. 512, citing Corning *v.* Troy Iron and Nail Factory, 15 How. 451. In Tennessee, as between the adverse parties affected by the decree appealed from, the appeal vacates the decree: Smith *v.* Holmes, 12 Heisk. 466; and brings up the entire record for a hearing *de novo*: Carnes *v.* Polk, 5 Heisk. 244; Wood *v.* Cooper, 2 Heisk. 441; Grubb *v.* Browder, 11 Heisk. 299; Milly *v.* Harrison, 7 Coldw. 191; but where the appellant's rights are separate and distinct from those of others, only those rights will be brought up by the appeal: Williams *v.* Palmer, 2 Baxt. 488; Gibson *v.* Compton, 3 Baxt. 220. And it has been held, in an unreported case, that where the appeal is from a decree on exceptions to the Master's report, only the exceptions of the appellant will be noticed. An appeal from only a part of a decree is an admission of the correctness of the residue. Norbury *v.* Meade, 3 Bligh, 261; Clowes *v.* Dickinson, 8 Cow. 328; Sands *v.* Codwise, 4 Johns. Ch. 536; Kelsey *v.* Weston, 2 N. Y. 505; Morgan *v.* Morgan, 83 Ill. 196. In New York, an appeal from a Vice-Chancellor to the Chancellor was not in the nature of a rehearing, but an appeal proper. Lenox *v.* Mitchell, 14 Wend. 662. See *infra*, 1489.]

of Lords, apply also to rehearings and appeals in Chancery, the present section will be devoted to the consideration of those rules and principles which are common to both methods of proceeding. The term appeal will, also, where used in the following pages, include rehearings and appeals in Chancery, as well as appeals to the House of Lords, except where a distinction is specifically pointed out.

Except in the instances already mentioned,[3] a decree or order made by consent cannot be the subject of appeal.[4]

*1460 * Where, upon a demurrer for want of parties, the demurrer was allowed, with liberty to the plaintiff to amend, the plaintiff by undertaking, in the order, to amend within three weeks, did not lose his right of appeal.[1]

It seems that a party, dissatisfied with a decree, will not prejudice his right to appeal, or to have the cause reheard, by consenting to an order consequential upon the decree.[2] Indeed, the general rule of the Court being, that an appeal or a rehearing does not suspend the proceedings under a decree, it would be absurd to say that, if a party, in order to save the expense of a contest upon a point which, supposing the decree to stand, he could not sustain, should obey the decree, by consenting to an order consequential upon it, he is by such obedience to be deprived of his right to have the case reheard.

Where an agreement had been signed by the parties, and by consent made an order of the Court, to submit to such a decree as the Court should make, provided it should be on the merits, and not on any mistake in the pleadings, and that neither party should bring an appeal: notwithstanding which, one party petitioned for and obtained, from Lord King, an order for a rehearing: Lord Talbot, although he expressed doubts whether, if the agreement had been disclosed to the Court originally, the order for a rehearing would have been made, yet, as his predecessor, who heard the cause, had ordered a rehearing, and thereby shown he was not satisfied with the decree, he refused to discharge it.[3]

It is not necessary that the person who appeals should be actually a

[3] *Ante*, p. 973.

[4] Stewart *v.* Forbes, 1 M'N. & G. 137; 13 Jur. 523; Dodson *v.* Sammell, 8 W. R. 252, V. C. K.; Atkinson *v.* Manks, 1 Cowen, 691; Ringgold's Case, 1 Bland, 512; *ib.* 18, 278; Coster *v.* Clarke, 3 Edw. Ch. 405; French *v.* Shotwell, 6 John. Ch. 564; DeCoster *v.* La Farge, 1 Paige, 574; Monell *v.* Lawrence, 12 John. 521; see also Cole *v.* Scott, 1 M'N. & G. 518, 523, 526. [But the refusal of the Court, at the same term, to open such a decree upon cause shown will be reviewed on appeal. Saleski *v.* Boyd, 32 Ark. 74.] As to what are consent orders, see Davis *v.* Chanter, 2 Phil. 545; 1 C. P. Coop. t. Cott. 285; and for observations on the impropriety of a party appealing from an order which he has not opposed in the Court below, see Christ's Hospital *v.* Grainger, 1 M'N. &. G. 460, 462. An appeal will not lie from a decree entered by default. Kane *v.* Whittick, 8 Wend. 219. As to appeals from decrees entered *pro confesso*, see Rowley *v.* Van Benthuysen, 16 Wend. 369; Hove *v.* Penn, 1 Bland, 35; Ringgold's Case, *ib.* 5, 12; Shye *v.* Llewellen, *ib.* 18; McKim *v.* Thompson, *ib.* 270; Murphey *v.* Amer. Life Ins. and Trust Co., 25 Wendell, 249; Tripp *v.* Cook, 26 Wendell, 243; Hunt *v.* Strong, 15 Vermont, 377.

In Ohio, under the Act of 1831, giving an appeal "from any final sentence or decree," an appeal was allowed from a decree in the Common Pleas, taken by consent of parties. Brewer *v.* Connecticut, 9 Ohio, 189; see Morris *v.* Davies, 5 Cl. & Fin. 163.

[1] Lidbetter *v.* Long, 4 M. & C. 286, 288; Davis *v.* Chanter, 2 Phil. 545; 1 C. P. Coop. t. Cott. 285; *ante*, p. 598.

[2] Wood *v.* Griffith, 1 Mer. 35, 38.

[3] Buck *v.* Fawcett, 3 P. Wms. 242.

party to the record: provided he has an interest in the question which may be affected by the decree or order appealed from. Thus, a rehearing of an order made on petition was directed at the instance of a person who had not been served with it, but who offered new evidence, and was substantially the only person interested in supporting the contention which it tended to prove.[4] Persons who have been served with notice of,[5] and creditors coming in under a decree, have been held entitled to rehear the cause, * though not parties to the bill: because the decree affected their interest;[1] but a person not a party to the record must first obtain from the Court permission to apply for a rehearing.[2] *1461

In *Hungerford's* case,[3] the creditors complained, that the property had not been applied as it ought: it was objected, that they could not come in under the decree, and impeach it; but it was answered that they might: for, if the decree contained in itself a wrong disposition of the property, they, coming in as creditors, had a right to appeal, because the decree bound their rights. In *Osborne* v. *Usher*,[4] the same principle was admitted; and it was held, that if the right of a remainder-man, or of any person entitled to the estate in any way, is bound by the decree, he must have a right to appeal from it, as

[4] Jopp *v.* Wood, 33 Beav. 372. The petition for rehearing by such a person need not be signed by counsel. Leete *v.* Jenkins, 14 W. R. 489, L. C. & L. JJ.

[See, as to the rights of a *quasi* party, Bruff *v.* Cobbold, L. R. 8 Ch. App. 217; and as to the mode of proceeding to secure the right of appeal by a person interested who is not a party, Sage *v.* Central R. Co., 93 U. S. 412. A surety upon a probate bond cannot appeal from a decree settling the account of his principal in the Probate Court: Tuxbury's Appeal, 67 Me. 267; but he may appeal from a decree in a suit in equity to which he is a party defendant: Porter *v.* Burton, 10 Heisk. 584.]

[5] Ellison *v.* Thomas, 1 De G., J. & S. 18; Kidd *v.* Cheyne, 18 Jur. 348, V. C. W.; *ante*, p. 438; Parmiter *v.* Parmiter, 3 De G., F. & J. 461.

[1] Giffard *v.* Hort, 1 Sch. & Lef. 409.

[2] Berry *v.* Attorney-General, 2 M'N. & G. 16; Gwynne *v.* Edwards, 9 Beav. 22, 34; Hodgson *v.* Smithson, 4 W. R. 699, L. JJ.; Parmiter *v.* Parmiter, 2 De G., F. & J. 526.

[And see, as to the rights of a shareholder, not named as a party, to apply to the court to vary or discharge a winding-up order, *Re* Anglo-Californian Gold Mining Co., 1 Dr. & Sm. 628.

A person interested in proving a will may take an appeal, although not named as a party to the proceedings. Foster *v.* Tyler, 7 Paige, 48. A receiver is so far a party that he may appeal from a decree directing him, after the sale of the property, to pay into court the balance found due from him on settlement. Hinckley *v.* Gilman, &c. R. Co., 94 U. S. 467. And a party may appeal, although he did not appear in the Court below. Hyslop *v.* Powers, 9 Paige, 322. And any one of several parties may appeal. Forgay *v.* Conrad, 6 How. 201; Johnson *v.* Johnson, 1 Dana, 366; Peer *v.* Cookerow, 1 McCarter, 361; Emerick *v.* Armstrong, 1 Ham. 513. And see, as to severance where the decree is joint, Masterson *v.* Herndon, 10 Wall. 416; Holcombe *v.* Holcombe, 2 Stew. Eq. 375; Terry *v.* Abrahams, 93 U. S. 38; Huff *v.* Miller, 2 Swan, 85; Foster *v.* Burem, 1 Heisk. 783. An appeal after the death of a party is void. Squibb *v.* McFarland, 11 Heisk. 563.

Only parties or those who represent them can appeal, and as stockholders do not represent the corporation, they cannot appeal in a case in which the corporation was a party, nor can they have a mandamus from the Appellate Court to compel the lower Court to grant an appeal, unless they were allowed to intervene below, or, at least, were treated as parties. *Ex parte* Cutting, 94 U. S. 14; *Ex parte* Jordan, 94 U. S. 248. A party who has no interest in the subject-matter of suit, or has lost it, cannot appeal. Mills *v.* Hoag, 7 Paige, 18; Idley *v.* Bowen, 11 Wend. 238. Although he may have an interest in the question. Ludlow *v.* Greenhouse, 1 Bligh N. S. 17; Steele *v.* White, 2 Paige, 478. Interest in the costs gives no right of appeal in other matters. Reid *v.* Vanderheyden, 5 Cow. 719. Nor can a party on appeal call in question a part of the decree in which he has no interest. Cuyler *v.* Moreland, 6 Paige, 273; Hone *v.* Van Schaick, 7 Paige, 221.]

[3] Cited, 1 Sch. & Lef. 409.

[4] *Ibid.*; 6 Bro. P. C. ed. Toml. 20.

well as the person against whom it was made. Upon this ground, it has been held that a tenant in tail, in remainder expectant after the determination of a prior estate tail (who would not be a necessary party to a suit affecting the entailed estate, against the prior tenant in tail), has a right to appeal against the decree in that suit; and that he may file a supplemental bill, for the purpose of making himself a party to the suit, in order to appeal from it.[5]

It has also been determined, by the House of Lords, that a purchaser under a decree, though no party to the suit, may appeal from an *1462 order setting aside a bidding, and ordering a new sale;[6] * and it has been held, that a creditor coming in under a decree, and having his claim disallowed, may appeal from the order disallowing it.[1]

It is only, however, in cases in which the interest of the party, wishing to appeal, will be bound by the decree, that a rehearing or appeal will be permitted, at the instance of an individual not on the record: in no other case can he have ground to complain of the decree or order.[2]

A party who is poor is entitled to prosecute or defend an appeal or a rehearing, *in formâ pauperis*, in the same manner that he has a right to sue, and be sued, in that character.[3] In the House of Lords, a poor person may also be admitted to sue or defend *in formâ pauperis*.[4]

The grounds upon which a party may appeal from a decree or order of the Court, or have it reheard, are as numerous and various as the cases themselves; and cannot therefore be pointed out in detail. In fact, wherever the Court is called upon to determine a question of Law or of fact, the decision may be the subject of a rehearing or appeal, by any party, bound thereby, who considers himself aggrieved by it.[5] The only case in which a party

[5] Giffard *v.* Hort, 1 Sch. & Lef. 411; but see Osborne *v.* Usher, *ubi sup.*, where such an appeal was sustained, although it does not appear that any supplemental bill was filed. [Duboll *v.* Field, 9 R. I. 266.]

[6] Ryder *v.* Earl Gower, 6 Bro. P. C. ed. Toml. 306; Barlow *v.* Osborne, 6 H. L. Ca. 556; 4 Jur. N. S. 367. [And a purchaser may appeal from a decree declaring him liable for the loss on a resale. Sharp *v.* Hess, 1 Tenn. Leg. Rep. 23.]

[1] Earl of Winchilsea *v.* Garetty, 1 M. & K. 253, 257.

[2] *Ibid.*

[3] Bland *v.* Lamb, 2 J. & W. 402; *ante*, p. 37; and *post*, p. 1482. In Bolton *v.* Gardner, 3 Paige, 273, it was held that an appeal cannot be prosecuted by the appellant in *formâ pauperis*, but he must give security for costs. And if he succeeds, he may have *dives* costs on the appeal, although he sue as a poor person in the Court below.

[4] Macqueen's H. L. Prac. 259; and *post*, p. 1494.

[5] See Brumagim *v.* Chew, 4 C. E. Green, 337. There can be no appeal from an order concerning the mere practice of the Court, or course of proceeding in the cause. Rowley *v.* Van Benthuysen, 16 Wend. 369, 371, 378, 379; Tripp *v.* Cook, 26 Wend. 150, 155. No appeal lies from a mere initiatory order. See McCredie *v.* Senior, 4 Paige, 378; Buel *v.* Street, 9 John. 443; Trustees of Huntingdon *v.* Nicoll, 3 John. 566. Nor from an order directing a sale of the property in litigation, and that the money be brought into Court. Chapman *v.* Hammersley, 4 Wend. 173; McKim *v.* Thompson, 1 Bland, 172. Nor from an order refusing a rehearing of a motion for instructions to a Master, as to the examination of a witness. Williamson *v.* Hyer, 4 Wend. 170. Nor from a decree ordering an account. Berryhill *v.* M'Kee, 3 Yerger, 157. In Robertson *v.* Bingley, 1 M'Cord Ch. 351, it is remarked by Nott J. in delivering the opinion of the Court, "I think there is no rule which ought more rigidly to be adhered to, than that an appeal ought not to be allowed from an interlocutory order." See Gibson *v.* Randolph, 2 Munf. 310; Allen *v.* Belcher, 2 Hen. & M. 595; Daniels *v.* Taggart, 4 Gill & J. 311;

cannot * appeal from the decision of the Court is, where the *1463
determination complained of is merely the result of the exercise of discretion on the part of the Judge, in a case where the matter was fairly a subject for the exercise of discretion: in such cases, the practice of the Court will not allow an appeal from the discretion of one Judge to that of another.[1]

Hagthorp *v.* Hook, 4 Gill & J. 270; Richardson *v.* Jones, 3 *id.* 163; Roberts *v.* Salisbury, *id.* 425. See the observations of Mr. Justice Bronson on this subject in Rowley *v.* Van Benthuysen, 16 Wend. 369, 371, 378, 379. If an order for an attachment contains a final determination or adjudication that the defendant is in contempt, he may appeal therefrom. McCredie *v.* Senior, 4 Paige, 378. An order directing an issue is a proper subject of an appeal. *Ante*, 1075, 1076, and note to this point. An appeal will lie from an order refusing to open proofs in a cause, for the purpose of re-examining a witness who, since his examination, has disclosed facts material and pertinent to the issue, which he did not disclose when on examination. Beach *v.* Fulton Bank, 2 Wend. 225. An appeal lies from an order of the Court refusing to dissolve an injunction, and awarding costs against the defendants. M'Vicar *v.* Wolcott, 4 John. Ch. 510. So from an order granting an injunction. Simpson *v.* Hart, 14 John. 65; Martin *v.* Dwelly, 7 Wend. 11; see Hoyt *v.* Gelston, 13 John. 140. [But not from a refusal to grant an injunction. Ogle *v.* Bill, 55 Ind. 131. It is otherwise in North Carolina. Jones *v.* Thorne, 80 N. C. 72; Myers *v.* Daniels, 6 Jones Eq. 1. An interlocutory decree dissolving an injunction may be appealed from. Union Ins. Co. *v.* Benit, 29 La. Ann. 297. Or granting or refusing to grant an injunction. Beebe & Guinault, 29 La. Ann. 795. The Supreme Court of Georgia will not revise the discretion of the Court below in granting or refusing an injunction unless an abuse of such discretion is shown. Nelms *v.* Clark, 44 Ga. 617; Thomas *v.* Stokes, 44 Ga. 631.] An appeal will lie to the Chancellor from an order of a Vice-Chancellor, made subsequent to a final decree in the cause. Tripp *v.* Vincent, 8 Paige, 176. An application for a rehearing must usually state some reason which would constitute a good ground for a new trial at Common Law. Hunter *v.* Marlboro, 2 Wood. & M. 168; see Baker *v.* Whiting, 1 Story, 218.

[1] See Stewart *v.* Forbes, 1 Mac. & Gor. 137; Tripp *v.* Cook, 26 Wend. 150; Rogers *v.* Hosack, 13 Wend. 319; Rowley *v.* Van Benthuysen, 16 Wend. 369, 371, 378, 379; Owings *v.* Worthington, 10 Gill & J. 283; Scott *v.* Crawford, 10 Gill & J. 379; Merriam *v.* Barton, 14 Vt. 501. There is, therefore, no appeal from an order directing a question of fact to be tried before the Judge and a special jury. Shrubsole *v.* Schneider, 12 W. R. 359, L. C. [As to the right of appeal from an order granting or refusing an issue, see *ante*, pp. 1076, 1077, and notes.

The granting or refusing an application for rehearing is a matter of discretion from which no appeal lies. Steines *v.* Franklin County, 14 Wall. 15. So of the granting or dissolution of a temporary injunction: Buffington *v.* Harvey, 95 U. S. 99; Rae *v.* Mayor, &c., 62 N. Y. 342; Spencer *v.* Stearns, 28 Mich. 463; except in a case of manifest abuse: Lowry *v.* Williams, 47 Ga. 387; Schoeffer & Hunnewell, 47 Ga. 660; even where damages are awarded: Johnson *v.* Board of Education, 65 Mo. 47. So of the grant or refusal of an attachment. Sartwell *v.* Field, 68 N. Y. 341. So of a decision on the sufficiency of a notice of appearance. Martine *v.* Lowenstein, 68 N. Y. 456. So, an appeal does not lie from an order denying a motion to permit a person to intervene in a pending suit, and become a party thereto. *Ex parte* Cutting, 94 U. S. 14; Bronson *v.* La Crosse R. Co., 2 Wall. 302. An appeal will not be encouraged from an order giving the plaintiff further time, on a motion to dismiss for want of prosecution. Sheffield *v.* Sheffield, L. R. 10 Ch. App. 206.

The appointment of a receiver resting in discretion, and being in its nature interlocutory, for the preservation of property *pendente lite*, no appeal lies in the Courts of the United States, and of such of the States as only allow appeal from a final decree. Forgay *v.* Conrad, 6 How. 204; Holden *v.* McMakin, 1 Pars. Eq. Cas. 289; Wood *v.* Brewer, 9 Ind. 86; Mansony *v.* Bank, 4 Ala. 475; Wilson *v.* Davis, 1 Montana, 98; Meadow Valley Min. Co. *v.* Dodds, 6 Nev. 261; Duncan *v.* Campau, 15 Mich. 415; Eaton R. Co. *v.* Varnum, 10 Ohio St. 622. In other States, which follow the English rule of allowing appeals from interlocutory orders, an appeal lies (Dale *v.* Kent, 58 Ind. 584), although the Appellate Court will not, as a general rule, revise the action of the lower Court, except in a clear case of abuse of discretion. Doilard *v.* Taylor, 33 N. Y. Sup. Crt. 496; Journeay *v.* Brown, 2 Dutch, 111; State *v.* Johnson, 13 Fla. 33; Jones *v.* Holliday, 37 Ga. 573; Cohen *v.* Meyers, 42 Ga. 46; Wade *v.* Amer. Col. Soc., 4 Sm. & M. 680; Callanan *v.* Shaw, 19 Iowa, 185. If, however, the order appointing or discharging a receiver operates, in effect, as a final decree, an appeal will lie. Milwaukee R. Co. *v.* Soutter, 2 Wall. 521; Cain *v.* Warford, 2 Md. 282; Cincinnati R. Co. *v.* Sloan, 31 Ohio St. 1. Or, if the appointment of the receiver is a substantial decision of the merits, the appeal lies: Lewis *v.* Campau, 14 Mich. 458; Barry *v.* Briggs, 22 Mich. 201; or is in execution of a decree adjudging rights: Produce Bank *v.* Morton, 67 N. Y. 199. *Infra*, p. 1491, note 10.

Discretionary matters are, in general, not

Upon this ground it is, that the Courts have adopted the rule, that there can be no rehearing or appeal upon the question of costs.[2] The foundation of this rule, as stated by Lord Hardwicke, in *Owen* v. *Griffith*,[3] is to prevent vexation and trouble: for, as cases in Equity often depend on abundance of circumstances, about which the reason of mankind might differ, the question of costs would, if it could be laid open generally, create perpetual appeals. The operation of the rule, however, is strictly confined to cases in which costs are to be paid by one party to another, and do not form any part of the relief sought by the bill; and it is liable to exception, where any principle is involved;[4] or where the costs are payable out of a fund; or are chargeable upon an estate; or are part of the relief to which a party is entitled, and the facts of the case distinctly appear upon the face of the proceed-
*1464 ings themselves: * so that it is not necessary, in determining the question of costs, upon the appeal, to enter into any investigation of the merits.[1] Upon this ground, in the case of *Owen* v. *Griffith*, above cited, Lord Hardwicke entertained an appeal by an incumbrancer: who had brought his bill to compel the payment of his charge, out of an estate which he had extended by *elegit* upon a judgment, and to

reviewable by appeal. Privett *v.* Calloway, 75 N. C. 233. Such as the refusal of the Court below to amend its records. State *v.* Brown, 73 N. C. 81. So of the award of damages on the dissolution of an injunction, treated as discretionary. Moore *v.* Granger, 30 Ark. 574. So of the setting aside of a default. Powell *v.* Clement, 78 Ill. 20. So, of an order refusing a motion for the delivery of securities on file to one of the parties. Driggs *v.* Daniels, 2 McArth. 254. So of an order denying an application for admission to the bar, unless, perhaps, in a clear case of abuse of discretion. Matter of Beggs, 67 N. Y. 120. Opening a default is a matter of discretion, not reviewable except in a clear case of abuse. Bank of Statesville *v.* Foote, 77 N. C. 131; Peoria Ry. Co. *v.* Mitchell, 74 Ill. 394. So of the control of the trial Court over the argument of counsel. Barden *v.* Briscoe, 36 Mich. 254.

An appeal lies from an order sustaining exceptions to a bill for impertinence. Rickards *v.* Attorney-General, 12 Cl. & F. 30; Camden, &c. R. Co. *v.* Stevens, 6 C. E. Green, 458.]

[2] As to appeals for costs, see Morgan & Davey, 105. A rehearing or appeal is not granted for costs only, except in special cases. Travis *v.* Waters, 1 John. Ch. 48; Eastburn *v* Kirk, 2 John. Ch. 17; Ashby *v.* Kiger, 3 Rand. 165; Rogers *v.* Holly, 18 Wend. 350; Lewis *v.* Wilson, 1 M'Cord Ch. 210; M'Millan *v.* Eldridge, Harp. Eq. 260; Lyles *v.* Lyles, 1 Hill Ch. 76, 92; Hope *v.* Carnegie, L. R. 4 Ch. Ap. 264. [And see Lozear *v.* Shields, 8 C. E. Green, 509.] Or where a party is entitled to costs as a matter of strict right. Buloid *v.* Miller, 4 Paige, 473; Winslow *v.* Collins, 3 Paige, 88. If a decree be opened as to other points, it may be reformed also in the matter of costs. Randolph *v.* Rosser, 7 Porter, 249; Hunt *v.* Lewin, 4 Stew. & Port. 138. Where a bill has been dismissed from the docket for want of prosecution, on motion of the defendant, the cause cannot properly be brought forward at a subsequent term, on motion, to obtain an order for his costs. Stone *v.* Locke, 48 Maine, 425.

[3] 1 Ves. S. 250; Amb. 520; and see Wirdman *v.* Kent, 1 Bro. C. C. 140; 2 Dick. 594; Williams *v.* Begnon, cited *ib.* 595; and Beames on Costs, Ap. No. 10. It is to be noticed, that the case of Gould *v.* Granger, in Moseley, 395, which, from the statement of it there, appears to be at variance with the rule laid down, is incorrectly reported; the question having been, not as to the costs of the cause, but as to the costs of the conveyance of the estate. See Beames on Costs, Ap. No. 12; and Angell *v.* Davis, 4 M. & C. 363.

[4] Perks *v.* Stothert, 11 W. R. 1016, V. C. K.; Chappell *v.* Gregory, 2 De G., J. & S. 111; see Hope *v.* Carnegie, L. R. 4 Ch. Ap. 264, 265. [See also Witt *v.* Corcoran, 2 Ch. Div. 69, where the appellant was charged with costs in an order declaring that he had committed a breach of an injunction.]

[1] Angell *v.* Davis, 4 M. & C. 360, 366; Chappell *v.* Purday, 2 Phil. 227, 229; 11 Jur. 256; Horn *v.* Coleman, 5 W. R. 409; L. JJ.; *Re* Cant's Estate, 1 De G., F. & J. 153; 6 Jur. N. S. 183; Corporation of Rochester *v.* Lee, 2 De G., M. & G. 427, 430; Chappell *v.* Gregory, *ubi sup.*; Winslow *v.* Collins, 3 Paige, 88; and see Collard *v.* Roe, 7 W. R. 623, L. C. & L. JJ.; Seton, 1157; Norton *v.* Cooper, 5 De G., M. & G. 728; Lord Advocate *v.* Lord Douglas, 9 Cl. & F. 174.

whom the Judge below had refused his costs, although he had given him his principal and interest: his Lordship holding, that an incumbrancer upon an estate for a just debt has a lien upon the estate for his costs, as well as his demand; and that, therefore, the appeal, although for costs, affected the merits of the case.[2]

The same distinction was recognized, by Lord Northington, in *Cowper* v. *Scott*,[3] and by Lord Eldon, in *Jenour* v. *Jenour*.[4] In the latter case, the question arose upon the interest of the parties in a trust fund, which had been separated from the general residue, and the bill prayed, that the costs of the suit might be paid out of the general estate: upon the hearing, the costs were ordered to be paid out of the general estate; but on an appeal, although the decree of the Master of the Rolls, upon the right to the fund, was affirmed, Lord Eldon corrected the decree, as to costs, by directing them to be paid out of the particular fund, and not out of the general estate;[5] holding, that the costs were not within the common rule.

So, in *Taylor* v. *Popham*,[6] Lord Eldon states the rule to be, that where the costs are disposed of, as subjects of relief: though they are the subject of appeal, it is not an appeal for costs only. In that case, a creditor had a contingent lien upon a particular fund: which had been appropriated to answer it: and an order of Lord Erskine had given, to the solicitors in the cause, a lien for their costs, upon the fund generally.[7] The question on the appeal was, whether they should have those costs out of the appropriated fund, in preference to the party having the contingent claim upon it; and Lord Eldon's observation upon the question is: "It is quite competent to rehear or appeal upon such a point concerning costs as this: the Court having given costs, has applied the fund of the party to a payment to which it ought not to have been applied."[8] * The same distinction was acted upon by Lord *1465 Lyndhurst, in *Burkett* v. *Spray*;[1] and was much considered and approved of by Lord Cottenham, in *Taylor* v. *Southgate*,[2] *Eyre* v. *Marsden*,[3] and *Angell* v. *Davis*:[4] in the last of which cases, his Lordship founds his judgment upon three very important circumstances which appeared in the case: any of which, his Lordship held, would have been sufficient to sustain the appeal: 1st. The bill prayed, that the defendant might restore the property in question, and pay the costs: asking the payment of the costs, by way of special relief;[5] 2dly. The case was one, in which the proceedings themselves, without going into the details of the transaction, furnished all the information necessary for the pur-

2 See Angell *v.* Davis, 4 M. & C. 363; Norton *v.* Cooper, 5 De G., M. & G. 728.
3 1 Eden, 17; S. C. *nom.* Cooper *v.* Scott, 1 Bro. C. C. 141, n.
4 10 Ves. 562, 573.
5 See *ante*, p. 1431.
6 15 Ves. 72; and see Heighington *v.* Grant, 1 Phil. 600.
7 See 13 Ves. 59, 61.
8 See 15 Ves. 78.
1 1 R. & M. 113, 115.
2 4 M. & C. 203.
3 *Ib.* 231.
4 *Ib.* 360.
5 In Lancashire *v.* Lancashire, 2 Phil. 657, 661, 662, this was held insufficient; see also Umpleby *v.* Waveney Valley Railway Company, 1 J. & H. 254.

pose of determining the question; and, 3dly. It was not a case of personal costs, in which the Court had ordered one party to pay them; but a case in which the Court had directed them to be paid out of a particular fund.[6]

In a subsequent case, Lord Cottenham held, that as a party, interested in a fund, might appeal from a decree directing costs to be paid out of that fund, so, persons personally ordered to pay costs might appeal from the decree, on the ground that the costs ought to be paid out of the fund.[7] The case alluded to was an appeal from a decree of Sir Lancelot Shadwell V. C. with regard to the right to a certain fund in Court, which was claimed by a married woman against her husband, as property settled to her separate use. The Vice-Chancellor held, that the fund belonged to the wife; and ordered the costs of the suit to be paid by the husband, and the trustees of the settlement. From this decision two petitions for a rehearing were presented: one by the husband, and the other by the trustees. It was objected, at the rehearing, that the petition of the trustees, being in effect merely an appeal for costs, could not be proceeded with; but Lord Cottenham held, that an appeal for costs, under such circumstances, might be sustained; and allowed the argument to go on.[8]

Another exception to the general rule as to costs, is afforded by a decision[9] in the House of Lords: which, although made upon the hearing of an appeal from the Court of Session in Scotland, may be cited *1466 as applicable to all cases, English as well as Scotch. * In that case, it was held, that though an appeal for costs only will not lie, when costs are in the discretion of the Court, yet, where the Court is directed, by an Act of Parliament, to give costs, it is a proper subject of appeal, if they are not given according to the requisition of the Act.

The above instances form the only exceptions to the general rule of the Court, that there can be no rehearing or appeal for costs.[1] This rule is so strictly adhered to that the Court will not permit it to be evaded, by coupling the appeal for costs with another ground of appeal, which is unfounded, for the mere purpose of giving color to the appeal for costs. Thus, where the ground of the rehearing was, that a defend ant, charged by the decree with a sum of money, ought also to have been charged with interest and costs, the Court was of opinion that the decree was correct as to interest, which ought not to have been given;

6 4 M. & C. 362, 366.

7 Bagot *v.* Bagot, L. C. July, 1840, MSS.

8 But in Taylor *v.* Dowlen, L. R. 4 Ch. Ap. 697, it was decided that an order that trustees shall pay the costs of a suit personally, forms no exception to the general rule that no appeal will be allowed for costs.

9 Tod *v.* Tod, 1 Bligh, N. S. 639; and see *Re* Gregson, 13 W. R. 193, L. JJ. As to cases where a party is entitled to costs as a matter of strict right, see Buloid *v.* Miller, 4 Paige, 473; Winslow *v.* Collins, 3 Paige, 88.

1 It seems to be the proper mode of proceeding for a defendant, after dismissal of the bill, on his motion, for want of prosecution without any order for costs, to apply for an order to discharge the decree dismissing the bill. But such an application will not be favored, where the bill was regularly dismissed, if it be for the sole purpose of agitating the question of costs. Stone *v.* Locke, 48 Maine, 425.

but that the decree was wrong in not charging the defendant with the costs; and as the claim of interest was unfounded, the costs were the only thing in question: the decree was therefore affirmed, on the ground that a rehearing does not lie for costs.[2]

It must not, however, be assumed, from the case last quoted, that, in all cases where the appeal for costs is coupled with other grounds of appeal, the Court will, if it affirms the decree upon the other grounds, refuse to interfere upon the question of costs, if it considers the decision below upon that point to have been wrong: on the contrary, many cases have occurred in which decrees have been varied as to costs, though affirmed on every other point.[3] The rule, as to this, is very distinctly laid down by Lord Lyndhurst, in *Attorney-General* v. *Butcher*,[4] where his Lordship says: "If a party appeals, having a substantial ground of appeal, and a fair question to agitate, and brings in the question of costs along with it, he may succeed with respect to the costs, though he does not succeed in the substantial ground of appeal; but if a point is brought forward as a ground of appeal, which, on the slightest consideration, appears to have no substance, it would be too much to vary the decree as to costs. A point is not to be put forward as a ground of appeal, merely for the purpose of covering an appeal on the question of costs."

*A party will not be allowed to appeal piecemeal: that is, he *1467 cannot appeal from part of a decree by one petition, and afterwards appeal from another part, by another petition.[1] The rule is, that if a party appeals from a part of a decree, he admits the remainder to be correct.[2]

An order for a rehearing or an appeal does not stop or hinder any proceedings on the decree or order appealed from, unless by special order of the Court; but the person in possession of any decree or order is at liberty to proceed thereon, as if no appeal or rehearing had been granted.[3] Therefore, if a bill is dismissed with costs, the defendant

2 Williams *v.* Beynon, Beames on Costs, Ap. No. 10; see also Wirdman *v.* Kent, 1 Bro. C. C. 140; *ante*, p. 1463, note (2).

3 Jenour *v.* Jenour, 10 Ves. 562, 573; Pitt *v.* Page, 1 Bro. P. C. ed. Toml. 1; Squire *v.* Pershall, 2 *id.* 396; Wekett *v.* Raby, 2 *id.* 386; Maguire *v.* Maddin, *ib.* 393; Lewis *v.* Smith, 1 M'N. & G. 417, 421; Reynell *v.* Sprye, 1 De G., M. & G. 660, 688; Power *v.* Reeves, 10 H. L. Ca. 645.

4 4 Russ. 180.

1 [Anderson *v.* Moberly, 46 Mo. 191; Hume *v.* Commercial Bank, 1 Lea, 220.]

2 Norbury *v.* Meade, 2 Bligh, 261; [Clowes *v.* Dickinson, 8 Cow. 328; Kelsey *v.* Weston, 2 N. Y. 505;] and see Parker *v.* Morrell, 2 Phil. 453, 461.

3 [General Order of House of Lords, 15 Ves. 184;] Ord. XXXI. 2; and see Gwynn *v.* Lethbridge, 14 Ves. 585; Waldo *v.* Caley, 16 Ves. 206, 212. 215; Willan *v.* Willan, *ib.* 216; Seton, 1157; see also Wood *v.* Farthing, 8 W. R. 425, L. C.

[The rule is different in the United States. In New York, the appeal stayed proceedings on the point appealed from, and if the party wished to proceed notwithstanding the appeal, he was compelled to make application to the Chancellor for leave to proceed. Green *v.* Winter, 1 John. Ch. 80. See Halsey *v.* Van Amringe, 4 Paige, 279; Gregory *v.* Dodge, 3 Paige, 90; Messonier *v.* Kauman, 3 John. Ch. 66. So, in New Jersey, an appeal from a final decree, perfected within the time prescribed, suspended the execution of the decree without an order of the Chancery or Appellate Court. Ch. rule 149; Schenck *v.* Conover, 2 Beas. 31. If not perfected, the motion to stay is addressed to the discretion of the Court. An appeal from an interlocutory order does not stay proceedings without an order of the Chancery or Appellate Court. Rule 148. In Massachusetts, an appeal from an interlocutory decree does not suspend its excution (Genl. Sts. c. 113, § 10); while an appeal

may, notwithstanding an appeal, proceed to recover his costs.[4] So, also, it has been held, that the circumstance of an appeal depending, is not a reason against the plaintiff filing a supplemental bill for the purpose of carrying it into effect.[5] It is, also, a general rule, that a party does not lose the right of appeal, by acting on an order.[6]

The Court, however, will, in some cases, upon special applica-
*1468 tion * of the appellant,[1] suspend the proceedings under a decree or order pending a rehearing or appeal. Thus, it has been held, that although a party may proceed to recover his costs, the Court will, when the appeal is lodged before any step taken, order the proceedings to be suspended.[2] Similar applications have, however, been refused.[3]

The Courts, however, are very unwilling to suspend the execution of decrees; and will not do so, except in cases where there is danger of the object of the appeal being defeated, before the appeal can be heard.[4] Where that is the case, the Court will suspend the execution of a decree or order, pending an appeal: thus, where the object of a demurrer is to take the opinion of the Court upon the liability of a party to make the discovery required by the bill, the Court will suspend proceedings to

from a final decree stays all proceedings. Genl. Sts. c. 113, § 8. In the United States Courts, if the appeal be perfected within sixty days, it operates as a supersedeas. U. S. Rev. St. § 1007; Goddard *v.* Ordway, 94 U. S. 672. The provision of the section of the Revised Statutes which stays execution within the sixty days thus given, does not apply to appeals or writs of error from the State Courts. Doyle *v.* Wisconsin, 94 U. S. 56. If the supersedeas be vacated, or not allowable, the appeal will not prevent the lower Court from making proper orders to enable the party, in whose favor the decree was rendered, to have the same executed. Farmers' Loan and Trust Co. *v.* Central R. Co., 4 Dill. 533; S. C. 5 Cent. L. J. 258. And the general rule of the text was enforced on a rehearing in Vose *v.* Trustees, 2 Woods, 654. In New Jersey, a rehearing does not stay proceedings without an order of Court. Ch. rule 146. In Tennessee, a general appeal, which is only allowed as of right from a final decree, vacates the decree. Nichol *v.* Colville, 1 Tenn. 82; Smith *v.* Holmes, 12 Heisk. 466.]

[4] Tyson *v.* Cox, 3 Mad. 278; Dunster *v.* Mitford, cited *ibid.*; Archer *v.* Hudson, 8 Beav. 321; Bainbrigge *v.* Baddeley, 10 Beav. 35.

[5] Woodward *v.* Woodward, 1 Dick. 33.

[6] Masterman *v.* Price, 1 C. P. Coop. t. Cott. 358, and cases referred to, *ib.* 360 *et seq.* particularly: White *v.* Lisle, 3 Swanst. 342; and Brophy *v.* Holmes, 2 Moll. 1; and see Butlin *v.* Masters, 2 Phil. 290; Parker *v.* Morrell, *ib.* 453, 462. [The execution of the decree, either before or after the appeal, in no wise interferes with the right of appeal, or with the proceedings upon appeal. Peer *v.* Cookerow, 1 McCarter, 361. And therefore, a party who collects money under a decree may afterwards sue out a writ of error to recover a larger sum. Erwin *v.* Lowry, 7 How. 172, 184; Bond *v.* Greenwald, 4 Heisk. 454, 467. And, in like manner, the losing party may execute the decree, and afterwards sue out a writ of error and reverse it. O'Hara *v.* McConnell, 93 U. S. 150, 154. And payment of a judgment subsequent to an appeal cannot be pleaded to defeat the appeal. Belton *v.* Smith, 45 Ind. 291. But acceptance by one party of his share under a decree for partition will compel him to dismiss his appeal or refund the money. Murphy *v.* Murphy, 45 Ala. 123. And buying at a sale under a judgment has been held to be a waiver of the right to appeal. Sims *v.* Laws, 22 La. Ann. 105. And see, where the provisions of a judgment are connected and dependent, and there is an appeal from only a part of the judgment, Bennett *v.* Van Sykel, 18 N. Y. 481; Murphy *v.* Spaulding, 46 N. Y. 556; Wallace *v.* Castle, 68 N. Y. 370.]

[1] Rowley *v.* Adams, 9 Beav. 348; Smith *v.* Earl of Effingham, 11 Beav. 82, 86.

[2] Dunster *v.* Mitford, cited 19 Ves. 447; and see Roberts *v.* Totty, *ib.* 446; see also Meade *v.* Norbury, 4 Pri. 322.

[3] Roberts *v.* Totty, *ubi sup.*; Herring *v.* Clobery, 12 Sim. 410, 412; Pinkett *v.* Wright, 4 Hare, 160.

[4] How far an appeal shall operate as a stay of proceedings in Equity is a matter regulated in a great degree by, and is very much within, the discretion of the Court of Chancery. Ringgold's Case, 1 Bland, 15; Schenck *v.* Conover, 2 Beasley, 31; Green *v.* Winter, 1 John. Ch. 80. And the Court may, notwithstanding the appeal, allow the party to proceed to enforce his decree. Messonier *v.* Kauman, 3 John. Ch. 66; Barrow *v.* Rhinelander, *ib.* 123; Riggs *v.* Murray, *ib.* 160.

enforce an answer, pending the appeal from an order overruling the demurrer.[5]

So, also, where there would be danger of irreparable mischief.[6] In cases of injunction, for instance, and, still more, of orders dissolving injunctions, an appeal ought almost always to be permitted to stay execution.[7] Upon this ground, likewise, where the Court has directed the sale of property, it will suspend the sale;[8] or where property of a perishable nature is ordered to be delivered up, it will direct security to be given for the amount of the property.[9] And so, where specific performance of an agreement for a sale has been decreed, it will suspend the execution of the conveyance till after the appeal: although it will not suspend the other proceedings in Chambers.[10] Where, also, a bill for specific performance * of an agreement for a lease had *1469 been dismissed, an action of ejectment was stayed on terms during the pendency of an appeal to the House of Lords.[1] It seems, however, that it is the duty of the Court to exercise its discretion according to the circumstances of each particular case; and that no general rule can be laid down upon the subject.[2]

Where a bill seeking an injunction has been dismissed at the hearing, the Court of Chancery has no jurisdiction to make any order binding on

[5] Wood *v.* Milner, 1 J. & W. 636; King of Spain *v.* Machado, 4 Russ. 560; see, however, the judgment of Lord Lyndhurst, in Garcias *v.* Ricardo, 1 Phil. 498; and see S. C. 14 Sim. 528; Walburn *v.* Ingilby, 1 M. & K. 61, 79, 81.

[6] See Wood *v.* Griffith, 19 Ves. 550; Way *v.* Foy, 18 Ves. 452; Powell *v.* Hopson, 12 La. An. 615; Johnston *v.* Johnston, 13 La. An. 581.

[7] Walburn *v.* Ingilby, 1 M. & K. 61, 84; but see Galloway *v.* Mayor of London, 3 De G. & S. 59. [The Court may continue an injunction pending an appeal from a decree of dismissal. Jewett *v.* Dringer, 2 Stew. Eq. 199. By a recent rule in Equity, rule 93, promulgated by the Supreme Court of the United States, on Jan. 13, 1879, it is provided: "When an appeal from a final decree, in an Equity suit, granting or dissolving an injunction, is allowed by a Justice or Judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond, or otherwise, as he may consider proper for the security of the rights of the opposite party." Published in 97 U. S. Rep.

An injunction dissolved by an interlocutory order is not restored by an appeal from the final decree. Kearney *v.* Jackson, 1 Yerg. 294. Nor will a bill of exceptions made on such a dissolution keep the injunction in force pending the appeal. Nacoochee, &c. Co. *v.* Davis, 40 Ga. 309. It is otherwise where the dissolution is the effect of the final decree appealed from. Williams *v.* Pouns, 48 Tex. 141; Bressler *v.* McCune, 56 Ill. 475; and see Brevoort *v.* Detroit, 24 Mich. 322. A preliminary order restraining acts of trespass until a rule for an injunction can be heard, is not kept alive by an appeal from the order refusing an injunction. Carrington *v.* Sweeney, 2 McArth. 68. By the Mass. Genl. Sts. c. 113, § 9, the Justice by whom the final decree is made, which is appealed from, may make such orders of injunction or prohibition, or for continuing the same in force, and for the appointment of a receiver, as may be needful for the protection of the rights of the parties, subject to the revision of the Appellate Court.]

[8] Nerot *v.* Burnand, 2 Russ. 56; Rowley *v.* Adams, 9 Beav. 348.

[9] Nerot *v.* Burnand, *ubi sup.*

[10] Gwynn *v.* Lethbridge, 14 Ves. 585.

[1] Price *v.* Salusbury, 11 W. R. 1014, M. R.; but see Wilson *v.* West Hartlepool Railway Co. (No. 2), 34 Beav. 414, where suspension of the decree was refused; the purchaser consenting to allow notice of the appeal to be indorsed on the conveyance. Suspension ordered, where appeal from an identical case was pending. Scholey *v.* Central Railway of Venezuela, 14 W. R. 786, M. R.

[2] Mayor, &c., of Gloucester *v.* Wood, 3 Hare, 131, 153; 1 Phil. 493, 495; see also M'Gregor *v.* Topham, 4 Hare, 162; Attorney-General *v.* Monro, 12 Jur. 318, L. C.; Prendergast *v.* Lushington, *ib.* 385, L. C.; Swift *v.* Grazebrook, 3 M'N. & G. 6; Stainton *v.* Chadwick, *ib.* 343; Portarlington *v.* Damer, 11 W. R. 869, V. C. K.; 12 *id.* 391, L. C.; Finch *v.* Shaw, 20 Beav. 555; Bauer *v.* Mitford, 9 W. R. 135, V. C. K.; Lord *v.* Colvin, 1 Dr. & Sm. 475; De Mattos *v.* Gibson, 1 J. & H. 79, 80; Pickering *v.* Cape Town Railway Co., 1 W. N. 119, L. C.

the defendant, during the pendency of the plaintiff's appeal to the House of Lords; and if the plaintiff intends to appeal to that House, he should apply to have the order dismissing the bill so framed as to maintain the jurisdiction of the Court, pending the appeal.[3]

Although the effect of an order was to remove a stop placed on a large sum of money, which had been impounded in the Court of Common Pleas, and to enable the defendant to obtain uncontrolled possession of the fund, Lord Brougham refused to suspend the operation of the order till the hearing of the appeal.[4] In commenting on that decision, in a later case,[5] his Lordship observed, that, if the application were granted, it would really amount to deciding the matter the other way. "It would be all which the party opposing had contended for: it would give him the very stop upon the fund for which he had in vain been struggling, and expose his adversary to the delay against which he had successfully striven: it would be a reversal of the decision, under the form of staying execution."

The Court, also, has refused to suspend the distribution of a fund by a trustee for charitable purposes, pending an appeal, unless there is something, as to pecuniary means, in the situation of the party who has to make the distribution which authorizes an inference that, if he should thereafter be found to have made a wrong distribution, he would not be able to furnish the means of setting it right.[6] So also, where a legacy was ordered to be paid out of Court, and the decree was appealed
*1470 * from, the Court allowed it to be paid out, notwithstanding the appeal.[1]

Where, however, the circumstances make it expedient, the Court may require a party entitled to receive a sum of money or costs, to give security for the repayment, if the decree should be reversed.[1]

In like manner, where a decree was obtained by an equitable mortgagee, for the payment of principal, interest, and costs, within a fixed time, in default of which the estate was to be sold, the Court refused to suspend the execution of the decree; but gave six months, on the defendant's bringing the money into Court, consenting to a receiver, and paying the interest and costs: the plaintiff undertaking to repay, if the decree should be reversed.[2]

The Court will never suspend proceedings under the decree, on the

[3] Galloway *v.* Mayor, &c., of London, *ubi sup.*; and see Oddie *v.* Woodford, 3 M. & C. 584, 625.

[4] King of Spain *v.* Machado, cited 1 M. & K. 85, n.

[5] Walburn *v.* Ingilby, 1 M. & K. 61, 84.

[6] Waldo *v.* Caley, 16 Ves. 206, 215.

[1] Way *v.* Foy, 18 Ves. 452; and see Suisse *v.* Lord Lowther, 2 Hare, 438; Swift *v.* Grazebrook, 3 M'N. & G. 6; Gibbs *v.* Daniel, 9 Jur. N. S. 632; 11 W. R. 653, L. JJ.; Taylor *v.* Midland Railway Company, 30 Beav. 219; Monypenny *v.* Monypenny, 8 W. R. 430, V. C. W.; Ralli *v.* Universal Marine Assurance Company, 10 W. R. 327, L. JJ.; Lord *v.* Colvin, 1 Dr. & Sm. 475; Mackintosh *v.* Great Western Railway Company, 11 Jur. N. S. 705; 13 W. R. 1029, L. JJ.; Barnes *v.* Fewkes, L. R. 1 Eq. 392, V. C. W.; Bourne *v.* Brickton, 1 W. N. 243, V. C. K.; [Burdick *v.* Garrick, L. R. 5 Ch. App. 453; Atherton *v.* British Nation Assurance Co., L. R. 5 Ch. App. 720]; City Bank *v.* Bangs, 4 Paige, 285; Amer. Ins. Co. *v.* Oakley, 9 Paige, 496.

[2] Monkhouse *v.* Corporation of Bedford, 17 Ves. 380; and see *ante*, pp. 999, 1000; see also Schenck *v.* Conover, 2 Beasley (N. J.), 31.

mere ground that, if they are prosecuted, the parties will, if the decree is reversed, be put to unnecessary expense.[3] Thus, it is not the habit of the Court to suspend the taking of an account.[4] Nor will it suspend the proceedings under a decree directing the specific performance of a contract: at least, it will not go further than to direct the execution of the conveyance to be stayed.[5]

Every application to stay proceedings, upon a decree or order which is appealed from, must be made first to the Judge who pronounced the decree or order.[6] It is conceived, however, that in cases of appeals to the House of Lords, the party may still, as formerly, apply for a stay of proceedings against the decree so appealed from, either to that House, or to the Court below.[7]

*An application of this nature is made by motion, of which *1471 notice must be given;[1] and it seems that, according to the course of the Court, the applicant must pay the costs of the application.[2]

If the order appealed against is one which directs the transfer of stock, or payment of money, out of Court, and it is wished to prevent the transfer or payment being made pending the appeal, immediate notice of the appeal should be given to the Accountant-General: who, upon such notice, will be justified in delaying to comply with the order till there has been time for the appellant to make a special application to the Court for a stay of proceedings.[3]

Section II. — *Rehearings and Appeals in the Court of Chancery.*

Until recently, rehearings in the Court of Chancery were, necessarily, either before the same Judge, or before the Lord Chancellor; but now, the Lord Chancellor, and the Lords Justices of the Court of Appeal in Chancery, constitute the Appellate Court.[4] It is not, however, necessary that the Lord Chancellor should sit together with the Lords Justices; but all the jurisdiction, powers, and authorities of the Court

[3] The appellant, however, upon a petition of rehearing, is always required to give an undertaking to pay such costs, as the Court shall award, in respect of any proceedings had since the decree or order. Price *v.* Dewhurst, 4 M. & C. 282; Seton, 1158; and see Corporation of Gloucester *v.* Wood, 1 Phil. 493, 497; 9 Jur. 673.

[4] Nerot *v.* Burnand, 2 Russ. 56, 58; [Ratzer *v.* Ratzer, 2 Stew. Eq. 162; Burdick *v.* Garrick, L. R. 5 Ch. App. 453; Cheney *v.* Gleason, 125 Mass. 166.]

[5] Gwynn *v.* Lethbridge, 14 Ves. 585.

[6] Ord. VI. 12. [Now by Order LVIII., rules 16, 17, of 1875, Attorney-General *v.* Swansea, &c. Co., 9 Ch. Div. 46.] Before this order, the application could only be made to the Appellate Court. Macnaghten *v.* Boehm, 1 J. & W. 48; see also Huguenin *v.* Baseley, 15 Ves. 180; Gwynn *v.* Lethbridge, *ubi sup.* It is presumed that the order applies to the office, and not to the person of the Judge. See *ante*, p. 398; and see Reece *v.* Reece, 1 M. & C. 372.

[7] Huguenin *v.* Baseley, *ubi sup.*; and Ord. of H. L., 12 Aug. 1807, cited 15 Ves. 184; but the House will not, in general, entertain the application, until it has been made to the Court below. Macq. H. L. Prac. 236.

[1] For form of notice, see Vol. III.

[2] Lady Topham *v.* Duke of Portland, 1 De G., J. & S. 603; Waldo *v.* Caley, 16 Ves. 206, 212, 215; Willan *v.* Willan, *ib.* 216, 218; [Merry *v.* Nickalls, L. R. 8 Ch. App. 205;] see, however, Earl of Shrewsbury *v.* Trappes, 2 De G., F. & J. 172; [Burdick *v.* Garrick, L. R. 5 Ch. App. 453].

[3] Ferguson *v.* Tadman, 1 R. & M. 331.

[4] 14 & 15 Vic. c. 83, § 1.

of Appeal may be exercised, either by one only of the Lords Justices and the Lord Chancellor, sitting together, or by both Lords Justices sitting apart from the Lord Chancellor, either in his absence or during the same time as he is sitting; and the Lord Chancellor may also, by himself, exercise all the jurisdiction, powers, and authorities he formerly had.[5] Since the creation of this Court, appeals are usually marked for hearing before the Lords Justices: unless appointed to be heard before the Lord Chancellor, or the full Court.[6]

An appeal lies from the decision of this Court to the House of Lords, in the cases in which the like decision of the Lord Chancellor would have been subject to appeal.[7]

The decision of the majority of the Judges of the Court of Appeal is taken and deemed to be the decision of the Court; and if the Judges of the Court are equally divided in opinion, the decree or order appealed from is taken and deemed to be affirmed.[8]

*1472 *It appears that, when once a case has been decided by the Court of Appeal, however constituted, it will not be reheard before the same Court in another form; but when no decision has been given, a rehearing before the full Court may be obtained.[1]

If a party is dissatisfied with a decree or order which has not been enrolled, the proper course, where it cannot be rectified in the manner already pointed out,[2] is to apply, by petition, for a rehearing.[3] This he may do, whether the decree or order is made upon the hearing of the cause, or of a motion for decree, or of a demurrer or plea, or upon further consideration, or upon exceptions. A decretal order cannot, in fact, be discharged in any other manner; and where an attempt was made, by motion, to discharge an order, pronounced by consent upon further directions, on the ground that the party had been surprised,

[5] 14 & 15 Vic. c. 83, § 1. The Court of Appeal may call to its assistance, if necessary, one or more of the Common Law Judges; *ib.* § 8, as to which, see *ante*, p. 884.

[6] Seton, 1153. The sittings of the Court of Appeal are regulated by the Lord Chancellor. See 14 & 15 Vic. c. 83, § 12. For circumstances under which appeal may be transferred from the Lord Chancellor to the Lords Justices, and *vice versa*, and mode of making application, see Williams *v.* Glenton, 14 W. R. 89, L. C.

[7] *Ib.* § 10.

[8] *Ib.* § 9.

[1] Blann *v.* Bell, 2 De G., M. & G. 775, 783; 16 Jur. 1103, 1105. The Court has no jurisdiction to correct an error in an order of the Lord Chancellor's. Attorney-General *v.* Mayor, &c., of Exeter, 22 L. J. Ch. 418, L. JJ.

[2] *Ante*, p. 1028.

[3] See Coleman *v.* Franklin, 26 Geo. 368. Rehearings in Equity are allowed in the United States Courts only where some plain omission or mistake has been made, or where something material to the decree is brought to the notice of the Court which had been before overlooked. Jenkins *v.* Eldredge, 2 Story, 299. Where a rehearing is sought on the ground of newly discovered evidence, after an interlocutory decree, the Court will grant such a rehearing upon the filing of a supplemental bill, if the evidence is of such a nature as to entitle the party to relief upon a bill of review, or a supplemental bill in the nature of a bill of review, after a final decree, but not otherwise. Baker *v.* Whiting, 1 Story, 218.

[The Court of Errors will not entertain an application to rehear a cause at a subsequent term after the judgment has been entered and the cause remitted to the Court below. King *v.* Ruckman, 7 C. E. Green, 551; and see Noonan *v.* Bradley, 12 Wall. 129. Nor, *a fortiori*, upon a second appeal. Cassedy *v.* Bigelow, 12 C. E. Green, 505. And, strictly speaking, there is no such thing as a rehearing in the House of Lords or the Supreme Court of the United States, but only a reargument, and the latter Court will not allow a reargument except upon the motion of one of its own members. Brown *v.* Aspden, 14 How. 25].

Lord Thurlow refused to make the order upon motion: although he appeared to think, that, where any thing is inserted in a decretal order, as by consent, to which the party has not consented, there must be some way of rectifying it, namely, by bill of review; but that it cannot be done by motion.[4]

The same rule, also, prevails where the order is made upon a petition:[5] in which case, the proper course is to apply by petition of rehearing, in the same manner as upon a decree or decretal order.

Orders made upon motion are not proper subjects for a rehearing; but may be varied or discharged, upon application, by motion, either to the Judge who made the order, or to the Court of Appeal. A decree or decretal order made on motion, such as an order in a foreclosure suit under the statute,[6] or a decree made on a motion for a decree, cannot be discharged on motion; but must be reheard * on *1473 a petition of rehearing or appeal, in the same manner, in every respect, as in the case of a decree made on the hearing of a cause.[1]

All decrees and orders made under the provisions of the Stat. 13 & 14 Vic. c. 35,[2] are subject to rehearing, appeal and review, and may be discharged and varied, in the same and the like manner as decrees and orders of the Court made in suits instituted by bill.[3]

A rehearing ought never to be applied for, where the defect, in the decree or order, is one which can be remedied by any of the methods before pointed out;[4] and, as a general rule, it cannot be obtained till the decree or order has been passed and entered. Thus, in *Robinson* v. *Taylor*,[5] the Court refused to allow a cause to be reargued, upon a petition to alter the minutes; and the same rule was laid down, by Lord Eldon, in *Taylor* v. *Popham*,[6] where an application was made, whilst the decree was in minutes, to rehear a cause heard by Lord Erskine.

A rehearing can only take place for the purpose of altering the decree upon grounds which existed at the time when the decree was pronounced. Where, therefore, the object, is not to correct the decree, but to remedy a grievance consequent upon it, resulting from circumstances *ex post facto*, and not making part of the case as it originally stood, a rehearing will not be permitted: in such a case, a new bill must be filed.[7]

Where the objection to a decree is upon matter of law apparent, or a mistake in law, to be collected from all the pleadings and evidence, the decree not being signed and enrolled, it is the subject of a rehearing; and there is no occasion for a bill in the nature of a bill of review; unless

[4] Anon., 1 Ves. J. 93.
[5] Bishop *v.* Willis, 2 Ves. S. 113.
[6] Cadle *v.* Fowle, 1 Bro. C. C. 515; *ante*, p. 993.
[1] Ord. XXXI. 8. [*Ante*, 1462, n. 5.]
[2] See *post*, Chap. XLIII., *Special Case*.
[3] 13 & 14 Vic. c. 35, § 33.
[4] *Ante*, p. 1028. A rehearing of a bill of foreclosure will not be ordered, when it appears from the petition that another decree would be rendered for the same amount. Hurlburd *v.* Freelove, 3 Wis. 537.
[5] 1 Ves. J. 44.
[6] 15 Ves. 72; and see Commissioners of Charitable Donations *v.* Hunter, 1 Dr. & War. 544; see also *Re* Risca Coal Company, 8 Jur. N. S. 900; 10 W. R. 701, L. C.
[7] Bowyer *v.* Bright, 13 Pri. 316; Horne *v.* Barton, 8 De G., M. & G. 587; 2 Jur. N. S. 1032. The fraud of a mortgagee in preventing payment of a mortgage, and in suppressing competition at the foreclosure sale, is not a ground for a petition for a rehearing. Hurlburd *v.* Freelove, 8 Wis. 537.

a supplemental bill is also necessary, to introduce new facts: in which case, the cause will come on to be heard upon the matter of that supplemental bill, together with the rehearing of the original cause.[8]

A cause which has been heard by the Master of the Rolls, or one of the Vice-Chancellors, may either be reheard before the Judge who *1474 heard it, or before the Court of Appeal.[9] In the latter * case, it is generally termed an appeal, although, in fact, it is only a rehearing; and a second rehearing by the Court of Appeal may sometimes be obtained.[1]

The Master of the Rolls and Vice-Chancellors respectively may discharge, reverse, or alter any order made on motion or petition of course by any other of them, or by the Lord Chancellor,[2] or Lords Justices.[3] An application to discharge, reverse, or alter any order made on motion or petition of course by the Lord Chancellor, the Lords Justices, the Master of the Rolls, or one of the Vice Chancellors, must be made to the Judge to whom special applications in the cause or matter in which such order is made ought to be made:[4] namely, the Judge to whose Court the same is attached;[5] but no order made by one Judge for another, during vacation, will be reheard, for the purpose of being discharged or varied, otherwise than by the Lord Chancellor, or the Lords Justices.[6]

Orders made in Chambers by the Judge in person are subject to appeal by motion;[7] but as we have seen, the Court of Appeal will, in general, decline to hear appeals directly from Chambers where the parties have not had an opportunity of being heard by counsel.[8]

Except as above stated, the Master of the Rolls cannot rehear a decree or order of the Lord Chancellor, or Lords Justices, unless specially authorized so to do; nor of a Vice-Chancellor;[9] and, in like manner, no rehearing can take place before a Vice-Chancellor of any decree or order made by the Lord Chancellor or Lords Justices,[10] unless under a special authority;[11] nor can a Vice-Chancellor rehear any mat-

[8] Perry *v.* Phelips, 17 Ves. 173, 178; Head *v.* Godlee, Johns. 536, 579. Petition of appeal by some of several co-plaintiffs, against the other parties, allowed; the appellants having also filed a supplemental bill. Jopp *v.* Wood, 2 De G., J. & S. 323.

[9] Maybery *v.* Brooking, 7 De G., M. & G. 673; 2 Jur. N. S. 76.

[1] Taylor *v.* Popham, 15 Ves. 72; Fuller *v.* Willis, 11 Jur. 233, L. C.

[2] 13 & 14 Vic. c. 35, § 29.

[3] 14 & 15 Vic. c. 83, § 5.

[4] Ord. VI. 10.

[5] Ord. VI. 5; and see Sturgeon *v.* Hooker, 2 Phil. 289.

[6] Ord. VI. 11.

[7] 15 & 16 Vic. c. 80, §§ 13, 15; Saunders *v.* Druce, 3 Drew, 139; Snowdon *v.* Metropolitan Railway Company, 1 De G., J. & S. 408; 9 Jur. N. S. 588; M'Veagh *v.* Croall, 1 De G., J. & S. 399, 401; 9 Jur. N. S. 240.

[8] Stroughill *v.* Gulliver, 1 De G. & J. 113; Harrison *v.* Mayor of Southampton, 29 L. T. 61, L. JJ.; Hutchinson *v.* Swift, 11 Jur. N. S. 274; 13 W. R. 532, L. JJ.; Ridgway *v.* Newstead, 4 De G. & J. 15.

[9] It has been said, that a motion may be made before the Master of the Rolls, to discharge an order, made by the Lord Chancellor *ex parte*, because only one side being heard, it is a continuance of the same motion. Davy *v.* Seys, Mos. 72. It seems, however, that this is only in consequence of a special authority, introduced into the order: the practice of the Court being, where there is an *ex parte* application to the Lord Chancellor, to introduce into the order, made in such cases, a provision that the other party shall be at liberty to apply to one of the other Judges of the Court to vary or discharge it; see Lindsay *v.* Tyrrell, 24 Beav. 124; 2 De G. & J. 7; 3 Jur. N. S. 1014.

[10] Smith *v.* Earl of Effingham, 10 Beav. 589, 598.

[11] Shirley *v.* Earl Ferrars, 5 L. J. (Ch.) N. S. 200, M. R.

ter in which an order or decree has been made by any other Vice-Chancellor, or by the Master of the Rolls.[12]

* The Court seldom allows more than one rehearing, whether *1475 the second hearing was before the Judge who heard the cause originally, or before the Lord Chancellor or Lords Justices by way of appeal.[1] It must not, however, be understood, that the power of the Court to direct a hearing before enrolment is limited to one only: the practice of doing so is only a general, not an inflexible rule;[2] and there are many cases in the books in which it has been departed from;[3] and it seems that there is no positive restriction with regard to the number of rehearings; that the granting or refusing of a hearing is in the discretion of the Court;[4] and that, according to the general course of practice, one rehearing of a case, where the application has been sanctioned by the signature of two counsel, in the manner required by the rules of the Court, whether before the Judge who heard it or before the superior Judge of the Court, is merely a matter of course: the Court giving such credit to the opinion of the counsel who sign the petition that the cause should be reheard, as to order it to be set down.[5] This, however, is not the case, after a cause has been already reheard before the appellate tribunal: in such a case, a second rehearing will not be permitted, unless leave has been previously granted by the appellate Judge, upon a special application for that purpose;[6] which may be made *ex parte*.[7] This rule applies, whether the decree upon the first rehearing had the effect of overruling, or of affirming the original decision; and is now so well recognized, that, in *Moss* v. *Baldock*,[8] Lord Lyndhurst directed a petition of appeal to be taken off the file for irregularity, because it had been presented without special leave, after one rehearing.

There can be no rehearing of a decree or order of the Court, after it has been enrolled;[9] but till enrolment, it is not, as we have

[12] 53 Geo. III. c. 24, § 2; 5 Vic. c. 5, § 19; 14 & 15 Vic. c. 4; 15 & 16 Vic. c. 80, § 52 *et seq.*

[1] Where there had been one rehearing, a second rehearing was granted before another Chancellor, at the instance of the other party. Land *v.* Wickham, 1 Paige, 256.

[2] Per Lord Eldon, in Waldo *v.* Caley, 16 Ves. 214; see also Gilb. For. Rom. 183.

[3] Noel *v.* Robinson, 1 Vern. 90, 94, n.; Eyton *v.* Eyton, 4 Bro. P. C. ed. Toml. 149; Lady Falkland *v.* Lord Cheney, 5 *id.* 476; Howel *v.* Howel, 1 Dick. 426; Omerod *v.* Hardman, 5 Ves. 722, 725; Brown *v.* Higgs, 8 Ves. 561, 562; East India Company *v.* Boddam, 13 Ves. 421; Macintosh *v.* Townsend, 16 Ves. 330, 331; Blackburn *v.* Jepson, 2 V. & B. 359; Deerhurst *v.* Duke of St. Albans, 2 R. & M. 702, 706; Fuller *v.* Willis, 11 Jur. 233, L. C.; Maybery *v.* Brooking, 7 De G., M. & G. 673; 2 Jur. N. S. 76.

[4] Mills *v.* Banks, 3 P. Wms. 8. [*Infra*, p. 1479, note 5.]

[5] Cunyngham *v.* Cunyngham, Amb. 89.

[6] Byfield *v.* Provis, 3 M. & C. 437; Deerhurst *v.* Duke of St. Albans, 2 R. & M. 702; see Wilcox *v.* Wilkinson, 1 Murph. 11; Overton *v.* Bigelow, 10 Yerger, 48; Haywood *v.* Marsh, 6 Yerger, 69.

[7] *Ex parte* Besley, 3 M'N. & G. 287, 296.

[8] 1 Phil. 118.

[9] *Ante*, 1019; Robinson *v.* Lewis, 2 Jones Eq. (N. C.) 25. There is no proceeding, under the practice in Massachusetts, such as the signing and enrolling of a decree in the English Court of Chancery; but what is equivalent thereto is the entering and recording of a decree. After a decree has been entered and become a matter of record, there can be no rehearing, on motion or petition for the purpose of correcting an alleged error which involves the merits of the case. Clapp *v.* Thaxter, 7 Gray, 384, 385; Thompson *v.* Goulding, 5 Allen, 81.

*1476 * seen, a record of the Court, and may be altered upon a rehearing.[1] An enrolment by one defendant, of a decree dismissing the plaintiff's bill, will prevent the cause being reheard at the instance of another defendant.[2]

No appeal from any decree or order, or any rehearing of the case on which such decree or order is founded, is allowed, unless the same is set down for hearing, and the requisite notice thereof duly served, within five years from the date of the decree or order;[3] but the Lord Chancellor or the Lords Justices may, where it appears under the peculiar circumstances of the case to be just and expedient, enlarge that period.[4] Thus, a rehearing has been permitted, after the expiration of the five years, where a declaration which was prejudicial to the appellant, and unnecessary for the determination of the question in the cause, had been inserted in the decree;[5] and where there was a manifest error in the decree, and the fund was still in Court, the Court allowed a rehearing, although thirty years had elapsed since the decree was pronounced.[6] The application for leave was made *ex parte*.[7]

A rehearing may be obtained, after the decree has been carried into execution;[8] and we have seen that, after the trial of an issue, the Court has permitted a petition, for a rehearing of the order directing an issue, to come on for hearing, at the same time as a motion for a new trial of the issue.[9] So, also, where the Court, by decree, directing the bill to be retained, with liberty to the plaintiff to bring an action, *1477 which he did, and failed, the Court permitted * the cause to be reheard: although it was objected, that the plaintiff, having acted under the decree himself, by bringing the action, could not be

[1] *Ante*, p. 1019; Brumagim *v.* Chew, 4 C. E. Green, 337, 338; Travis *v.* Waters, 1 John. Ch. 48; The N. J. Zinc Co. *v.* The N. J. Franklinite Co., 1 McCarter (N. J.), 311.

[2] Gore *v.* Purdon, 1 Sch. & Lef. 234.

[3] In Haywood *v.* Marsh, 6 Yerger, 69, it is held that a petition for a rehearing must, according to Chancery rules, be filed at the same term in which the decree is pronounced. Overton *v.* Bigelow, 10 Yerger, 48. So in Illinois. Delahay *v.* McConnel, 4 Scam. 156. In Vermont, an application for a rehearing must be made, and notice served upon the adverse party, within twenty days from the rising of the Court which pronounced the decree. French *v.* Chittenden, 10 Vt. 127; see Jenkins *v.* Wild, 14 Wend. 539; Tyler *v.* Simmons, 6 Paige, 127; Farley *v.* Farley, 7 Page, 40; Barclay *v.* Bowen, *ib.* 245; North Amer. Coal Co. *v.* Dyett, 4 Paige, 273; Eldridge *v.* Howell, *ib.* 457; Strike *v.* M'Donald, 2 Harr. & G. 191; Townsend *v.* Townsend, 2 Paige, 413; Owings *v.* Owings, 3 Gill & J. 1; Smith *v.* Smith, 1 Paige, 301; Fulton Bank *v.* New York and Sharon Canal Co., 4 Paige, 127; Boyd *v.* Vanderkemp, 1 Barb. Ch. 273. [In Rhode Island, the petition may be filed within one year. Randall *v.* Peckham, 11 R. I. 600. And see, for the practice in Virginia, Kendrick *v.* Whitney, 28 Gratt. 646.]

[4] Ord. XXX. 1; see Horne *v.* Barton, 8 De G., M. & G. 587; 2 Jur. N. S. 1032; Storrs *v.* Benbow, 1 W. R. 134, L. C. & L. JJ.; Cookson *v.* Lee, *ib.* 509, L. C. & L. JJ. An appeal from an order refusing an injunction to restrain a public company from proceeding with their works, was held to be too late after the lapse of one month. Williams *v.* St. George's Harbor Company, 2 De G. & J. 547.

[5] Walmsley *v.* Foxhall, 1 De G., J. & S. 451.

[6] Brandon *v.* Brandon, 7 De G., M. & G. 365; 2 Jur. N. S. 981; see also Mills *v.* Banks, 3 P. Wms. 1, 2; Scarisbrick *v.* Lord Skelmersdale, 4 Y. & C. Ex. 78, 106; Kelly *v.* Lennon, 1 Jo. & Lat. 305, 333; Gwynne *v.* Edwards, 9 Beav. 22, 34; Townley *v.* Bedwell, 15 Beav. 78; Turner *v.* Turner, 2 De G., M. & G. 28, 35; 15 Jur. 711.

[7] Brandon *v.* Brandon, *ubi sup.*; and see Storrs *v.* Benbow, 1 W. R. 115, L. C. & L. JJ.

[8] See Peer *v.* Cookerow, 1 McCarter (N. J.), 361. [*Ante*, 1467, n. 3.]

[9] White *v.* Lisle, 3 Swanst. 342, 351; Butlin *v.* Masters, 2 Phil. 290; Parker *v.* Morrell, *ib.* 453; *ante*, p. 1139.

heard to dispute the propriety of it.[1] But where a decree directs inquiries, the Court will not be disposed to reverse it, after the inquiries have been made.[2]

As long as a decree or order remains unenrolled, it is open to a rehearing; but if a party is desirous of obtaining a rehearing, he should, to prevent disappointment, immediately that it is passed and entered, enter a *caveat* against its being enrolled;[3] and, having done that, he must take care to set down his petition for a rehearing, and give notice thereof, within the time limited for that purpose by the practice of the Court;[4] as, if he delays it, and the decree is enrolled, he will be too late, unless he can vacate the enrolment upon any of the grounds already pointed out.[5]

A petition for a rehearing is drawn or settled by the junior counsel of the appellant; and is intituled in the cause or matter. If the cause or matter has been heard before the Master of the Rolls, and it is wished to have it heard again before him, it must be addressed to the Master of the Rolls. If the cause was heard by a Vice-Chancellor, and it is intended to have it reheard by the same Judge, the petition must be addressed to the Lord Chancellor, praying that it may be reheard by such Vice-Chancellor. If it has been heard before either the Master of the Rolls or a Vice-Chancellor, and the object is to appeal from his decision to that of the Court of Appeal, it must be addressed to the Lord Chancellor.

One petition cannot seek the rehearing of orders made in different suits: though the parties in both suits are the same.[6]

In a petition of rehearing of any decree or order, it is not necessary to state the proceedings anterior to the decree or order appealed from, or sought to be reheard.[7] In a complicated case, however, the petition may contain a full statement of the facts, requisite to explain the effect and working of the decree which is appealed from.[8]

If the appeal is from an order made on petition, the petition is considered as an original petition; and must contain all the statements which were properly inserted in the petition presented for hearing in the Court below.[9]

If any order of the Court has been made since the decree, for the purpose of carrying its provisions into effect, it should be *1478 stated in the petition of rehearing; and the circumstance of such an order having been made by consent, will not prejudice the appellant's right to have the cause reheard.[1]

[1] Brophy *v.* Holmes, 2 Moll. 1.

[2] Rowley *v.* Adams, 2 H. L. Ca. 725, 767.

[3] See *ante*, p. 1024.

[4] *Ibid.*

[5] For the methods of preventing and vacating an enrolment, see *ante*, p. 1024 *et seq.*

[6] Boys *v.* Morgan, 3 M. & C. 661, 665.

[7] Ord. XXXI. 3. For cases as to proper statements of petitions before this order, see Wood *v.* Griffiths, 19 Ves. 550; Nevinson *v.* Stables, 4 Russ. 210. For forms of petitions, see Vol. III.

[8] Lambe *v.* Orton, 33 L. J. Ch. 81, V. C. K.

[9] See Richards *v.* Platel, C. & P. 79, 84.

[1] Turner *v.* Turner, 2 De G., M. & G. 28, 36; Wood *v.* Griffith, 19 Ves. 550.

Where the petition is improperly framed, as where it makes a different case from that on which the decree was made, or introduces representations which were not made in the Court below, the Court will, on application by motion, order it to be taken off the file, with costs: the deposit to go in part of costs.[2] It seems, however, that it will, on such an occasion, introduce into the order a proviso, that it is to be without prejudice to the appellant's presenting another petition in more regular form.[3]

It is not necessary that a petition for a rehearing should state the reasons why the party presenting it is dissatisfied with the original decree or order;[4] but it usually states, in a general manner, that he is aggrieved by it, or by part of it, and prays that the cause may be reheard, and either that the decree may be reversed, or that it may be altered in such points as are objected to.[5]

A certificate, signed by two counsel, certifying, "that they conceive that the cause is proper to be reheard," must be annexed to every petition for a rehearing.[6] This is required, in order to guard against the abuse of the right to appeal, by the pledge of counsel that the case is fit to be reheard.[7] The counsel who sign the certificate are usually those who were concerned in the original hearing, or at least one of them; and "such credit is given by the Court to their opinion that the cause ought to be reheard, as to order it to be set down," as a matter of course.[8]

*1479 * Where the property was very small,[1] the party appealing a pauper,[2] or only one counsel had appeared for the appellant in

[2] *Ibid.*; and see Davenport *v.* Stafford, 9 Beav. 106, as to what costs are included.

[3] Wood *v.* Griffith, *ubi sup.*

[4] Giffard *v.* Hort, 1 Sch. & Lef. 398. But if it appears from the petition for a rehearing that another decree would be rendered for the same amount, the rehearing will not be ordered. Hurlburd *v.* Freelove, 3 Wis. 537.

[5] It is irregular and an infraction of the rule of the Court in Florida, to accompany the petition with a written argument and the citation of authorities. Smith *v.* Croom, 7 Florida, 180.

The 88th Equity Rule of the United States Courts requires, that every petition for a rehearing shall contain the special matter or cause on which a rehearing is applied for; shall be signed by counsel; and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or of some other person. No rehearing shall be granted after the term at which the final decree of the Court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the Court in the discretion of the Court. In New Jersey, the petition must be signed by two counsel, except in cases submitted without argument, when it shall be sufficient if signed by one counsel. Chancery Rule 142; see Emerson *v.* Davies, 1 Wood. & M. 21, 23; *Ex parte* Terry, Rice Ch. 1; Wiser *v.* Blachly, 2 John. Ch. 488.

[6] See Buckeridge *v.* Whalley, 8 Jur. N. S. 473; 10 W. R. 513, L. C. For form of certificate, see Vol. III.

[7] Monkhouse *v.* Corporation of Bedford, 17 Ves. 380; *Ex parte* Terry, Rice Ch. 1; Faussett *v.* Ormsby, 1 Irish Eq. 388; Emerson *v.* Davies, 1 Wood. & M. 22, 23. It is not necessary that either of the counsel signing the certificate should be a Q. C.

[8] Per Lord Hardwicke, in Cunyngham *v.* Cunyngham, Amb. 91; East India Company *v.* Boddam, 13 Ves. 423; Attorney-General *v.* Brooke, 18 Ves. 325; Wilcox *v.* Wilcox, 1 Ired. Ch. 36; Cotton *v.* Parker, 1 Sm. & M. Ch. 125. The mere certificate of counsel has no such effect in obtaining a rehearing in the United States. Jenkins *v.* Eldredge, 3 Story, 299, 304; Emerson *v.* Davies, 1 Wood. & M. 21; Field *v.* Schieffelin, 7 John. Ch. 256; Land *v.* Wickham, 1 Paige, 256; Decarters *v.* La Farge, 1 Paige, 574; Brumagim *v.* Chew, 4 C. E. Green, 338; N. J. Zinc Co. *v.* N. J. Franklinite Co., 1 McCarter (N. J.), 308, 311.

[1] Knowles *v.* Greenhill, 30 L. J. Ch. 670, L. C. & L. JJ.; Buckeridge *v.* Whalley, 8 Jur. N. S. 473; 10 W. R. 513, L. C.

[2] Jones *v.* Gregory, 12 W. R. 92, L. C.

the Court below,[3] the petition has been directed to be received with the signature of one counsel only; but this will not be directed, unless the counsel signing the petition was engaged in the case in the Court below.[4]

But although the general practice is, for the Lord Chancellor, or Master of the Rolls, to order the cause to be set down for rehearing, as a matter of course, upon the certificate of counsel, he may, if he has any doubt upon the subject, order the petition itself to come on for hearing, before he orders it to be set down.[5]

A person not a party on the record, though bound by the decree or order complained of, cannot have the cause or application reheard, without first obtaining special leave to present a petition * of re- *1480 hearing or appeal.[1] The application for such leave is made by motion,[2] or, it seems, by petition,[3] with notice;[4] and the applicant may be required to undertake, by his counsel, to abide by any order as to costs.[5]

The proper course, where there is any irregularity in the petition, is for the respondent to make a special application to the Court, by motion, to discharge the order for setting down the petition, and to have the petition taken off the file with costs.[6]

[3] *Re* Midland Counties Benefit Building Society, 10 Jur. N. S. 691, L. C.; De Beauvoir *v.* Benyon, 14 W. R. 41, L. C.; Belaney *v.* Belaney, 1 W. N. 265, L. C.

[4] *Re* Skeggs, 11 Jur. N. S. 274; 13 W. R. 512, L. JJ.; Parkinson *v.* Hanbury, 10 Jur. N. S. 1190; 13 W. R. 191, L. C.; De Beauvoir *v.* Benyon, 14 W. R. 41, L. C.

[5] Fox *v.* Mackreth, 2 Cox, 158, 159. Rehearings in Equity, after a decree, are not a matter of right, but rest in the sound discretion of the Court. Daniel *v.* Mitchell, 1 Story, 198; Land *v.* Wickham, 1 Paige, 256; Travis *v.* Waters, 1 John. Ch. 48; Field *v.* Schieffelin, 7 *id.* 256; Brumagim *v.* Chew, 4 C. E. Green, 337; N. J. Zinc Co. *v.* N. J. Franklinite Co., 1 McCarter, 308; [Attorney-General *v.* N. Y., &c. R. Co., 9 C. E. Green, 59; Steines *v.* Franklin County, 14 Wall. 15; Buffington *v.* Harvey, 95 U. S. 99]. Except in cases provided for by the rules of the Court. Land *v.* Wickham, 1 Paige, 256; Harrison *v.* Hall, 1 Hopk. 112. If a motion for rehearing is made for delay, it will be refused. Land *v.* Wickham, 1 Paige, 256. A rehearing will not be granted on account of the discovery of new evidence or new matter: Mead *v.* Arms, 3 Vt. 148; nor because the importance of the testimony has only been discovered since the decision; if the party had it in his power to ascertain its importance before the hearing, and has neglected to do so, and obtain the testimony; although the justice of the case might be promoted by it. Provost *v.* Gratz, 1 Peters C. C. 364; see Daniel *v.* Mitchell, 1 Story, 198; Hinson *v.* Pickett, 2 Hill Ch. 357; Robinson *v.* Sampson, 26 Maine, 11. [The rule is the same in patent cases. Hitchcock *v.* Tremaine, 5 Fish. Pat. Cas. 537.] A rehearing will generally not be allowed where the newly discovered evidence is merely cumulative upon the litigated facts already in issue. Baker *v.* Whiting, 1 Story, 218; Dunham *v.* Winans, 2 Paige, 24; Jenkins *v.* Eldredge, 3 Story, 299, 310, 311. Nor for the purpose of contradicting a witness examined by the adverse party. Dunham *v.* Winans, 2 Paige, 24. Nor to enable a party to release a witness declared incompetent on the hearing, and to re-examine him. *Ibid.* Error of judgment or mistake of law by counsel, as to the pertinency or force of evidence, furnishes no ground for a rehearing. Baker *v.* Whiting, 1 Story, 218; Jenkins *v.* Eldredge, 3 Story, 299, 316; Dennett *v.* Dennett, 4 N. H. 535; see Decarters *v.* La Farge, 1 Paige, 574. It is not enough on an application for a rehearing, to show that injustice has been done, but it must be shown that it has been done under circumstances which authorize the Court to interfere. Walsh *v.* Smyth, 3 Bland, 9.

If a party voluntarily absents himself from the hearing, he cannot appeal from a decree rendered in his absence; and if his absence was accidental, his remedy is by a petition for a rehearing, and not by an appeal. Townsend *v.* Smith, 1 Beasley (N. J.), 350.

[1] Seton, 1154; Paterson *v.* Scott, cited *ibid.*; Gwynne *v.* Edwards, 9 Beav. 22, 34; Berry *v.* Attorney-General, 2 M'N. & G. 16; Jopp *v.* Wood, 33 Beav. 372; 23 Jan., 1864, Reg. Lib. A. 183; *ante*, p. 1460; Parmiter *v.* Parmiter, 3 De G., F. & J. 461.

[2] Gwynne *v.* Edwards, and Jopp *v.* Wood, *ubi sup.*

[3] See Berry *v.* Attorney-General, *ubi sup.*

[4] For form of notice of motion, see Vol. III.

[5] Jopp *v.* Wood, *ubi sup.*

[6] Wood *v.* Griffith, 19 Ves. 550; and Berry *v.* Attorney-General, *ubi sup.*; see also Gwynne *v.* Edwards, *ubi sup.* For form of notice of motion, see Vol. III.

The certificate annexed to the petition, having been duly signed by counsel, the petition and certificate must be copied on brief paper, and left with the secretary of the Lord Chancellor, or of the Master of the Rolls, according to the address of the petition, together with a fair copy of the petition, and a copy of the decree or order appealed against;[7] and, if the appeal is from a decree in a cause, a printed copy of the bill must also be left.[8]

The *fiat* upon this petition usually directs that: upon the petitioner, or his solicitor, consenting to pay such costs (if any) as the Court may think fit to award, in respect of any proceedings had since the decree (or order), and upon depositing 20*l.* with the Registrar within a week, the cause be set down to be reheard.[9]

The petition having been answered, the undertaking required by the *fiat* to be signed by the petitioner, or his solicitor, must be added to it, and signed accordingly.[10] The object of the Court, in requiring this undertaking, was discussed before Lord Cottenham, in *Price* v. *Dewhurst*:[11] in which case, it was contended by the counsel for the respondent, that the intention of it is to create a liability, on the part of the party signing it, to all the costs of the appeal; but Lord Cottenham was of opinion, that the undertaking is required for the purpose of reimbursing to the respondent all such expenses as he may be put to, in prosecuting the decree or order appealed against,[12] and that it *1481 extends and * applies only to such costs as may have been incurred in the prosecution of the appeal.[1]

The undertaking having been signed by the petitioner, or his solicitor,

[7] In New Jersey, a copy of every petition for a rehearing shall be served on the opposite party, with a notice of presenting the same. Chancery Rule 143, Dick. Forms, 36. Notice must be given in Vermont. French *v.* Chittenden, 10 Vt. 127.

[8] Ord. XXXI. 6. A fee of 20*s.* higher scale, and 5*s.* lower scale, is payable in a fee-fund stamp impressed on or affixed to the first page of the original petition. Regul. to Ord. Sched. 4.

[9] See Seton, 1158.

[10] Ord. III. 1. Where the undertaking is signed by the party, his solicitor should attest his signature. For form of undertaking, see Vol. III.

[11] 4 M. & C. 282.

[12] An appeal granted becomes a nullity upon a failure to give the appeal bond as required. Wickliffe *v.* Clay, 1 Dana, 589. The execution of the decree will not be stayed, if no bond be given. Bryson *v.* Petty, 1 Bland, 183. It is not necessary that an appeal bond should be conformable in all respects to the statute, but only that it be sufficient in substance, so as to secure to the party, for whose benefit it is given, all his rights. Foster *v.* Tyler, 7 Paige, 48. Where a suit was against one as executor, and in his own right as legatee, and a decree was made against him personally, he was required, on appealing, to give a bond with surety. Erskine *v.* Henry, 7 Leigh, 378; see Shearman *v.* Christian, 1 Rand. 73; Wilson *v.* Wilson, 1 Hen. & M. 15; Sadler *v.* Green, *ib.* 36. For other decisions upon appeal bonds, their form, effect, &c., see Clark *v.* Clark, 7 Paige, 607; Ridabock *v.* Levy, 8 Paige, 197; Foster *v.* Tyler, 7 Paige, 48; North Amer. Coal Co. *v.* Dyett, 4 Paige, 273; City Bank *v.* Bangs, *ib.* 285; Potter *v.* Baker, *ib.* 290; Rogers *v.* Paterson, *ib.* 450; Eldridge *v.* Howell, *ib.* 457; Bracton *v.* Morris, 1 Wash. 381; Brown *v.* Mathews, 1 Rand. 462; Syme *v.* Johnson, 3 Call. 523; Van Wezel *v.* Van Wezel, 3 Paige, 38; Studwell *v.* Palmer, 5 Paige, 57. Where there are two distinct orders in the same cause, they may be both included in one notice of appeal and in the same bond. Tyler *v.* Simmons, 6 Paige, 127; see Gregory *v.* Dodge, 3 Paige, 90.

[See, as to the effect of bankruptcy of the principal pending the appeal upon the liability of the surety, Wilson *v.* Eifler, 11 Heisk. 179; Martin *v.* Kilbourn, 12 Heisk. 331; Thomas *v.* Cole, 10 Heisk. 411.]

[1] Price *v.* Dewhurst, 4 M. & C. 282; see Terry *v.* Stukeley, 3 Yerger, 506. In Andrews *v.* Scotton, 2 Bland, 629, it was held, that an appeal bond, on the decree being affirmed, becomes thereby an additional security for the debt.

the next step is to obtain an order to set down the appeal for hearing. For this purpose, if the petition has been presented to the Lord Chancellor, the petition, with the undertaking annexed, must be taken to the order of course clerk in the Registrars' office: who, upon payment of the deposit[2] (if any), will file the petition, and draw up the order: which must be passed and entered in the usual way. If the petition has been presented to the Master of the Rolls, the order will be drawn up and entered by his under secretary, on the petition and undertaking being left with him, and on the deposit (if any), being paid.[3] The order is dated on the day on which the petition is answered.[4]

It is to be observed, that, by the form of the *fiat*, the deposit is to be paid within a week after the date of the *fiat*. This direction must be complied with; and if, from any circumstance over which the appellant has no control, such as its being vacation time, or the absence of the Lord Chancellor from London, this cannot be done, the Lord Chancellor's secretary will alter the date of the *fiat*, to meet the emergency of the case. If the appellant does not comply with the conditions of the *fiat*, the other party may proceed to enrol the decree. Where, however, the delay was occasioned by circumstances beyond the control of the appellant, the enrolment was vacated.[5]

The deposit, in every case, is paid by the appellant to the Senior Registrar; but a deposit is only required where the appeal is from a decree or order made on the original hearing of a * cause, or *1482 on further consideration.[1] If the appeal is from an order made on a petition, no deposit is necessary: the petition being considered as an original petition.[2] Where there is an original and supplemental cause, or two supplemental causes, they are considered as one, and the payment of one deposit only is necessary.[3]

The Senior Registrar, once in every three months, pays all sums received by him as deposits into the Bank of England, to the credit of the Accountant-General of the Court, "the appeal deposit account;" and the moneys, from time to time standing to such account, will be paid and applied, as the Court orders or directs, by the Accountant-General, out of any sum of cash which, at the time of payment, may be in the Bank to his credit, on that account, to the person to whom such deposit or portion of deposit is ordered to be paid, or to his solicitor, to be named in such order: whose receipt, in such latter case, will be a sufficient discharge for the same.[4]

The deposit will be paid to the opposite party, when the decree or

[2] See Consequa *v.* Fanning, 3 John. Ch. 365.

[3] Reg. Regul. 15 March, 1860, rr. 1, 12.

[4] For form of order, see Seton, 1158.

[5] Richards *v.* Wood, 2 M. & K. 621; and see *ante*, 1025 *et seq.*

[1] Ord. XXXI. 4, 5; 15 & 16 Vic. c. 87, § 41.

[2] Richards *v.* Platel, C. & P. 79, 84; Seton, 1156. The petition must, however, be signed and certified by two counsel as if from a decree. Davis *v.* Gray, 12 Jan., 1849, cited Seton, 1156.

[3] Cowper *v.* Scott, 1 Eden, 17.

[4] 15 & 16 Vic. c. 87, § 41; Ord. XXXI. 5. As to these deposits, see Rep. Chan. Funds Com. (1864) p. xlv.

order is not varied in any material point, together with the further taxed costs occasioned by the appeal or rehearing, unless the Court otherwise directs.[5]

Where an appeal is dismissed without costs, the deposit will be returned, unless the Court makes a special order to the contrary.[6]

An appeal may be allowed *in formâ pauperis*,[7] and without making any deposit;[8] but the ordinary certificate of counsel is not sufficient: it should state special reasons why the appeal is proper.[9] If the appellant has not prosecuted the cause in the Court below as a pauper, an order to appeal *in formâ pauperis*, which can only be made by the Lord Chancellor or Lords Justices, is necessary.[10]

A married woman appealing *in formâ pauperis* prosecutes the appeal, without a next friend.[11] A married woman allowed to
*1483 *defend an appeal *in formâ pauperis*, on its dismissal obtained *dives* costs.[1]

An infant may also, it seems, appeal *in formâ pauperis;* but a next friend is required.[2]

All petitions for a rehearing, and petitions of appeal, are set down by the order of course clerk in the Registrars' office, on the same day the order to set down the same is produced to or left with him.[3]

All petitions of appeal or rehearing are marked in the cause-book as not to be in the paper for hearing before the expiration of six clear days from the day of setting down.[4]

The order for setting down the appeal having been passed and entered, must be served upon all the solicitors of the other parties to the suit (at least all those whose interest is affected by the appeal) in the usual way.[5] If service is made on a solicitor who has appeared for two parties, it must be stated for which party the service is intended, unless it is intended for both.[6]

The petition itself is not served upon the parties; but they may obtain copies from the appellant's solicitor, on a written application for that purpose, and undertaking to pay the proper charges;[7] or, if such copy be refused, or not furnished within forty-eight hours, the

[5] Ord. XXXI. 4.

[6] Dell *v.* Barlow, 2 R. & M. 686; Rattenbury *v.* Fenton, C. P. Coop. t. Brough. 60, 64. Where the appeal is compromised, the deposit will be returned on motion of the appellant with notice, or on motion of course by consent of the respondent. Order to stay repayment of deposit refused, where the appellant had been by the original decree ordered to pay costs. Martyr *v.* Lawrence, 2 De G., J. & S. 347.

[7] Bland *v.* Lamb, 2 J. & W. 402; [Phillips *v.* Rudle, 1 Yerg. 121].

[8] Bradberry *v.* Brooke, 4 W. R. 699, L. JJ.; Drennan *v.* Andrew, L. R. 1 Ch. Ap. 300, L. C.

[9] Grimwood *v.* Shave, 5 W. R. 482, L. C.; Seton, 1156.

[10] Clarke *v.* Wyburn, 12 Jur. 167, L. C.; Seton, 1271. For form of order, see *ib.* No. 7; and for form of motion paper, see Vol. III.

[11] Crouch *v.* Waller, 4 De G. & J. 43; 5 Jur. N. S. 326; *ante*, pp. 37, 38, 111.

[1] Wellesley *v.* Wellesley, 1 De G., M. & G. 501. [But see Phillips *v.* Phillips, 4 De G., F. & J. 208, 220.]

[2] See Lindsay *v.* Tyrrell, 2 De G. & J. 7; 24 Beav. 124; *ante*, pp. 37, 75.

[3] Reg. Regul., 15 March, 1860, rr. 1, 12.

[4] *Ibid.*

[5] *Ante*, p. 454.

[6] Attorney-General *v.* Corporation of Boston, 12 Jur. 686, L. C.

[7] See Ord. XXXVI. 3, 6, 8, 11, 13; *ante*, pp. 900, 1445. The charge for the copy is 4*d.* per folio.

parties may procure office copies from the stationer in the Registrars' office.[8]

It is said, that if the order is served so as to give two days' notice of the rehearing it will be sufficient; but it is advisable to serve the order as soon as possible.[9] The order for setting down the appeal must be served, and the appeal set down and notified, to prevent the enrolment of the decree.[10]

After a petition for a rehearing or of appeal has been presented, it may be withdrawn, on application by motion or petition: provided it is consented to by the respondent.[11] If not consented to, it cannot be withdrawn, but must come on in its course. The consent of the respondent is not, however, required if the application is made before service of the order to set down the appeal.

If, when the rehearing is called on, the appellant does not appear, his petition will, upon reading an affidavit of service of the *1484 order for setting it down, be dismissed with costs.[1] In the case of an appeal motion, this affidavit is not now required; but the motion is treated as abandoned.[2]

Where a party, who has been duly served with a copy of an order for setting down a cause to be reheard on a petition of appeal, or for a rehearing, does not appear on the rehearing, there, on proof by affidavit of such service, such order will be made upon the rehearing as, under the circumstances of the case, appears to be just.[3]

Where there was no proper affidavit of service, the appeal was ordered to be put in the paper again, and notice thereof given.[4]

Where the appeal is against the whole decree, the cause is, in ordinary cases, actually reheard: that is, the case is stated, and the cause proceeded with, exactly as if it were an original hearing.[5] The general

[8] Ord. XXXVI. 12. The fee for each office copy is 20*s.* higher scale, and 10*s.* lower scale, payable in fee-fund stamps. Regul. to Ord. Sched. 4.

[9] Robinson *v.* Taylor, 1 Ves. J. 44, 45.

[10] Groom *v.* Stinton, 2 Phil. 384; 11 Jur. 895; Pearce *v.* Lindsay, 4 De G. & J. 211; 5 Jur. N. S. 661; *ante*, p. 1024.

[11] Thomson *v.* Thomson, 10 Ves. 30. For forms of orders, see Seton, 1153.

[1] For form of order, see Seton, 1152, No. 2; and for form of affidavit, see Vol. III.

[2] Turner *v.* Turner, 2 De G., M. & G. 28, 31.

[3] Ord. XXXI. 7. For form of affidavit, see Vol. III.

[4] Rackham *v.* Siddall, 1 M'N. & G. 607, 625.

[5] *Ante*, p. 980; Turhune *v.* Colton, 1 Beasley (N. J.), 312; Pierce *v.* Wilson, 2 Clarke (Iowa), 20; Darkee *v.* Stringham, 8 Wis. 1. [And so, where a final decree involves the merits of the case settled by the interlocutory decree. Crane *v.* Deming, 7 C. E. Green, 614; Decker *v.* Ruckman, 1 Stew. Eq. 614; Morris *v.* Richardson, 11 Humph. 389. *Ante*, 1467, n. 3.] And in Massachusetts, all interlocutory decrees not appealed from "shall be open to revision on appeals from final decrees, so far only as it appears to the full Court that such final decrees are erroneously affected thereby." Genl. Sts. c. 113, § 11. In Pingree *v.* Coffin, 12 Gray, 324, it was observed by the Court, that "it has not been the practice of this Court to rehear the parties upon questions which have once been argued and decided, unless there is apparent error. The mere fact that the decision relates to legal principles upon which learned counsel may differ from the Court, and may fortify their opinions with reasons and authorities entitled to much consideration, is not enough. After questions of law have once been argued and decided in the progress of a suit in Equity, public policy requires that, as a general rule, the decision shall be regarded as final, although the decree that is based upon it is merely interlocutory." See Barker *v.* Belknap, 39 Vt. 168.

Where there is an interlocutory judgment, by default, against one of several defendants in Chancery, it must abide the result of the

rule is, that the appellant is entitled to begin.[6] The only exception is, where a defendant appeals from the whole of an original decree:[7] the reason being, that, in such a case, the plaintiff may adduce new *1485 evidence, and shape his case differently.[8] It is, * however, in the discretion of the Court to vary these rules.[1] An appeal from the whole decree except as to costs, is, for this purpose, treated as an appeal from the whole decree.[2]

All parties interested in supporting the decree or order appealed from are entitled to be heard;[3] but no party, except the appellant, can be heard in support of the appeal. If, therefore, any party, who is not included as a co-petitioner in a petition of rehearing, is desirous of appealing, he must present a separate petition:[4] otherwise, he will be precluded from all benefit of the appeal, even though the result of it should be to show that the decree was completely wrong, as well against him as against the appellant. Thus, where one of several defendants appealed, and an order was made dismissing the bill, upon grounds which were equally applicable to other defendants, who did not join in the appeal, it was held, that such other defendants could have no benefit of the order, although it might prevent the prosecution of the decree.[5] It seems, however, that if the result of the appeal had been otherwise, and the appeal had been dismissed, or the decree only slightly varied,

final decree; and if another defendant succeed, on an answer going to the entire equity of the bill, the bill should be dismissed with costs, as to all the parties. Aikin *v.* Harrington, 7 Eng. 391. [See *ante*, p. 532, note.] In case an interlocutory decree by a subordinate Court is within the scope of its power, the Supreme Court will not interfere, until the whole case upon a final decree shall be presented. Warner *v.* Burton, 7 Eng. 144. As to the fees allowed on a rehearing, see Sturgis *v.* Morse, 26 Beav. 562. For forms of orders on appeal or rehearing, see Seton, 1151 *et seq.*

[6] Bell *v.* Lord Mexborough, 1 C. P. Coop. t. Cott. 246; Williams *v.* Williams, L. R. 2 Ch. Ap. 15.

[7] If a rehearing is ordered in New Jersey, the party who complains of the decree or order, and applies to have it corrected, is entitled to open and close the argument. Chancery Rule 142. The granting of a rehearing does not stay proceedings on any interlocutory decree or order, unless a special order be obtained for that purpose. Rule 146.

[8] Roberts *v.* Marchant, 1 Phil. 370; Lees *v.* Nuttall, 2 M. & K. 819; Seton, 1155. On an appeal from the whole of an order made on motion for decree, the plaintiff begins. Trustees of Birkenhead Docks *v.* Laird, 4 De G., M. & G. 732. On an appeal from an order on further consideration, the appellant's counsel begins. Freer *v.* Hesse, *ib.* 495, 500; Clarke *v.* Bridge, 6 Jur. N. S. 386, L. JJ. On appeal by defendants from order overruling demurrer, and from the whole decree, plaintiff held entitled to begin. Blockett *v.* Bates, L. R. 1 Ch. Ap. 117; 12 Jur. N. S. 151, L. C. Where one of several appealing defendants appeals from the whole decree, the plaintiff is entitled to begin. Chadwick *v.* Turner, 12 Jur. N. S. 153, L. JJ. In Williams *v.* Williams, 1 W. N. 378, L. C. and L. JJ., it is stated that for the future the appellant should begin in all appeals. See *ante*, p. 1484, note (7).

[1] Alexander *v.* The Duke of Wellington, 2 R. & M. 35, 52.

[2] Onslow *v.* Wallis, 13 Jur. 1085, 1086, L. C.; Senhouse *v.* Hall, 2 Eq. 483; 2 W. R. 297, L. JJ.; *contra*, Grainger *v.* Slingsby, 8 De G., M. & G. 385.

[3] Allday *v.* Fletcher, 3 Jur. N. S. 422, L. C.

[4] See Foster *v.* Tyler, 7 Paige, 48. In Peer *v.* Cookerow, 1 McCarter (N. J.), 361, it was held that one of several persons against whom a joint decree is rendered, may appeal and carry up the whole case for review, although the right of appeal may have been lost by the other parties. [All parties against whom a joint decree has been rendered must join in the appeal, or it will be dismissed, unless sufficient cause for the non-joinder be shown. Notice in writing to join in the appeal, and refusal, will be a severance. Masterson *v.* Herndon, 10 Wall. 416; Sage *v.* Central R. Co., 93 U. S. 419. And see, as to severance, Holcombe *v.* Holcombe, 2 Stew. Eq. 375; *ante*, p. 1461, note 2.] See Johnson *v.* Johnson, 1 Dana, 364; Emerick *v.* Armstrong, 1 Ham. 513.

[5] Tasker *v.* Small, C. P. Coop. 255. [But see 1 Coop. t. Cottenham, 61, note, where the language of this case is qualified by the Reporter himself. See, also, *ante*, p. 1459, note 2.]

the defendants who did not appeal would, if they had been heard in support of the decree, have been entitled to their costs: either to have them paid directly by the defendant who appealed, or by the plaintiff; such costs to be added to the plaintiff's own costs, and reimbursed to him by the appellant.[6] Where several parties have joined in one petition of appeal, they cannot appear by separate counsel as respondents to a cross-petition.[7]

Upon a rehearing it is not, in general, competent to either party to enter into any new evidence;[8] but evidence taken before the *original hearing, though not made use of, may be read;[1] and *1486 documents which were not in evidence at the original hearing have been permitted to be read on an appeal;[2] but for this purpose, an order to prove them as exhibits at the hearing of the appeal must be obtained. Such an order may be obtained *ex parte*.[3] No evidence *will be received as to matters which have occurred since the *1487 original hearing.[1]

The plaintiff, by reading on the original hearing, part of the answer as an admission, does not make it evidence upon the appeal.[2]

[6] Stocken *v.* Stocken, and Stubbs *v.* Sargon, cited *ib.* 257. As to other defendants appearing voluntarily on an appeal, see Attorney-General *v.* Gibbs, 2 Phil. 327.

[7] *Re* Stephen, 2 Phil. 562, 568; Collinson *v.* Lister, 25 L. J. Ch. 38, L. JJ.

[8] [Williams *v.* Butcher, 2 Russ. 91]; Addison *v.* Hindmarsh, 1 Vern. 442; Whitworth *v.* Whyddon, 2 M'N. & G. 56; 14 Jur. 142; and see Jenner *v.* Morris, L. R. 1 Ch. Ap. 603, L. JJ. [But see, as to new evidence on appeal, Weston's Case, 10 Ch. Div. 579.]

As a general rule, when a rehearing is granted in Equity, the Court will not permit an examination at large; no proof will be admitted but what was heard, or ought to have been heard, upon the original hearing. Scales *v.* Nichols, 2 Yerger, 140; Dale *v.* Roosevelt, 6 John. Ch. 255; Mitchell *v.* Lenox, 14 Wend. 662; Wendell *v.* Lewis, 6 Paige, 233; Lovell *v.* Hicks, 1 Irish Eq. 472; Care *v.* Towle, 8 Paige, 479; Jenkins *v.* Eldredge, 3 Story C. C. 299. If the appellant wishes to offer new evidence, he should, in his petition of appeal, ask leave to produce further proofs, and state his excuse for not producing such evidence in the Court below. Scribner *v.* Williams, 1 Paige, 550. Where there is newly discovered testimony, such as would authorize a bill of review, or where there has been surprise, by the Court unexpectedly relying on evidence at the hearing, which could be satisfactorily explained by other testimony; in these cases, and perhaps others of a like nature, the Court will permit the testimony to be taken, if it is satisfied by affidavit of its materiality. Scales *v.* Nichols, 2 Yerger, 140; [Tomlinson *v.* Tomlinson, 11 Rich. Eq. 52]. So it appears a party may be let in to read fresh evidence, not read at the former hearing, where it has been duly taken in chief, and *omitted* by negligence or other cause to be read, or if the evidence be new matter not before ready, or relates only to papers since found, and which may be proved *vivâ voce*, at the hearing, or to testimony going to show the incompetency of a witness in a former deposition. Dale *v.* Roosevelt, 6 John. Ch. 255; see Story *v.* Johnson, 1 Irish Eq. 586; Wendell *v.* Lewis, 6 Paige, 233; Hill *v.* Chapman, 1 Sumner's Ves. 405, note (*a*), and cases cited.

[And see, where the object is to exclude evidence, Whitman *v.* Brotherton, 2 Tenn. Ch. 393.]

[1] Cunyngham *v.* Cunyngham, Amb. 90; Goodyer *v.* Lake, *ib.* ed. Blunt, n. 4; White *v.* Fussell, 1 V. & B. 153; Hedges *v.* Cardonnel, 2 Atk. 408; Williams *v.* Goodchild, 2 Russ. 91; Seton, 1155. [See 1504, n. 10, and 1003, n. 3.]

Upon a simple appeal from a final decree in a suit in Equity, without any assignments of reasons of appeal, and without any report of evidence or of facts found by the Judge who heard the cause and made the decree, there is nothing before the Court except the inquiry whether the decree is justified by the record. Ross *v.* Harper, 99 Mass. 176.

[2] Williams *v.* Goodchild, 2 Russ. 91; Lovell *v.* Hicks, 1 Irish Eq. 480; Jenkins *v.* Eldredge, 3 Story C. C. 299; and see Glover *v.* Daubney, 9 Jur. N. S. 90, L. JJ. [S. C. 4 De G., F. & J. 561], as to receiving new affidavits from persons who have already given evidence.

[3] Walker *v.* Symonds, 1 Mer. 37, n.; 2 Y. & C. Ex. 478, n.; Higgins *v.* Mills, 5 Russ. 287; Lovell *v.* Hicks, 2 Y. & C. Ex. 472, 478; Herring *v.* Clobery, C. & P. 251; *ante*, pp. 880–884.

[1] Lambe *v.* Orton, 33 L. J. Ch. 81, V. C. K.

[2] Allfrey *v.* Allfrey, 1 M'N. & G. 87, 93; 13 Jur. 269, 270.

Where the plaintiffs had, through the inadvertence of counsel, omitted to prove a will of real estate, in consequence of which the bill was dismissed at the original hearing, they were allowed to prove the will at the rehearing, which was postponed on the terms of their paying the costs of the application, and the costs of the day on the original hearing: in that case, however, the will was not disputed in the cause, and the omission arose wholly from the inadvertence of counsel;[8] and in other cases, new evidence has been allowed to be read *de bene esse*.[4]

It seems, that if, after the hearing, a witness has been convicted of perjury, the circumstance may be brought before the Court upon a rehearing. So, also, where a witness in an answer to a bill exhibited against him since the original hearing, had confessed that, on the day he was examined, he took a bond from the plaintiff, whereby the plaintiff bound himself, that, if he recovered the estate in question, he would convey part of it to the witness, the answer was allowed to be read at the rehearing to take off the effect of the witness's evidence.[5]

An application to discharge or vary an order made upon motion may, as we have seen,[6] be made by motion: two clear days' notice of which must be served on all those parties whose interests are affected by the application.[7]

Appeal motions must be set down at least two clear days before the day for which the notice is given. They are set down by the order of course clerk in the Registrar's office, upon production of the order appealed from, or an office copy thereof, and upon filing with him a copy of the notice of motion.[8] No deposit or certificate of counsel is required.

If the appellant does not appear, the motion will be treated as abandoned; and no affidavit of having been served with notice of the appeal motion will be required.[9]

*1488 * The Court of Appeal may, if it thinks fit, on a rehearing or appeal, examine a party or a witness orally, although he was not examined in the Court below.[1]

Where evidence has been taken *vivâ voce* at the hearing in the Court below, the Judge's notes are, *primâ facie*, to be deemed a sufficient note thereof.[2]

An application by motion or petition, whatever is its object, which

[8] Hood *v.* Pimm, 4 Sim. 101.

[4] Dashwood *v.* Lord Bulkeley, 10 Ves. 230. 236; Buckmaster *v.* Harrop, 13 Ves. 456, 458; Dawson *v.* Prince, 2 De G. & J. 41, 43; 4 Jur. N. S. 497.

[5] Needham *v.* Smith, 2 Vern. 463.

[6] *Ante*, p. 1472.

[7] See *post*, Chap. XXXV., § 2, *Motions*. For form of notice, see Vol. III.

[8] Reg. Regul. 15 March, 1860, rr. 1, 11. Counsel's brief will consist of a copy of the notice of motion; of a brief of the order sought to be discharged or varied; and of any observations which may be thought advisable.

[9] Turner *v.* Turner, 2 De G., M. & G. 28, 31.

[1] 15 & 16 Vic. c. 86, § 39; and see Martin *v.* Pycroft, 2 De G., M. & G. 785, 797; Hope *v.* Threlfall, 2 Eq. Rep. 307; Hindson *v.* Weatherill, 18 Jur. 499; [Bigsby *v.* Dickinson, 4 Ch. Div. 24].

[2] Ord. 5 Feb., 1861, r. 14.

has failed in the Court below, may be renewed before the Court of Appeal upon fresh evidence: when, if it is successful, the party moving or petitioning, nevertheless, commonly has to pay the cost of his first attempt: the circumstance that fresh evidence is brought forward sufficiently showing that the application had been made upon a defective case.[3] But if the application is to discharge an order as not being justified by the evidence which has been used in the Court below, the Court of Appeal looks at that evidence only which is recited in the order as having been read; and if the application is successful, the party moving or petitioning commonly gets the costs of the motion or petition in the Court below.[4]

Upon a rehearing or appeal, the whole case is open to the respondent; so that, if the appeal is against the whole decree, it is competent to the Court to modify the decree, by making it more favorable to the respondent.[5] Thus, where a plaintiff, who had succeeded in obtaining a decision against the defendant, with costs, not being satisfied with the view which a Vice-Chancellor had taken of the case, had the cause reheard before Lord Cottenham, in order to obtain an alteration in the decree more favorable to himself: his Lordship, upon the rehearing, being of opinion that the plaintiff was not entitled to any relief at all, dismissed his bill with costs. In his judgment, his Lordship said: "The plaintiff having thought fit to present a petition of rehearing against the whole decree, the defendants are entitled to raise any question (and amongst others the question of costs) which properly arose out of the subject-matter of the appeal; and I am bound to deal with the cause as if it now came on before me upon the original hearing. Supposing that to be so, I should certainly, in dismissing the bill, give the defendants their costs; and it is only upon those terms that the plaintiff can be entitled to get rid of the decree * which he has impeached *1489 by his present appeal. The result is, the defendants must have their costs of the suit up to and inclusive of the hearing; but I cannot give them their costs of setting the decree right." [1]

So, where the appeal is against part of the decree only, the respondent may, if he considers it necessary, go into the whole case: [2] whilst the appellant can only go into the parts complained of in his petition.[3]

[3] Upon this point, see Williams *v.* Goodchild, 2 Russ. 91.

[4] Tanner *v.* Carter, 1 C. P. Coop. t. Cott. 337; see also Whitworth *v.* Whyddon, 2 M'N & G. 56; Pyle *v.* Joel, 2 De G. & J. 285; *Re* Dixon, 3 Jur. N. S. 29, L. JJ.

[5] Sullivan *v.* Jacob, 1 Moll. 472; Smith *v.* Effingham, 1 C. P. Coop. t. Cott. 61, n. (*c*); Seton, 1155. [See *ante*, p. 1459, note 3.] As to appeals from orders under the Lands Clauses Consolidation Act, see *Re* Gregson, 13 W. R. 193, L. JJ.; and *post*, Chap. XLV.

[1] Oldham *v.* Stonehouse, 3 M. & C. 317.

[2] Watts *v.* Symes, 1 De G., M. & G. 240; Sherwin *v.* Shakespeare, 5 De G., M. & G. 523; see Hawley *v.* James, 16 Wend. 61, 85; Mapes *v.* Coffin, 5 Paige, 296; Clowes *v.* Dickenson, 8 Cowen, 358; Terhune *v.* Colton, 1 Beasley, 312, 318. A party can appeal only from such parts of a decree as affect himself. Idley *v.* Bowen, 11 Wend. 227. [See Milner *v.* Meek, 95 U. S. 252.] And if he is aggrieved by part of a decree only, he cannot call in question other parts of the decree in which he has no interest. Hone *v.* Van Shaick, 7 Paige, 222; [Jacobs *v.* Turpin, 83 Ill. 424; Crocker *v.* Lowenthal, 83 Ill. 579; *ante*, p. 1459, n. 3].

[3] On a rehearing, the cause is open to the party who petitions for it, only as to those parts of the decree complained of in the petition; but to the other party, it is open as to

Therefore, where there were two questions in the cause, one being whether the executor was entitled to the surplus, and the other whether a legacy given to him by the will was in satisfaction of a debt due to him by the testator, and, upon the first point, the Court decided against him, because he had put in an answer in which he admitted himself accountable for the surplus, but the second point was determined in his favor, whereupon the plaintiff appealed against the last decree, Lord Cowper held, that it was competent to the defendant to go into the first point: though he eventually did not decide it in his favor.[4]

But as between the respondent and the parties other than the appellant, only the point appealed from is open to the respondent.[5] Therefore, where there is an appeal against a part of a decree, and the respondent or some other party feels himself aggrieved by another part, the proper course is to present a cross-appeal. Where that is done, the last appeal may be brought on to be heard at the same time with the first, and one order be made in both.[6] If the respondent chooses, when the appeal is from part of the decree only, to go into the whole case, the whole case is then open to the appellant.[7]

At the hearing of an appeal or rehearing, the Court may give the plaintiff leave to amend, by adding parties in the same manner as upon an original hearing, and may order the rehearing to stand over *1490 for the purpose; and it has gone to the extent of allowing * the plaintiff to add the Attorney-General as a party: either by converting the bill into an information and bill, or into an information only.[1]

The Lord Chancellor may, within six weeks after delivering up the Great Seal, give in to the Registrar a written judgment signed by him in any case which has been fully heard by him, and is standing for judgment at the time of his resignation; and a decree or order is to be drawn up in pursuance of such judgment; and is to have the same force and effect as if the judgment had been given in open Court the day before he so delivered up the Great Seal.[2]

The costs of a rehearing, as well as of an original hearing, are in the discretion of the Court; but, generally, if an appeal is dismissed, it will be with costs;[3] and the Court will not take into consideration the fact that, in affirming the decision of the Court below, the Court of Appeal

the whole matter. Consequa *v.* Fanning, 3 John. Ch. 394; Dale *v.* Roosevelt, 6 John. Ch. 255; Ferguson *v.* Kimball, 3 Barb. Ch. 616; see Glover *v.* Hodges, 1 Saxton, 113, where it was held in New Jersey, that on a petition and order for a rehearing generally, the whole case is open, and the party supposing himself aggrieved has a right to insist upon a reconsideration of any part of it. See also, to the same effect, Sparhawk *v.* Buel, 9 Vt. 41; see Hill *v.* Chapman, 1 Sumner's Ves. 405, note (*a*). [See *ante*, p. 1459, n. 2.]

[4] Rawlins *v.* Powel, 1 P. Wms. 297, 300.

[5] Lord Brooke *v.* Earl of Warwick, 13 Jur. 547, L. C.; Tasker *v.* Small, 1 C. P. Coop. t. Cott. 61, n. (*b*); Seton, 1155.

[6] Blackburn *v.* Jepson, 2 V. & B. 359.

[7] Anon., 1 C. P. Coop. t. Cott. 61, n. (*b*).

[1] President of St. Mary Magdalen *v.* Sibthorp, 1 Russ. 154; and see *ante*, p. 418; see 2 Hoff. Ch. Pr. 38.

[2] 15 & 16 Vic. c. 80, § 60.

[3] M'Calmont *v.* Rankin, 2 De G., M. & G. 403, 426; Borton *v.* Dunbar, 9 W. R. 41, L. C.

had proceeded upon entirely different grounds.[4] Where the Lord Justices differ, the appeal is usually dismissed without costs.[5]

From a certificate furnished to Lord Langdale M. R. by the Taxing Masters, in the case of *Agabeg* v. *Hartwell*,[6] it appears, that as a general rule, costs of appeals, rehearings, and exceptions, are not carried by the words "costs of suit as between solicitor and client;" but require to be specially mentioned in the order for taxation.

When evidence is used on a rehearing, which was not used upon a former hearing, it is a circumstance which is taken into consideration in disposing of the costs.[7]

It was formerly the practice, in no case to order a respondent to pay costs; but according to the modern practice, there is no rule against giving a successful appellant all his costs;[8] and a respondent has frequently been ordered to pay costs.[9]

In *Phelps* v. *Prothero*,[10] where the decree was made more beneficial to the respondents than the one appealed from, their costs * were made costs in the cause, instead of being ordered to be * 1491 paid by the appellant. And where new issues were directed on the appeal, the costs were reserved.[1]

In *Oldham* v. *Stonehouse*,[2] where a plaintiff appealed from a decree which had been pronounced in his favor with costs, and, upon the rehearing, the respondent satisfied the Court that he was entitled to no decree at all, Lord Cottenham, as we have seen, reversed the decree, and dismissed the bill: giving the defendants the costs up to, and of the hearing; but he refused to give them the costs of setting the decree right.

Where an appeal, which is dismissed, has been recommended by the Court below, no costs are usually given.[3]

Where the decree omitted to provide for the costs of an appeal motion which had been reserved till the hearing of the cause, an order was made, on petition, for payment thereof, notwithstanding the decree had been enrolled.[4]

Where a decree is varied by the Court of Appeal, subsequent proceedings belong, nevertheless, to the Court below, as if the order made

[4] Cradock v. Piper, 1 M'N. & G. 684; see *contra*, Oriental Steam Company v. Briggs, 8 Jur. N. S. 201, 204; 10 W. R. 125, L. C.; [4 De G., F. & J. 191, 198]. As to the costs, generally, of rehearings and appeals, see Morgan & Davey, 96-104.

[5] King v. King, 1 De G. & J. 663, 674; 4 Jur. N. S. 721.

[6] 5 Beav. 271, 273.

[7] Williams v. Goodchild, 2 Russ. 91; Tanner v. Carter, 1 C. P. Coop. t. Cott. 337; Martin v. Pycroft, 2 De G., M. & G. 785, 806; 16 Jur. 1125.

[8] Collins v. Burton, 4 De G. & J. 612, 619; 5 Jur. N. S. 1113, 1114; and see Morgan & Davey, 101.

[9] Powell v. Lovegrove, 8 De G., M. & G. 357; 2 Jur. N. S. 791; Pooley v. Quilter, 2 De G. & J. 327; 4 Jur. N. S. 345; Lillie v. Legh, 3 De G. & J. 204; *Re* Skiggs, Marriage v. Skiggs, 4 De G. & J. 4, 9; 5 Jur. N. S. 325; Collins v. Burton, 4 De G. & J. 612, 618; 5 Jur. N. S. 1113; Ralli v. Universal Marine Insurance Company, 2 J. & H. 176; 8 Jur. N. S. 495, 497, L. JJ.; Baring v. Harris, 10 Jur. N. S. 1190; 13 W. R. 210, L. C.

[10] 12 Jur. 783, V. C. K. B.

[1] Parker v. Morell, 2 Phil. 453, 468.

[2] 3 M. & C. 317; *ante*, pp. 1488, 1489.

[3] *Re* Colquhoun, 5 De G., M. & G. 35. [So, where the cases are conflicting. Eno v. Tatam, 9 Jur. N. S. 481.]

[4] Viney v. Chaplin, 3 De G. & J. 282; S. C. 7 W. R. 159, where the form of order was given; and see Morgan & Davey, 34.

on appeal had been made by that Court.[5] The Court of Appeal, however, sometimes, by the order on the appeal, directs, that the further consideration be had before that Court.[6]

No rehearings or appeals are allowed to stand over to an indefinite period.[7]

The opinion of the Court, taken under the 30th section of 22 & 23 Vic. c. 35, is not subject to an appeal.[8]

Section III. — *Appeals to the House of Lords.*

Any person who feels himself aggrieved, by a decree or order of the Court of Chancery,[9] is entitled, as a matter of right, to appeal to the House of Lords.[10]

[5] Sowdon *v.* Marriott, 2 Phil. 623; S. C. *nom.* Flight *v.* Marriott, 12 Jur. 487, L. C.; Salkeld *v.* Johnston, 1 M'N. & G. 242, 256; Malcolm *v.* Scott, 3 M'N. & G. 29, 45.

[6] See Seton, 1152.

[7] Ord. XXI. 13.

[8] *Re* Mockett, Johns. 628; 8 Jur. N. S. 142; *Re* Muggeridge, Johns. 625; 6 Jur. N. S. 192; and see *Re* Dennis, 5 Jur. N. S. 1388, V. C. S. *In Re* Spiller, 6 Jur. N. S. 386; S. C. *nom. Re* ——, 6 W. R. 333, the Lords Justices gave an opinion under the Act at the request of Vice-Chancellor Wood. See also *post*, Chap. XLV.

[9] Including decisions, decrees, and orders of the Court of Appeal. 14 & 15 Vic. c. 68, § 10; *ante*, p. 1471.

[10] As to the jurisdiction of the House of Lords, in appeals and writs of error, see Sugd. H. L. Ca. 1. [An appeal from a final decree, for which see *ante*, 993, will bring up for revision the previous interlocutory orders: De Burgh *v.* Clarke, 4 Cl. & F. 562; Attwood *v.* Small, 6 Cl. & F. 232, 309; Jaques *v.* Methodist Episcopal Church, 17 Johns. 548; Crane *v.* Decamp, 7 C. E. Green, 614; Decker *v.* Ruckman, 1 Stew. Eq. 614; Morris *v.* Richardson, 11 Hum. 389; Laidley *v.* Merrifield, 7 Leigh, 354; even where the interlocutory orders have been directly appealed from and passed upon by the Appellate Court: Price *v.* Nesbit, 1 Hill Ch. 445; Travis *v.* Waters, 1 Johns. Ch. 88; S. C., on appeal, 12 Johns. 500; Shrewsbury R. Co. *v.* London R. Co., 4 De G., M. & G. 115; and even in matters of discretion, where there has been a clear abuse of that discretion. Detroit, &c. Fire Ins. Co. *v.* Renz, 33 Mich. 298; McPherson *v.* Rockwell, 37 Wis. 159; Frazier *v* Tubb, 2 Heisk. 670; White *v.* North West Stage Co., 5 Oreg. 99. And see, as to matters of discretion, *ante*, p. 1463, n. (1). But an appeal from an order on further directions, after a final decree settling rights and from which an appeal would lie, will not bring up previous orders and decrees. Beavan *v.* Mornington, 8 H. L. Cas. 525, 540; Gilchrist *v.* Cannon, 1 Coldw. 582; Caldwell *v.* Hodsden, 1 Lea, 45; Taylor *v.* Read, 4 Paige, 568; Mapes *v.* Coffin, 5 Paige, 296.

The action of the Court in overruling a motion, when it operates as a final disposition of the case, may be appealed from, and will be reviewed in the Appellate Court. Gale *v.* Michie, 47 Mo. 326. So of the dismissal of a petition to set aside or supersede an execution. New Orleans Railroad *v.* Morgan, 10 Wall. 256; Elders *v.* Johnston, Peck, 204. So of the rejection of a claim. Derrick *v.* Lamar, 74 Ill. 404; Johnson *v.* Gillett, 52 Ill. 358. So of a decree for the payment of a fixed sum, otherwise that execution issue, although an account be ordered as to other matters. Saunders *v.* Gregory, 3 Heisk. 567; Forgay *v.* Conrad, 6 How. 653; Thomson *v.* Dean, 7 Wall. 342; Railroad Co. *v.* Bradley, 7 Wall. 575. So of a decree settling the merits, although an account of rents be ordered. Jones *v.* Wilson, 54 Ala. 50. So of the orders of a Probate Judge, making a final disposition of a proceeding in lunacy. Fore *v.* Fore, 44 Ala. 478. So of an order appointing or discharging a receiver, where it operates as a final decree. Milwaukee R. Co. *v.* Soutter, 2 Wall. 521; Cincinnati R. Co. *v.* Sloan, 31 Ohio St. 1; Cain *v.* Warford, 2 Md. 282; Barry *v.* Briggs, 22 Mich. 201. But an appeal will not lie from an order quashing an ancillary attachment: Jacobi *v.* Schloss, 7 Coldw. 385; nor from an order discharging the levy of an attachment: Bray *v.* Laird, 44 Ala. 295; nor from an order refusing an attachment: Sartwell *v.* Field, 68 N. Y. 341. But if the refusal amounts to an abuse of discretion, it seems the Appellate Court will revise the act. Seidentopf *v.* Annabil, 6 Neb. 524.

Whatever has once been decided by the Appellate Court on appeal from a final decree cannot be re-examined on a subsequent appeal in the same suit. Supervisors *v.* Kennicott, 94 U. S. 498. See, to the same effect, Cassidy *v.* Bigelow, 12 C. E. Green, 505; Sexton *v.* Henderson, 47 Iowa, 131; McNairy *v.* Mayor of Nashville, 2 Baxt. 251, drawing no distinction between an appeal from a final and an appeal from an interlocutory decree. But see Plant *v.* Barclay, 56 Ala. 561, reversing the decision in the same case, *sub nom.* Barclay *v.* Plant, 50 Ala. 509, perhaps under

*The mode of obtaining the interposition of the House of *1492
Lords, in the case of an appeal from the Court of Chancery, is by petition of appeal, which may be preferred from an interlocutory, as well as from a final order;[1] in which respect, appeals from Courts of Equity, by petition, differ from appeals, by writ of error, from the judgments of the Courts of Law: which will only lie where the judgment is final. The reason for this distinction is stated to be, that Courts of Equity often decide the merits of a case in intermediate orders; and the permitting of an appeal, in the early stage of the proceedings, frequently saves the expense of further prosecuting the suit; but in actions at Law, no such orders intervene: consequently, a writ of error cannot be brought before final judgment.[2]

No appeal lies to the House of Lords, against a decree or order, until it has been enrolled:[3] and no appeal lies from orders made by the Lord Chancellor, or Lords Justices, in lunacy: in such case, the appeal is to the Privy Council.[4]

Petitions of appeal must be presented within two years from the enrolment of the decree or order, and the end of fourteen *days after the first day of the session, or meeting of Parliament *1493
next ensuing the two years: unless the appellant be an infant, *covert*, *non compos mentis*, imprisoned, or out of Great Britain or Ireland: in which cases, the time begins to run from the determination of the

Ala. Rev. Code, § 3510, Moulton *v.* Reid, 54 Ala. 320. Where the decree below is passed in strict conformity with the instructions of the Appellate Court, an appeal therefrom cannot be entertained. Grait *v.* Baxman, 33 Md. 283. It is, perhaps, otherwise where the decision was upon an appeal from an interlocutory order. Price *v.* Nesbit, and other cases cited *supra*. See also Railroad Co. *v.* Soutter, 2 Wall. 519; Meyers *v.* Dittmar, 47 Texas, 373.

After a decree adjudicating rights between the parties, persons having no previous interest in the litigation may become so connected with the case as to subject them to its jurisdiction, and entitle them to an appeal. As a bidder at a foreclosure sale. Blossom *v.* Railroad Co., 1 Wall. 655. Deardaine *v.* Lawrence, 10 Paige, 602. And a purchaser at a Master's sale. Barrow *v.* Osborne, 6 H. L. Cas. 536; Buckmaster *v.* Barker, 2 Swan. 340; Sharpe *v.* Hoe, 1 Irish Eq. Rep. 25. And a receiver who is ordered to pay in money. Hackley *v.* Gilman, &c. R. Co., 94 U. S. 467. And a person interested, although not a party, may, by proper proceedings, secure the right of appeal. Sage *v.* Central R. Co., 93 U. S. 412. And a creditor called in to present his claim in an action for the settlement of an insolvent corporation may appeal. State *v.* Spartenburg, &c. R. Co., 8 S. C. 129. The assignee of a part or the whole of the interest of a residuary devisee may appeal from a decision of the Probate Court denying his motion to remove an executor. O'Rourke *v.* Lisbroe, 11 R. I. 459.

In Dudgeon *v.* Thomson, 3 App. Cas. 34, the House of Lords heard and decided a cause on the merits, at the request of both parties, notwithstanding fatal irregularities in the appeal.]

[1] [An appeal lies from an order of the Chancellor sustaining exceptions to a bill for impertinence. Rickards *v.* Attorney-General, 12 Cl. & F. 30; Camden, &c. R. Co. *v.* Stevens, 6 C. E. Green, 484. And from an order setting aside a sale. Bailey *v.* Maule, 2 Cl. & F. 121, note; National Bank *v.* Sprague, 6 C. E. Green, 458. And see *ante*, p. 1461, n. (6); 1463, n. (1); Townsend *v.* Smith, 1 Beas. 353.

In the Courts of the United States and of some of the States, as we have already seen (*ante*, 993, n. 8), an appeal only lies from a final decree. Forgay *v.* Conrad, 6 How. 205; Perkins *v.* Fourniquet, 6 How. 206; S. C. 16 How. 85; Pullian *v.* Christian, 6 How. 209; Wiggle *v.* Owen, 43 Miss. 158; Chemwith *v.* Smith, 20 Md. 18; Meek *v.* Mathis, 1 Heisk. 534; see Rodman *v.* Forline, 2 Met. (Ky.) 325; Hull *v.* Lamb, 28 Vt. 85; Heath *v.* Vreelan, 11 Md. 388; Martindale *v.* Brown, 18 Ind. 284; Woodside *v.* Woodside, 21 Ill. 207; Stovall *v.* Banks, 10 Wall. 583.]

[2] Palmer's H. L. Prac. 1.

[3] Foster *v.* Cockerell, 3 Cl. & F. 456; Andrewes *v.* Walton, 8 *id.* 457; Broadhurst *v.* Tremellin, 9 *id.* 71; Macq. H. L. Prac. 108.

[4] Sheldon *v.* Fortescue, 3 P. Wms. 108; Elmer, 84.

disability; but the time is in no case to exceed on account of absence five years from the date of the last decree or order appealed from.[1] It has, however, been held, that an appeal brought from a decree more than five years after its enrolment, was saved by being extended to subsequent orders: the appeal from which was brought within two years from enrolling them.[2]

Petitions of appeal must be presented within fourteen days from the first day of every session or meeting of Parliament after a recess; after which time, the Lords will receive no petition of appeal: unless upon a decree made whilst the Parliament is actually sitting: in which case, the party who finds himself aggrieved may bring his petition of appeal within fourteen days after such decree has been made and entered.[3]

A poor person may be admitted, on appeals to the House of Lords, to sue or defend *in formâ pauperis*.[4] To obtain such admission, the pauper must present a petition, accompanied by an affidavit of his poverty, and by a certificate to the same effect from the minister and church-wardens of the parish where he is resident.[5]

Previously to a petition of appeal being presented to the House, a notice must be given to the agents of the respondents, of the time when such petition is intended to be presented: and the day of giving such notice must be indorsed, by the petitioner's agent, on the back of the petition of appeal.[6]

A petition of appeal to the House of Lords is nearly the same in form *mutatis mutandis*, as a petition for rehearing in the Court of Chancery.[7]

*1494 All appeals must be signed by the counsel, who have been of counsel in the cause below, or shall attend as counsel at the bar of the House, when the appeal is to be heard; and they must certify that, in their judgment, there is reasonable cause of appeal.[1]

[1] Stand. Ord. H. L. 24 March, 1725, No. 118; 2 June, 1737; 22 June, 1829; Macq. 778; De Burgh *v.* Clarke, 4 Cl. & F. 562.

[2] De Burgh *v.* Clarke, 4 Cl. & F. 562; see, however, Beavan *v.* Earl of Mornington, 8 H. L. Ca. 525; 9 Jur. N. S. 1123. Where the time for appealing has been fixed by statute, the Court has no power to extend it, not even on the ground of the mistake of the party; and the lapse of time is an absolute bar to the appeal. Townsend *v.* Townsend, 2 Paige, 413; Barclay *v.* Brown, 7 *id.* 245; Caldwell *v.* Mayor, &c. of Albany, 9 *id.* 572. [See Untereiner *v.* Miller, 29 La. Ann. 435; Dobson *v.* Dobson, 7 Neb. 296; Herrick *v.* Racine Warehouse Co., 43 Wis. 93.] Nor can the Court vacate the order, and cause it to be entered as of a more recent date, to enable the party to appeal therefrom. *Ibid.*; Caldwell *v.* Mayor, &c. of Albany, 9 Paige, 572. But where the time for appealing depends on a rule of the Appellate Court, such Court, upon sufficient cause shown, may suspend its rule and allow an appeal, although such appeal was not brought within the time prescribed by the rule for appealing. Caldwell *v.* Mayor, &c. of Albany, 9 Paige, 572; Smith *v.* Smith, 1 Paige, 391. [And see, as to the power of the Court to modify its rules in particular cases, Mutual Building Fund *v.* Bossieux, 1 Hughes, 386, and *ante*, p. 4, note.]

[3] Stand. Ord. H. L. 13 July, 1678, No. 55; Macq. 775.

[4] *Ante*, p. 1482.

[5] Macq. 259.

[6] Stand. Ord. H. L. 9 April, 1812, No. 188; Macq. 780. For form of notice, see Vol. III.

[7] *Ante*, p. 1447. For form, see Vol. III.

[1] Stand. Ord. 3 March, 1697, No. 58; amended 9 April, 1812; Macq. 776; see Fulton Bank *v.* Beach, 2 Paige, 188. [In the United States, appeals are regulated by statute, and are usually of right, requiring no application by petition, or certificate of counsel, whether taken at once, upon rendition of the decree, or subsequently by writ of error, within the time prescribed. Caldwell *v.* Hodsden, 1 Lea, 305.]

When the petition of appeal has been settled and signed by counsel, the petition, with the certificate of reasonable cause at the foot, must be engrossed, on parchment, in words at length, in one continuous roll, and the names of the counsel, as well to the appeal as to the certificate, must be added. A certificate of notice having been given[2] must then be indorsed; and the petition, so indorsed, lodged with the Clerk of Appeals at the Parliament office.[3]

The petition being lodged in the Parliament office, will, in due time, be presented to the House. To effect this, it is not now necessary to seek the good offices of a peer, as the officers of the House will take the proper steps to present the appeal, and obtain an order requiring the respondent to answer.[4]

The order is obtained by the appellant's agent at the Parliament office; and it must be served, either on the respondent, or on the agent named in the order; and the service is effected by delivering a true copy thereof, and at the same time showing the original. The order names a time within which the respondent is to answer.[5]

When the order has been served, an affidavit of the service should be indorsed on it.[6] The affidavit may be sworn before a commissioner to administer oaths in Chancery.[7]

Within eight days after the appeal has been received, the appellant must enter into a recognizance to the Crown in the penalty of 400*l.*, conditioned to pay such costs as the House of Lords shall appoint, in case the decree appealed from shall be affirmed; and if the appellant neglects to give such security within the above time, the Clerk of the Parliaments informs the House thereof, and the appeal will be dismissed.[8]

If the appellant cannot conveniently attend to give security, he may procure a substitute; whom the House, on special motion, of which two days' notice must be given, will permit, if of sufficient substance, to enter into the recognizance.[9]

The recognizance is prepared by the Clerk of Appeals: it is written on unstamped parchment; signed by the appellant or his surety; and witnessed by the Clerk of Appeals.

In appeals brought by the Attorney-General, or other officer, on behalf of the Crown, no recognizance for costs is required;[1] *1495 nor is it required from a person appealing *in formâ pauperis*.[2]

If an answer is not put in within the time limited for that purpose, the appellant's agent should obtain a peremptory order upon the respondent to answer:[3] to obtain which order, the appellant's agent

2 *Supra.*
3 See Macq. 139.
4 Macq. 141.
5 *Ibid.*
6 For form of affidavit, see Vol. III.
7 Macq. 142.
8 Stand. Ord. H. L. 22 June, 1829, No. 61; Macq. 143, 776.
9 Macq. 148.
1 Lord Advocate v. Dunglas, 9 Cl. & F. 174; Macq. 150.
2 Macq. 150.
3 Stand. Ord. H. L. 15 Jan., 1719, No. 106; Macq. 166, 777; see Irving v. Dunscomb, 2 Wend. 205; Waters v. Travis, 8 John. 566.

should leave at the Parliament office, the first order with the affidavit of service thereof; and, upon the Clerk's reading the affidavit in the House, the peremptory order is made as a matter of course: in point of regularity, however, this order ought to proceed upon the motion of a peer.[4] A week is always the time limited by a peremptory order; and upon the expiration of the week, if no answer has been put in, the appellant's agent may apply to have the cause appointed for hearing *ex parte*.[5]

Although the Lords expect that parties should conform to their standing orders, yet, when circumstances manifestly require it, they will dispense with them: as where, by reason of sickness or other inevitable accident, the agent has been prevented from presenting an appeal, or the respondent from filing his answer within the limited period; and so, in all cases, where there has been no wilful neglect, provided it can be made to appear that no inconvenience is likely to accrue from granting the indulgence; but in these cases, an order must be obtained to dispense with the standing order, upon a petition for that purpose. A petition of this description is lodged with the Clerk of Appeals, through whom it is presented to the House; and unless the prayer of the petition is consented to by the opposite party, the petition is referred to the Committee of Appeals:[6] who are attended thereon by the agent of the parties.

On being served with the order to answer, the respondent should obtain from the Parliament office an office copy of the petition of appeal. If he wishes to expedite the hearing, he may, on having notice that an appeal is intended, and, without waiting till the order is served, or the time for answering has expired, put in his answer.[7]

Where the respondent is unable to put in his answer within the time prescribed by the order or orders served on him, he should apply for further time. The application is made by petition:[8] which must be lodged with the Clerk of Appeals; and two days' notice thereof given to the appellant's agent. The notice should be accompanied by a copy of the petition.

*1496 * Where a respondent objects to the competency of an appeal, he should present a preliminary petition: which will be referred to the Committee of Appeals.[1]

The answer is engrossed on parchment; and lodged with the Clerk of the Parliaments: who marks on it the day it is brought in; and the names of the parties answering, and of the parties to whose appeals such answers are put in, are, the same day, entered in the Journals of the House.[2]

In some cases both parties are dissatisfied with the determination of

[4] Macq. 167.
[5] *Ibid.*
[6] *Ib.* 33.
[7] See *ib.* 157. For form of answer, see Vol. III.
[8] For form of petition, see Vol. III.

[1] Rochfort *v.* Battersby, 2 H. L. Ca. 388; Macq. 156; and see Norbury *v.* Meade, 3 Bli. 261; and as to the costs in such cases, see Morgan & Davey, 103.
[2] Stand. Ord. H. L. 29 March, 1720, No. 107; Macq. 163, 777.

the Court below, and the respondent as well as the appellant is advised to prefer an appeal.[3] The time allowed for bringing in such cross-appeals is limited to a fortnight after answer put in to the original appeal: after which time, the same will not be received, unless the House, on petition, grants leave to present it *nunc pro tunc:* which it may do, if good cause can be shown for the omission.[4]

A cross-petition of appeal is presented and moved, and an order made upon it, in the same manner as upon an original appeal.[5]

The cross-petition must be signed by counsel: it is not, however, usual to require the cross-petitioner to enter into a recognizance for costs.[6]

If the session of Parliament determines before the time limited for answering has expired, and no answer is put in during the same session, service of the order upon the respondent, five weeks before the first day of the then next session, is deemed good service; and the appellant may apply for a peremptory day, in case the respondent does not put in his answer within three days from the first day of the next session of Parliament.[7]

All appeals continue, and are proceeded on *in statu quo*, notwithstanding a prorogation or dissolution of Parliament.[8]

All such appeals as are presented in any session, to which answers are put in during the same session, and for hearing whereof no day is appointed in such session, if neither the appellant nor respondent applies to the House, within eight days, to be accounted from the first day of the next meeting of Parliament, for a day of hearing, will stand dismissed, but without prejudice to * the appellant's pre- *1497
senting any new appeal thereafter;[1] and all such appeals as are presented in any session, to which no answer is put in during the same session, if neither the appellant, within eight days from the first day of the next meeting of Parliament, applies to the House to appoint a peremptory day to answer, nor the respondent puts in an answer within the eight days, will stand dismissed; but without prejudice to the appellant's presenting any new appeal thereafter.[2]

The House of Lords will permit a petition of appeal to be amended, after it has been presented:[3] thus, if any error is discovered in the petition, or if the appellant is advised that some previous orders are so connected with the order appealed from that it will be impossible to do

[3] See Vernon v. Wright, 7 H. L. Ca. 35, where a cross-appeal was dismissed with.

[4] Stand. Ord. 8 March, 1763, No. 127; amended 22 June, 1829; Macq. 226, 227, 779.

[5] Macq. 226.

[6] *Ib.* 226, 228. As to the costs of cross-appeals, see Maxwell & Dalzell, 103. For forms of cross-petition and answer, see Vol. III.

[7] Stand. Ord. 28 March, 1735, No. 124; Macq. 178.

[8] Palmer's Prac. H. L. 37; Resolution of H. L. 29 March, 1678; Macq. 32.

[1] Stand. Ord. 29 March, 1720, No. 107; amended 5 April, 1734; Macq. 168, 777.

[2] Stand. Ord. 29 March, 1720, No. 108; Macq. 169, 777. Where an appeal has been regularly taken from an interlocutory decree, mere delay in the prosecution of it is not a ground for its dismissal. Nor is it ground for dismissal, that the appellant has omitted to give notice of an order to answer the appeal. Dey v. Walton, 2 Hill (N. Y.), 403.

[3] Macq. 154.

justice to his case, without extending his appeal to these former orders, he should petition for liberty to amend his petition of appeal.[4] On the other hand, if the respondent considers the proceedings are not correctly set forth in the petition of appeal, he may petition the House that the appellant may be ordered to amend such petition, in the particulars specified, and to amend the respondent's copy of the petition.[5]

Two days' notice in writing is to be given to the opposite agent, of the intention of the appellant or respondent to present the petition to amend; and such notice should be accompanied by a copy of the petition.[6] The petition is referred to the Appeal Committee, unless it is consented to.[7]

If an appeal is amended after the respondent has put in an answer, and it is considered necessary that a new answer should be put in to the amended appeal, he must obtain an order for leave to withdraw the former answer, and put in a new one: in which case, the respondent will be entitled to costs. An order to this effect may be obtained on petition: but if the respondent does not voluntarily apply for such an order, and put in his answer, the appellant may proceed against him by a new peremptory order; and may get the cause set down *ex parte*.[8]

If the appellant finds it expedient to withdraw his appeal, he *1498 must obtain leave of the House to do it, by petition: of which * two days' notice must be given to the respondent's agents, as in other cases, and a copy of the petition be also served; but the House will not grant the prayer of it without ordering the appellant to pay the respondent his costs; and if there is ground for hesitation, it will refer the matter to the Appeal Committee.[1]

In case an appeal which the respondent has reason to think is irregular, is presented, a counter petition should be presented, praying to have it dismissed.[2] The respondent's agent must give two days' notice to the appellant's agent, of his intention in this behalf; and should, at the same time, serve him with a copy of the petition; and both agents should attend on presenting it: on which occasion (unless there manifestly appears to be some palpable breach of the standing orders of the House, or of the legislative enactments respecting appeals, in which case the appeal will be dismissed at once) the petition will be referred to the Appeal Committee, before which the agents and counsel, if desired, will be heard.[3] In questions of great importance, however, the arguments have been heard at the bar of the House.[4]

[4] Bouchier *v.* Dillon, 5 Bligh, N. S. 688, 714.

[5] See Macq. 157.

[6] For forms of petition and notice, see Vol. III.

[7] Macq. 154; and *ante*, p. 1495.

[8] Macq. 155. If the appeal is made after the time allowed for appealing, the objection should be taken by motion to dismiss the same; and it cannot be taken at the hearing. Answering is a waiver of objections of a formal nature. Disbrow *v.* Henshaw, 8 Cowen, 353; Rogers *v.* Cruger, 3 John. 564. [See, as to the time within which a motion to dismiss an appeal for defect in the bond or other irregularity lies in Tennessee, Snyder *v.* Summers, 1 Lea, 481.]

[1] Macq. 263–265.

[2] See Halsey *v.* Van Amringe, 4 Paige, 279.

[3] Macq. 156, 157.

[4] Norbury *v.* Meade, 3 Bligh, 261.

If an irregular appeal is presented, the counter petition should be presented before the original appeal is answered: for, if the respondent treats it as an effective appeal, by answering it before he presents his counter petition, he will not be entitled to costs.[5]

After the answer is put in, either the appellant or respondent may apply to have the appeal appointed to be heard. An order to set down the appeal for hearing will then be made: which must be served on the opposite party.[6]

It sometimes happens that there are two appeals which relate to the same subject, or in which the questions in both are similar, and that one of them has been set down, so as to stand several causes before the other: in such a case, the House, upon a petition, will order the second to stand next to the first.

Appeals, for hearing whereof days have been appointed in any session, but which are not determined in that session, will be heard in the beginning of the next session, in the same order as they stand to be heard at the end of the foregoing session, without any new application to appoint a day for hearing the same.[7]

For the better information of the Lords, as to the matters in controversy, printed statements of the appellant's and respondent's cases are delivered to them.[8]

The case is usually prepared by the junior counsel of the party
* appellant or respondent; and is settled in consultation with a *1499
senior counsel: usually the counsel who is to argue the case with him at the bar of the House.[1]

The case should contain all the material facts; and should concisely narrate the proceedings, and the substance of the pleadings and evidence or proofs: whether consisting of documents or depositions; and particularly those on behalf of the party whose case it is.[2]

The printed cases must contain a copy of so much of the proofs, taken in the Court below, as the parties intend to rely on at the hearing, together with references to the documents where the same may be found.[3] It has, nevertheless, been said, by Lord Eldon: "that the rule was made by the House, for the purpose of guarding itself; but that it is competent to the House to hear evidence not printed, if it thinks proper. The parties are to print what they think material: but in such a case as that it was too much to suppose that any one could infallibly say what was, and what was not, material."[4] The House will not, however, admit new evidence.[5]

The pleadings in the Court below, and the proofs, are generally stated

[5] *Ibid.*
[6] Macq. 163. For form of motion paper, see Vol. III.
[7] Stand. Ord. 8 June, 1749, No. 124; Macq. 779.
[8] Macq. Ch. XVI.
[1] For formal parts of the cases, see Vol. III.
[2] See Kay *v.* Marshall, 8 Cl. & F. 245; Withy *v.* Mangles, 10 *Cl.* 215.
[3] Stand. Ord. 24 Feb., 1813, No. 131; Macq. 780.
[4] 3 Dow, 222.
[5] Macq. 171. [*Infra*, 1504, n. 10.]

in an appendix; and it is usual for the appellant and respondent to agree upon a joint appendix:[6] which is printed at their joint expense; but where they cannot agree as to the documents to be included, each party prints a separate appendix.[7]

At the hearing, the originals or official copies of the decrees and orders appealed from, office copies of the proceedings in the cause, and all original documents, must be laid on the table of the House.[8] If any documents required to be produced at the hearing are not in the possession of the appellant or respondent, the person in whose custody they are must be served with an order of the House to produce them at the bar, on the hearing. Such order is obtained on petition to the House: which is presented, and referred to the Appeal Committee, in the usual way.

No case must be delivered to any Lord, unless signed by one or more of the counsel who attended the hearing in the Court below, or shall be of counsel at the hearing in the House.[9] But, although this order expresses that the case may be signed by one or more counsel, it is, in practice, always signed by two.

*1500 *When the case has been signed by counsel, there are commonly an hundred and fifty copies of it printed off; and a like number of copies of each appendix, where separate, or of the joint appendix.

One hundred copies of each case, and of each appendix, or of the joint appendix, must be lodged with the Clerk of Appeals.[1] Where the application is joint, the hundred copies of it are lodged by the appellant's agent on behalf of both parties. Six copies of each case and appendix, bound, and interleaved with cream-wove paper, must be subsequently left at the House, for the use of the Lords, who are to hear the appeal. If the Judges are summoned, six more copies, bound and interleaved in like manner, must also be left at the House for their use. Where, also, the hearing in the Court below is reported, a note of reference to the report should be made, on the first page of each bound copy left at the House.[2]

The appellant and respondent must, severally, in strictness, deliver the prints of their cases at the House, within four weeks after the time appointed for the respondent to put in his answer. In default of the appellant so doing, the appeal will stand dismissed, but without prejudice to his presenting a new appeal within the first fourteen days of the next session of Parliament, or within the then remainder of the time limited for presenting appeals; and, in case of default on the part of the

[6] Macq. 194.

[7] The brief of each counsel will consist of printed copies of the case on each side, and of the appendix or appendices; and should be accompanied by such observations as may be deemed material. The whole are frequently bound together, for the convenience of counsel.

[8] Macq. 196, 197.

[9] Stand. Ord. H. L. 19 April, 1698, No. 59; Macq. 184, 776.

[1] See Macq. 192.

[2] Each bound copy left at the House must be labelled or indorsed on the cover, stating the title of the appeal. For form of indorsement, see Vol. III.

respondent, the appellant is at liberty to set down his cause *ex parte*.[3] If, however, through any casualty, either of the parties' agent should be prevented from getting his case prepared, in time to lodge the prints at the House pursuant to the Standing Order, he must present a petition for a further day: setting forth the cause of delay.[4] The petition is lodged and heard by the Appeal Committee, as before explained.[5]

After both parties have lodged their respective cases, they usually exchange about a dozen copies of the case and any separate appendix thereto.

When a day has been appointed for hearing an appeal, it can only be altered upon petition: of which two days' notice must be given to the opposite party, and service of the notice be proved, by oath, at the bar of the House.[6]

An application to advance the hearing of an appeal must be made to the Appeal Committee; and not to the House.[7]

* If the plaintiff or respondent dies, or if a female plaintiff *1501 marries, the appeal abates: and an order of revivor must be obtained, by a petition to the House: of which two clear days' notice must be given;[1] and if the printed cases have been delivered, a supplemental case must be delivered[2] (unless the abatement has happened after a full hearing),[3] stating the title of the appeal, the different facts set forth in the petition, and the order for the revival of the appeal: which case will not require the signatures of counsel, unless it contains arguments or observations: if it should, then it must be signed by counsel. It must be printed and indorsed as the original case, and a sufficient number lodged at the Parliament office.

Supplemental cases must also be delivered, where parties in the Court below have been omitted, and, by leave of the House, are added as parties to the appeal, after the printed cases have been delivered.[4]

If the appellant makes default in appearing when the appeal is called on, it will be dismissed with costs.[5] Where the respondent makes default, the appeal may be heard *ex parte*:[6] but where neither party appears the appeal will be dismissed without costs.[7]

Only two counsel on each side can argue;[8] but in cases of great

[3] Stand. Ord. H. L. 12 July, 1811, No. 177; amended 22 June, 1824; Macq. 182, 779.

[4] Macq. 183, 192.

[5] *Ante*, p. 1495.

[6] Stand. Ord. H. L. 22 Dec., 1703, No. 69; Macq. 2, 779.

[7] Bloch v. Joy, 3 H. L. Ca. 565.

[1] Macq. 241.

[2] Stand. Ord. H. L. 20 March, 1823, No. 199; Macq. 781.

[3] Hallifax v. Lyre, 9 Cl. & F. 43; and see Braymichi v. Attorney-General, 7 Jur. N. S. 741. H. of L.

[4] Stand. Ord. H. L. 20 March, 1823, No. 199; Macq. 781.

[5] Martin v. D'Arcy, 3 H. L. Ca. 698; Hearyman v. Marryat, 6 *id.* 112; 4 Jur. N. S. 17; Scanlan v. Usher, 8 Cl. & F. 561; Murphy v. Conway, 9 *id.* 73; and see Ricketts v. Lewis, 2 Cl. & F. 109; Fraser v. Gordon, 3 Cl. & F. 719, 720. When the appellant was present, but not his counsel, the appeal stood over, on payment of the costs of the day. Godson v. Hall, 7 Cl. & F. 549; and see Elliot v. Thomas, 8 *id.* 231.

[6] Hamilton v. Lithgow, 4 Cl. & F. 20.

[7] Shelburne v. Middleton, 9 Cl. & F. 72.

[8] The Queen v. Miles, 10 Cl. & F. 564; Stand. Ord. 2 March, 1837, No. 119; Macq. 778.

importance and complication, it is not uncommon to call in a third counsel for consultation and assistance. The House will rarely, however, allow on taxation the costs of more than two counsel.[9]

Though, by the Standing Order, which is founded on a supposition that there are but two parties, or sets of parties interested, only two counsel on a side are to be heard, yet, where it appears that the respondents have not identical, but separate, and perhaps conflicting interests, the House will allow a third or additional counsel in support of such interests.[10] To obtain leave to do so, it is usual to present a petition for that purpose, stating the peculiar circumstances. An instance of this occurred in the appeal of *Gore* v. *Stackpoole:* in which their Lordships made an order, that an infant respondent might have counsel on his separate behalf.[11]

*1502 *At the hearing, one of the counsel for the appellants opens the appeal; then the evidence on their side is read: which done, the other counsel for the appellants may make observations on the evidence; then one of the counsel for the respondents is heard, and the evidence on their side read: after which, the other counsel for the respondents is heard; and one counsel only for the appellants replies.[1] The Judges of the Superior Courts of Law are sometimes summoned, and questions of law put to them; and where they require time to consider such questions, they are subsequently summoned to deliver their opinions: in which case, the judgment of the House is seldom given during the session in which the appeal is heard.

When the arguments of counsel are finished, and the opinions of the Judges, if consulted, received and considered, the House gives judgment, affirming the decree or order of the Court below, with or without costs; or reversing or varying the same, according to the circumstances of the case. If any Lord conceives that the decree or order is erroneous he states his reasons, and moves that it be reversed or varied; and should the rest of the House be of that opinion, the motion is put and carried; but if it is opposed, then a debate ensues, and the question is put to the vote: on which occasion proxies are not allowed; and it being the rule of the House to put the question for reversing[2] the decree or order: unless, upon a division, there is a majority for the reversal, it will be affirmed.[3] Where the appeal is from part of a decree only, the portion not appealed from will be affirmed; and all par-

[9] See Poole *v.* Leask, 7 July, 1865, where the costs of three counsel were allowed.

[10] Macq. 205; and see Holme *v.* Pringle, 8 Cl. & F. 265.

[11] Lord's Journ. 8th May, 1812; see Macq. 205; and see Prendergast *v.* Prendergast, 3 H. L. Ca. 195, 225, where a trustee was held entitled to appear by counsel on an appeal, but not to print a case or appendix.

[1] Stand. Ord. 2 March, 1827, No. 119; Macq. 778. As to the hearing, generally, see Macq. 203 *et seq.*

[2] Stand. Ord. 7 Dec. 1691, No. 56; Macq. 27.

[3] Baker *v.* Lee, 8 H. L. Ca. 495; 7 Jur. N. S. 1; see Bridge *v.* Johnson, 5 Wend. 371. As to how far the House is bound by its own decisions, see Attorney-General *v.* Dean and Canons of Windsor, 8 H. L. Ca. 369; 6 Jur. N. S. 833; Tommey *v.* Sprang, 5 Ir. Jur. 321.

ties served with notice of the appeal are bound, whether they appear at the hearing or not.[4]

On some occasions, the House, instead of affirming or reversing the judgment, gives directions to the Court below to rectify its judgment: in such cases, the order of the House of Lords must be made a rule or order of the Court of Chancery. So, also, it must be, if the House of Lords reverses the decree of the Court: because it may otherwise be carried into execution.[5] In *Attorney-General* v. *Scott*,[6] where a decree of the Court of Chancery was affirmed by consent, an application was made to the Court, to make the judgment an order of the Court of Chancery, but Lord Hardwicke *doubted whether such *1503 a thing was ever done; nor indeed can it, under any circumstances, be necessary, where a decree is simply affirmed, unless the proceedings under it have been suspended, pending the appeal.

An order to make a judgment of the House of Lords, upon an appeal, a rule or order of the Court of Chancery may be obtained on motion of course, upon production of the order signed by the Clerk of the Parliament;[1] but where special directions are necessary, the cause is sometimes set down again for hearing, or a notice of motion is given.[2]

If the decree appealed from is affirmed and the appeal dismissed, the costs of the appeal, as a general rule, follow the result, and are payable by the appellant;[3] but sometimes the appeal is dismissed without costs, and the respondent's costs allowed out of the fund;[4] and sometimes the costs of both appellant and respondent are so allowed.[5] If the decree is reversed, no costs are given against the respondents supporting the decree;[6] but the appellant may be allowed his costs out of the estate or fund.[7]

Where two appeals were presented in the same interest, and raising the same question, no costs were given.[8]

Where the decree is partly reversed and partly affirmed, the practice is to give no costs of the appeal;[9] but if the decree is substantially affirmed, the appeal will be dismissed with costs.[10]

[4] Countess of Bective v. Hodgson, 10 H. L. Ca. 656.

[5] Seton, 1162; and see Man v. Ricketts, 3 De G. & S. 446.

[6] 1 Ves. S. 413, 419.

[1] Man v. Ricketts, *ubi sup.*; Wentworth v. Lloyd, 10 Jur. N. S. 1113; 13 W. R. 146, L. C.; Seton, 1162. The order may be made in an abated suit, without revival. Thorpe v. Mattingley, 1 Phil. 209, 443. For form of order, see Seton, 1160; and for form of motion paper, see Vol. III.

[2] Seton, 1162, and cases there cited.

[3] Nottidge v. Prichard, 8 Bligh, N. S. 493; 2 Cl. & F. 379; Stewart v. Menzies, 8 *id.* 300; Savery v. King, 5 H. L. Ca. 627; Rickards v. Attorney-General, 9 Jur. 585, H. of L.; Clarke v. Hart, 6 H. L. Ca. 633, 691; 5 Jur. N. S. 447.

[4] Sayer v. Bradley, 5 H. L. Ca. 873, 905; Baker v. Lee, 8 H. L. Ca. 495, 524; 7 Jur. N. S. 1, 6; Simpson v. Westminster Palace Hotel Company, 8 H. L. Ca. 712; 6 Jur. N. S. 985.

[5] Prendergast v. Prendergast, 3 H. L. Ca. 195, 225; Thellusson v. Lord Rendlesham, 7 *id.* 429; Countess of Bective v. Hodgson, 10 *id.* 656; and see Fisher v. Brierly, *ib.* 159; Martin v. Holgate, L. R. 1 H. L. Ca. 175.

[6] Wheatcroft v. Hickman, 7 Jur. N. S. 105, 113, H. of L.; but see Attorney-General v. Cox, 3 H. L. Ca. 240, 277.

[7] Stokes v. Heron, 12 Cl. & F. 161, 203; Eyre v. M'Dowell, 9 H. L. Ca. 619; but see Piers v. Piers, 2 *id.* 331.

[8] Abbott v. Middleton, 7 H. L. Ca. 68.

[9] Torre v. Browne, 5 H. L. Ca. 555.

[10] Wallace v. Patton, 12 Cl. & F. 491; Savery v. King, 5 H. L. Ca. 627.

Where there is a difference of opinion among the Lords, no costs are usually given.[11]

If the House, reversing the decree of the Court below, dismisses the bill as at the hearing with costs, such costs are costs up to the hearing only, and will not include the costs of the prosecution of inquiries, or issues directed by the decree appealed from.[12]

*1504 *Where costs are ordered to be paid, without specifying the amount,[1] they are taxed by the Clerk of the Parliaments, or the Clerk Assistant:[2] unless they are costs incurred in the Court of Chancery: in which case, they should be directed to be taxed by the Taxing Master of that Court.[3]

When costs are awarded to the respondent, on the affirmance of a decree or order appealed from, the order dismissing the appeal, with costs, and a certificate of the amount of such costs, should be served on the appellant personally; and, if the recognizance was entered into by any other person, the order and certificate should, in like manner, be served on such person; and the costs should be demanded of each by the person to whom they are ordered to be paid, or some person by him deputed, by power of attorney, to receive them. It will be proper, also to serve the order and certificate on the appellant's agent.[4]

In case of non-payment of the costs, the respondent may petition the House that the party may be compelled to pay to him the sum of costs ordered to be paid to him. When this petition is presented, the respondent must be prepared to prove, at the bar of the House, the personal service of the order and certificate, and the demand and refusal of the costs. The House may then, either order the parties into custody, for the contempt,[5] or direct the recognizance to be estreated into the Exchequer:[6] which latter is the usual mode.[7] Where the order has been made an order of the Court of Chancery, payment of the costs may be enforced by the process of that Court.[8]

Upon the rehearing of a cause in the Court of Chancery, by way of appeal, the reading of evidence, not read in the Court below, is, under certain restrictions, permitted.[9] In the House of Lords, however, no evidence can be received which was not laid before the Court below;

[11] Wing *v.* Angrave, 8 H. L. Ca. 183; Simpson *v.* Westminster Palace Hotel Company, *ubi sup.*; Monypenny *v.* Monypenny, 9 H. L. Ca. 114, 149; Baker *v.* Lee, 8 H. L. Ca. 712; 6 Jur. N. S. 985; but see Attorney-General *v.* Dean and Canons of Windsor, 8 H. L. Ca. 369, 459; Hopkinson *v.* Rolt, 9 *id.* 514, 555; 7 Jur. N. S. 1209, 1216.

[12] Morgan & Davey, 102, and cases there cited; and for more on the subject of costs of appeals, see *ib.* 96–104.

[1] In Gardiner *v.* Simmons, 6 Bligh, N. S. 60, a fixed sum for costs was given, on dismissing an appeal in the absence of the counsel for the appellant.

[2] Stand. Ord. 3d April, 1835, No. 215; Macq. 266, 781.

[3] Seton, 1163.

[4] Macq. 270, 271.

[5] As was done in the case of Mr. Carey; Lord's Journ. 21st March, 1717; Harg. Pref. 208.

[6] Callaghan *v.* Callaghan, 8 Cl. & F. 374, 709, n.

[7] Macq. 271.

[8] Man *v.* Ricketts, 3 De G. & S. 446; Seton, 1162; and see Wentworth *v.* Lloyd, 10 Jur. N. S. 1113, L. C.; 13 W. R. 146, where the order of the House of Lords was made an order of the Court of Chancery, that it might be so enforced: the House of Lords not being in session.

[9] See *ante*, p. 1485 *et seq.*

nor can any evidence which was received below be objected to above, unless the admission of improper evidence be among the points of appeal.[10] Where evidence has been rejected * below, which *1505 the House thinks ought to have been received, the usual course is to remit the cause to the Court below. It seems, however, that, before doing this, the House will look at the rejected evidence, in order to see whether, if it were admitted, it would affect the opinion of the House, in forming their judgment.[1]

[10] Eden *v.* Earl Bute, 1 Bro. P. C. ed. Toml. 465; and Bassit *v.* Mosse, 3 *id.* 546; Button *v.* Price, Prec. in Ch. 212; Seton, 1163. [So, upon appeal to the Supreme Court of the United States in an Equity case, no new evidence can be submitted, nor can the pleadings be amended. Pacific Railroad *v.* Ketchum, 95 U. S. 1; Blease *v.* Garlington, 92 U. S. 1. Nor can the Appellate Court set aside the decree below for the purpose of allowing a rehearing. Roemer *v.* Simon, 91 U. S. 149. Nor remand for amendment except upon some ground appearing in the record. Fogg *v.* Union Bank, 4 Baxt. 539. Nor after judgment rehear on discovery of new facts. Flower *v.* Lloyd, 46 L. J. 838. No paper not before the Court below, or offered and rejected, can be used on the hearing of an appeal from its decision. Bloodgood *v.* Clark, 4 Paige, 574; Studwell *v.* Palmer, 5 Paige, 166. A deposition rejected below is no part of the record unless made so by order of Court or bill of exceptions. Spurlock *v.* Fulks, 1 Swan. 289. A general objection made below only goes to the competency of the witness to testify, or the competency, legal effect, or relevancy of the testimony. Barton *v.* Trent, 3 Head, 168; Garvin *v.* Luttrell, 10 Humph. 16. All other objections must be special. Whiteley *v.* Davis, 1 Swan. 333. And if no objections are made below, none can be made in the Appellate Court. Gunn *v.* Mason, 2 Sneed, 638; Birdsong *v.* Birdsong, 2 Head, 289; Helm *v.* Hardin, 2 B. Mon. 231; Johnson *v.* Rankin, 3 Bibb, 87; Respass *v.* Morton, Hardin, 226; Pillow *v.* Shannon, 3 Yerg. 508; German *v.* German, 7 Coldw. 182. In Maryland, a general exception to the competency or admissibility of evidence will not avail on appeal: Bennett *v.* Oliver, 7 Gill & J. 191; while in West Virginia, objection to the competency of evidence may be taken for the first time in the Appellate Court: Rose *v.* Brown, 11 W. Va. 122. And see, as to what constitutes the record of the Appellate Court, *ante*, p. 1003, note 3.]

[1] Maccabe *v.* Hussey, 5 Bligh, N. S. 715, 729.

*1506

*CHAPTER XXXIII.

OF ABATEMENT, REVIVOR, AND SUPPLEMENT.

Section I. — *Abatement.*

In the preceding chapters, the attention of the reader has been directed to the rules and course of proceedings in a suit originally perfect in its frame, and in which no incidental circumstances have occurred to alter the state of the original parties, or the relation in which they stood to each other at the commencement of the proceedings. It frequently, however, occurs that, as the cause advances, defects in its original constitution are discovered; or, assuming that it was in all respects correctly instituted, the death of parties, or other events happening subsequently to the commencement of the cause, render it impossible that a suitable hearing or decree can take place. To obviate difficulties of this description it was, until the recent changes in the practice of the Court, the rule for the plaintiff to institute subsidiary suits by filing bills of different descriptions, designated by the terms Bills of Revivor, Bills of Supplement, Bills in the nature of Bills of Revivor and other phrases. The comparative simplicity of modern proceedings in Chancery, and more especially the abbreviation of the time usually elapsing between the commencement of a cause and the hearing, have diminished the number of occasions when it is necessary to have resort to proceedings of this description, with the view of remedying defects in a cause; and when such occasions do now occur, the means provided by the present practice are much simpler than they were formerly, and many of the distinctions that formerly prevailed have therefore become obsolete.

It will be convenient, first, to consider the case where the suit was originally perfect, but where an event happening subsequently has caused what is technically called an abatement, that is to say, has put the suit in such a condition that no further proceedings can be taken until the defect is remedied; and in order to make the provisions of the modern Act of Parliament on the subject of

*1507 *abatement intelligible, it will be convenient to state shortly what was the previous practice to which the Act now applies.

Upon the death of a plaintiff or defendant materially interested, the suit, both according to the former and the present practice, abates.[1] So, also, if a transmission of the interest in the suit of a plaintiff or defendant takes place after the commencement of the cause, it is necessary that the person to whom the interest is transmitted should be before the Court, and until he is made a party the suit is not absolutely abated, but deemed defective.[2] Under these circumstances, to render the record complete, different courses were, according to the former practice, necessary. In a simple case a bill of revivor was sufficient, and thereupon, in a few days, an order of course to revive the suit was obtained if no objection was taken. Frequently, however, when there was any fact capable of being disputed in Chancery, as to the transmission of the interest, a bill of supplement was necessary; in which case an answer was put in, a decree was made, and all the proceedings of a formal suit were taken.

With respect to the species of abatement which might be remedied by bill of revivor, it was laid down, that, whenever a suit abated by death, and the interest of the person whose death caused the abatement was transmitted to that representative which the Law gives or ascertains as an heir-at-law, executor, or administrator, so that the title could not be disputed, at least in the Court of Chancery, but the person in whom the title vested was alone to be ascertained, the suit might be continued by bill of revivor merely;[3] so also, if a suit abated by the marriage of a female plaintiff, and no act was done to affect the rights of the party but the marriage, no title could be disputed; the person of the husband was the sole fact to be ascertained, and therefore the suit might be continued in this case likewise, by bill of revivor merely.[4]

* If, however, upon the abatement happening, the interest of *1508

1 See Crook v. Turpin, 10 B. Mon. 243.

2 Where one of the defendants in an Equity suit dies while the suit is pending, and his heirs cannot be prejudiced by the proceedings, they need not be made parties. Adams v. Stevens, 10 Mass. 362. [And where the other defendants are the heirs of the deceased, the death need not be noticed. Cogswell v. Cameron, 1 Cal. W. 581.]

3 Boynton v. Boynton, 21 N. H. 246; Lancaster v. Markham, 2 J. J. Marsh. 303; Pope v. Chakerow, 1 McCarter. 361, 365. Where a bill in Equity to foreclose mortgaged premises is abated by the death of the plaintiff, his heirs may renew the suit by a bill of revivor. Putnam v. Putnam, 4 Pick. 134; see Pell v. Elliott, 1 Hopk. 86; Thompson v. Hill, 3 Yerger, 418; Douglass v. Sherman, 2 Paige, 358. Randolph v. Dickerson, 5 Paige, 517. In a suit for the rescission of a contract for lands, if the plaintiff dies, it should be revived in the name of the heirs, and not of the executors. If the defendant dies, it is error to take a decree against his heirs till they are served with process, or have appeared. Kinzart v. Sanders, 2 A. K. Marsh. 26; see Hallett v. Hallett, 2 Paige, 16; Bradford v. Felder, 2 McCord Ch. 168; Kellar v. Beelor, 5 Monroe, 574; Wilkinson v. Perrin, 7 Monroe, 217; Smith v. Manning, 9 Mass. 422; Coons v. Nall, 4 Litt. 234; Jackson v. Freyer, 4 Paige, 51. A suit for usury must be revived in the name of the executor or administrator, and not in the name of the heir. Meek v. Daly, 2 J. J. Marsh. 331.

If a suit abates, after a decree affecting both real and personal property, it may be revived either by the heirs or personal representatives. Owing's Case, 1 Bland, 429.

4 Douglass v. Sherman, 2 Paige, 358; Boynton v. Boynton, 21 N. H. 246; Campbell v. Bowne, 5 Paige, 34. A suit for administration was instituted in the name of three infants by their next friend. After this one of them, a female, married before decree. The next friend and the other parties to the suit were unaware of the marriage, and she and her husband were unaware of the existence of the suit until after a decree had been made. Vice-Chancellor Stuart declined to make an order of revivor, considering that the defect could not be remedied

the party did not vest in any representative which the law gives or ascertains, as in the case of bankruptcy or insolvency, or of a devisee of real estate,[1] the suit could not be continued by bill of revivor, but must, where the abatement was caused by the bankruptcy or insolvency of a defendant, be continued by supplemental bill.[2] So, where the suit abated by the bankruptcy or insolvency of a sole plaintiff, his assignees could not continue the suit by bill of revivor, but must do so by original bill, in the nature of a supplemental bill.[3] So also, in a suit relating to land, where a plaintiff died, having devised the land which was the subject of the litigation, the suit could not be continued on the part of the devisee by a simple bill of revivor.[4]

The same rule applied to abatements occasioned by the death of parties defendant as well as of parties plaintiff; therefore, a bill of simple revivor did not lie against the devisee of a defendant, but the suit was continued against him in the same manner that it was continued by the devisee of a plaintiff.

It has been necessary to refer to the nature of the distinctions that existed in the former practice, in order to render the new rules intelligible.

The Act of Parliament[5] now declares, "that upon any suit in *1509 * the said Court becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability,[1] it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings;

without a supplemental bill; but, the defendants consenting, an order of revivor was made by the Lords Justices. Griffin *v.* Morgan, L. R. 4 Ch. Ap. 351.

[1] A devisee cannot maintain a bill of revivor, but he may maintain an original bill in the nature of a bill of revivor, and thus obtain the benefit of the original proceedings, as well before as after there has been a decree in the original suit. Slack *v.* Walcott, 3 Mason, 508, where the subject is very fully discussed. Pingree *v.* Coffin, 12 Gray, 288; Peer *v.* Cookerow, 1 McCarter, 361; [Lyons *v.* Piper, 11 C. E. Green, 337].

Where a bill in the nature of a bill of revivor is filed by any one who was not a party to the original suit, either as the representative of a deceased party or otherwise, all of the other parties to such original suit, who have any interest in the further proceedings therein, should be made parties to such bill, either as plaintiffs or defendants. The Farmers' Loan and Trust Co. *v.* Seymour, 9 Paige, 538.

[2] See Johnson *v.* Fitzhugh, 3 Barb. Ch. 360. Where a creditor's bill is brought against a debtor, who afterwards obtains a discharge in bankruptcy, the plaintiff, if he wishes to contest the validity of the discharge, should file a supplemental bill, setting out the commencement of the original suit, the subsequent decree in bankruptcy, the discharge, and the facts relied upon to avoid the discharge, and should make the assignee and the bankrupt parties to such bill. Penniman *v.* Norton, 1 Barb. Ch. 246; Alcott *v.* Avery, 1 Barb. Ch. 347. But if he merely wishes to proceed against the property, he must revive the suit against the assignee alone, stating the discharge as a reason for proceeding no farther against the bankrupt; and if the assignee has sold his interest in the property, that fact should be shown, and the purchaser made a party to the suit instead of the assignee. Penniman *v.* Norton, 1 Barb. Ch. 246.

[3] Williams *v.* Kinder, 4 Ves. 387; Randall *v.* Mumford, 18 Ves. 424; Sedgwick *v.* Cleveland, 7 Paige, 287; Northman *v.* Insurance Companies, 1 Tenn. Ch. 312.]

[4] Slack *v.* Walcott, 3 Mason, 308; Douglass *v.* Sherman, 2 Paige, 358; Russell *v.* Craig, 3 Bibb, 377; Pingree *v.* Coffin, 12 Gray, 288; Peer *v.* Cookerow, 1 McCarter, 361.

[5] 15 & 16 Vic. c. 86, § 52.

[1] A defect of this nature cannot be remedied by amendment, or supplemental statement. Commerell *v.* Hall, 2 Drew. 194; S. C. *nom.* Commerell *v.* Bell, 18 Jur. 141; Williams *v.* Jackson, 5 Jur. N. S. 264; Webb *v.* Wardle, 11 Jur. N. S. 278, V. C. K.; *ante*, pp. 406, 407; *post*, p. 1530 and notes.

but an order to the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability,[2] and an order so obtained, when served upon the party or parties, who, according to present practice of the said Court, would be defendant or defendants to the bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties in the same manner in every respect as if such order had been regularly obtained according to the existing practice of the said Court;[3] and such party or parties

*shall thenceforth become a party or parties to the suit, and *1510

[2] In Maine, bills may be revived, in proper cases, by an amendment filed with the clerk, on which a subpœna and other process may issue, and be served as in case of an original bill; and the appearance shall be entered, and the like proceedings be had as on original bills, so far as they have not before taken place, or in the manner provided by statute. Rule of Chancery, 21; 37 Maine, 590. By rule of Chancery in Massachusetts, when the death of any party shall be suggested in writing and entered on the docket, the clerk, upon application, may issue process to bring into Court the representative of such deceased party. Rule 26. It was held in Pingree *v.* Coffin, 12 Gray, 288, that on the death of a sole plaintiff in a bill in Equity to obtain a title to real estate, his devisee cannot come in and prosecute without a bill in the nature of a bill of revivor. See Mass. Sts. 1873, c. 42; 1882, c. 218, § 7. In New Hampshire, "no proceeding in Equity shall become abated, if the person who shall become interested shall, on his petition, briefly setting forth his relation to the cause, be admitted to prosecute or defend as a party thereto; nor, if such person, upon petition of the adverse party, briefly stating his relation to the cause, shall be by order of the Court, duly notified to appear therein." Rule 28, 38 N. Hamp. 610. In the Courts of the United States, "whenever a suit shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process or *subpœna* shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any he have, why the cause shall not be revived. And if no cause be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived as of course." Equity Rule, 56. And see Rule 18 as to form of bill.]

Upon a bill of revivor, the sole questions before the Court are, the competency of the party to revive and the correctness of the frame of the bill to revive. Bettes *v.* Dana, 2 Sumner, 383; [Lewis *v.* Outlaw, 1 Tenn. 140; *infra*, 1540, n. 5]. A bill of revivor, when necessary, may be filed of course, without an order of the Court granting permission to file it. Pendleton *v.* Fay, 3 Paige, 204.

[In Tennessee, upon the death or marriage of a party, the suit may be revived by the representative or successor on motion, and by the adverse party by *scire facias*, without a bill of revivor. Code, §§ 2855, 2856, 4425 *et seq.* For the rule in Maryland, see Appold *v.* Prospect Building Association, 37 Md. 457.]

[3] From this it follows that when the suit abates by the change or transmission of the interest or liability of a defendant, the order of revivor need only be served upon the persons who have become necessary parties to the suit, by reason of such change or transmission; but when the suit abates by a change or transmission of the interest or liability of the plaintiff, or one of several co-plaintiffs, all the other parties to the suit must be served. See Fallowes *v.* Williamson, 11 Ves. 306; Cave *v.* Cork, 2 Y. & C. C. C. 130; 7 Jur. 461; Bignall *v.* Atkins, 6 Mad. 369; Dyson *v.* Morris, 1 Hare, 413; Jones *v.* Howells, 2 Hare, 342; Feary *v.* Stephenson, 1 Beav. 42; Pinkers *v.* Peters, 5 Beav. 253; Parker *v.* Parker, 9 Beav. 144; Jones *v.* Powell, 11 Beav. 398; Lyne *v.* Pennell, 1 Sim. N. S. 113; and see Ld. Red. 35, 75. If, after a decree, a suit is revived by a defendant, all parties must be served with the order of revivor. Buchanan *v.* Malins, 11 Beav. 52. Where the order has to be served on new parties, it must be served in the same manner as a copy of a bill. The Court will, however, upon a proper case being shown, order substituted service to be made. Foster *v.* Menzies, 10 Beav. 265; 17 Jur. 607; S. C. sub nom. Foster *v.* Menzies, 10 Hare Ap. 36, n.; *ib.* 71, n.; see also Hart *v.* Tulk, 6 Hare, 618; Scott *v.* Wilson, 13 Beav. 275. Where the order has to be served on former parties, who have already appeared by a solicitor, service upon such solicitor is sufficient. Harr. by Newl. 71. All persons served, who were not before parties to the suit, become thenceforth parties; and must enter an appearance, within such time, and in the same manner, as if they had been served with a bill. But it is not necessary that an appearance should be entered to an order of revivor for a party who has already appeared. Seton, 1171; Braithwaite's

shall be bound to enter an appearance thereto in the office of the Clerks of Records and Writs, within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him ; [1] provided that it shall be open to the party or parties so served, within such time after service as shall be in that behalf prescribed by any General Order of the Lord Chancellor, to apply to the Court, by motion or petition, to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill, stating the previous proceedings in the suit and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon: provided also, that *1511 if any party so served * shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians *ad litem* shall have been duly appointed for such party, and such time shall have elapsed thereafter as shall be prescribed by any General Order of the Lord Chancellor in that behalf." [1]

In order to carry out the provisions of the Act of Parliament, the 43d Order of August, 1852, directs the time within which a party under no disability may apply, and also the course of proceeding with respect to persons under disability. The Order is as follows: —

"Any party under no disability, or under the disability of coverture, who may be served with an order to revive any suit, or to carry on the proceedings therein, may apply to the Court to discharge such order within twelve days after such service; and any party being under any

Pr. 331, 559; and see Ward *v.* Cartwright, 10 Hare Ap. 73; 17 Jur. 781; Hanbury *v.* Ward, 18 Jur. 222, V. C. S.; Forster *v.* Menzies, *supra;* Cross *v.* Thomas, 16 Beav. 592; 17 Jur. 336; 10 Hare Ap. 36, n.; and Hall *v.* Radcliffe, 2 J. & H. 765, which, however, would seem to be imperfectly reported.

[1] This order may, in most cases, be obtained upon an allegation of the death or marriage, or of the facts by which the change or transmission of interest or liability has taken place. 15 & 16 Vic. c. 86, § 52. The order made under this section is usually called the "common order." The application for it is made by motion of course; which does not require, ordinarily, to be mentioned to the Court. Gordon *v.* Jesson, 16 Beav. 440; Bonfil *v.* Purchas, 16 Jur. 965, V. C. K.; 9 Hare Ap. 52, n.; England *v.* Ventham, *ibid.;* Goodall *v.* Skerratt, 1 Sm. & G. Ap. 7. Or by petition of course at the Rolls. Phippen *v.* Brown, 1 Jur. N. S. 698, V. C. W.; Brignall *v.* Whitehead, 30 Beav. 229; 8 Jur. N. S. 183. For forms of orders, see Seton, 1164–1167. No evidence is required of the alleged facts; but the order is made on the statement in counsel's brief, or in the petition. Martin *v.* Hadlow, 9 Hare Ap. 52; Gordon *v.* Jesson, 16 Beav. 440. If the statement is not substantially true, the order may be discharged with costs. Brignall *v.* Whitehead, 30 Beav. 229, on a special application, 15 & 16 Vic. c. 86, § 52; Ord. XXXII. 1. The order may be discharged on any ground which would have been open to the applicant on a bill of revivor or supplemental bill, stating the previous proceedings in the suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon. 15 & 16 Vic. c. 86, § 52. The order will, therefore, be discharged; if there is no sufficient ground for reviving the suit, Harris *v.* Pollard, 3 P. Wms. 348; Humphreys *v.* Incledon, 1 Dick. 38; and see 1 Eq. Ca. Ab. 2–4, either by or against the person by or against whom it is sought to be revived. University College *v.* Foxcroft, 2 Ch. Rep. 244; Ld. Red. 201, or, if the revivor is solely for costs which have not been taxed, unless the case comes within any of the exceptions to the general rule against revivor for costs merely. Umpleby *v.* Waveney Valley Railway Co., 1 J. & H. 254. In a proper case, the order of revivor will be made, with liberty to the new defendant to put in an answer. Lash *v.* Miller, 4 De G., M. & G. 841; 1 Jur. N. S. 457; Kitchin *v.* Himble, 8 Jur. N. S. 588; 10 W. R. 686, V. C. W.; Martin *v.* Purnell, 3 W. R. 395, L. JJ. Or he may be ordered to answer the former interrogatories. Trench *v.* Semple, 1 W. N. 102, M. R.; Earl Beauchamp *v.* Winn, L. R. 2 Eq. 302, V. C. W.

[1] See Ord. XXXII. 1; Decks *v.* Stanhope, 1 Jur. N. S. 413, V. C. K.

disability, other than coverture, who may be so served, may apply to the Court to discharge such order within twelve days after the appointment of a guardian or guardians *ad litem* for such party; and until such period of twelve days shall have expired such order shall have no force or effect as against such last-mentioned party."

These statutory enactments and orders apply "when a suit becomes abated by death or marriage or otherwise, or defective by reason of some change or transmission of interest or liability."[2]

It is not, however, every death of a party that abates or renders a suit defective. If the whole interest or liability of the party dying, be he plaintiff or defendant, survives to or devolves upon other parties to the suit, no abatement takes place.[3]

* There are, however, provisions in Acts of Parliament to pre- *1512
vent the abatement of suits by the death of persons who sue not for their own individual interest, as assignees of bankrupts and some others.

The 157th section of 12 & 13 Vict. c. 106, enacts, "That whenever an assignee shall die, or be removed, or a new assignee shall be chosen,

[2] See *ante*, 1509, n. (2).

[3] [Gilchrist *v.* Cannon, 1 Coldw. 581.] See Pingree *v.* Coffin, 12 Gray, 288, 314, 315. If the interest of the party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest; which happens in the case of a tenant for life, or a person having a temporary or contingent interest, or an interest defeasible on a contingency; the suit does not so abate as to require any proceedings to warrant the prosecution of it against the remaining parties; but if the party dying be the only plaintiff, or the only defendant, there may be necessarily an end of the suit, no subject of litigation remaining. Ld. Red. 58; see Hutchinson *v.* Gould, 1 W. N. 104, M. R. If, also, the whole interest of the party dying survives to another party, so that no claim can be made by or against the representatives of the party dying; as if a bill be filed by, or against, joint tenants, and one dies, the suit may be continued by or against the survivor, without revivor. Fallowes *v.* Williamson, 11 Ves. 503, 506; Beddy *v.* Kent, 1 Mer. 361, 364. And where the suit is by or against trustees or executors, and one dies, not having possessed any of the property in question, or done any act in relation to it which may be questioned in the suit; or by or against husband and wife, in right of the wife, and the husband dies under circumstances which entitle the survivor to be sued by or against his representatives, the proceedings do not abate; although, as we have already seen, the wife is not bound to continue the suit, unless she thinks proper to do so. Ld. Red. 59; and see *ante*, pp. 113, 114.

So if a surviving party can sustain the suit; as in the case of several creditors, plaintiffs on behalf of themselves and other creditors, no revivor is necessary, because the representatives of the deceased plaintiff may come in under the decree. Boddy *v.* Kent, 1 Mer. 361, 364; Hinde *v.* Morton, 2 H. & M. 368; see, however, Burney *v.* Morgan, 1 S. & S. 358; Smith *v.* Horsfall, 24 Beav. 331.

Where a creditor's suit had been carried on for twelve years after it had become abated by the plaintiff's death, an order was made, on motion, to confirm all the proceedings. Houston *v.* Briscoe, 7 W. R. 394, V. C. K.; and see Lys *v.* Lee, 4 De G., M. & G. 219; 17 Jur. 607; 10 Hare Ap. 72; 17 Jur. 272. And where at the date of the decree the suit had become abated by the death of a co-plaintiff, an order to revive the suit and carry on the proceedings was made, on his representatives submitting to be bound by the decree. Smith *v.* Horsfall, 24 Beav. 331; see also Jebb *v.* Tugwell, 20 Beav. 461; Freeman *v.* Whitbread, 12 W. R. 619, V. C. K. Where, before decree, a suit abates by the death of one of several plaintiffs, or of a sole plaintiff, the Court may order, on the motion of any defendant, of which notice must be given to the surviving plaintiff, or the legal representative of the deceased plaintiff, as the case may be, that he revive the suit within a limited time, or that the bill be dismissed. Ord. XXXII. 4; Adamson *v.* Hall, 1 K. & J. 245, see *ante*, pp. 812, 813; but see Hinde *v.* Morton, 2 H. & M. 368.

Where, before decree, a defendant dies, and the plaintiff neglects to revive the suit against his legal representative, the representative may obtain an order, on motion, of which notice must be given to plaintiff, that he revive the suit within a limited time, or that the bill stand dismissed. Norton *v.* White, 2 De G., M. & G. 6, 8; Powell *v.* Powell, *ib.* n. (6).

no action at Law or suit in Equity shall be thereby abated, but the Court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees in the same manner as if he had originally commenced the same." This section has been held to apply only to the assignees of a plaintiff.[1] In the case of an assignee defendant, a supplemental order to substitute his successor was granted as of course under the 52d section above set out.[2]

By the 17 & 18 Vict. c. 25, with respect to industrial and provident societies, it is enacted in the 4th section, "That no action, suit, or other proceeding, by or against such societies, is to be abated by the death or change of the officer to sue and be sued, or by a change in the members of the society."[3]

By the 15 & 16 Vict. c. 3, administration of the personal estates of intestates and others, when her Majesty is entitled, may be granted to the Solicitor of the Treasury for the time being, as *1513 * nominee of her Majesty and successors; and by the 3d section of the same, when administration is so granted, the suit does not abate by the death or removal of the Solicitor of the Treasury, but may be continued by his successor.[1]

By 7 Geo. IV. c. 46, § 9, suits instituted by or against banking companies in the name of the public registered officer may, on his death, resignation, or removal, be continued by or against any other public officer of the company for the time being.[2]

Where railway companies are amalgamated, it is often provided that existing suits, to which the old companies are parties, may be continued in the name of the new company, on a suggestion of the dissolution of the old company, and the constitution of the new one.[3] The suggestion is made upon and by the order above; no alteration being made upon

[1] Man *v.* Ricketts, 1 Phil. 6, 17; 7 Beav. 484; Bainbrigge *v.* Blair, You. 386; and see Lloyd *v.* Waring, 1 Coll. 536; Mendham *v.* Robinson, 1 M. & K. 217; Gordon *v.* Jesson, 16 Beav. 440; Seton, 1166.

[2] Gordon *v.* Jesson, 16 Beav. 440. The case of Heath *v.* Lewis, 18 Beav. 527, which decided that a supplemental bill must be filed, seems to be overruled, according to Pickford *v.* Brown, 1 K. & J. 643; and see more particularly, *post*, p. 1524.

[3] If the selectmen of a town, acting as a board of health, have brought a bill in Equity to restrain the exercise of an offensive trade or employment which they have prohibited under the law pertaining to that subject, an amendment may be allowed, by substituting the inhabitants of the town as plaintiffs, after the term of office of the selectmen has ceased. Winthrop *v.* Farrar, 11 Allen, 398.

[In a suit by or against an officer in his official capacity, the death of the individual works no abatement, and the successor for the time being becomes the party. Felts *v.* Mayor of Memphis, 2 Head, 650; Dawson *v.* Clark, 3 Sneed, 438; McDuff *v.* Beauchamp, 50 Miss. 531; Hardee *v.* Gibbs, 50 Miss. 802.]

[1] See Kane *v.* Reynolds, cited Seton, 1172; and Attorney-General *v.* Kohler, 8 Jur. N. S. 467; 9 W. R. 933, H. L.

[2] Seton, 1172; see Burmester *v.* Von Stenz, 23 Beav. 32.

[3] For form of such an order, see York & North Midland Co. *v.* Hudson, Braithwaite's Pr. 556; and see British Equitable Ass. Co. *v.* Vale of Neath Railway Co., 1 W. N. 318; 15 W. R. 37, V. C. K. The order is made on an *ex parte* motion, supported by evidence of the change.

any particular record, but the new name is substituted in all future proceedings.[4]

Subject to the foregoing and some other particular exceptions particularly provided for, the rule is general, that the death of a plaintiff abates a suit, and that the same must be revived before any future proceedings can be taken.

The death of a defendant in like manner formerly produced in most cases a complete abatement, unless his interest or liability survived to or devolved upon a co-defendant, but as decrees may now be made in suits defective for want of parties, the rule is not so strict as it formerly was.

It may be stated generally that now, with respect to a defendant dying, the suit does not necessarily wholly abate, but only to the extent of his interest or liability. When a defendant dies, leaving several executors, it is necessary, to make the suit complete, to revive the suit in the manner prescribed by the last-mentioned section of the Act against such of the executors as prove the will.[5]

Great expense was till recently occasioned by the necessity which the Court imposed of having the estate of every deceased person who was interested in the suit represented at the hearing. If no other representation had been taken out, it was frequently necessary for the plaintiff himself to take out administration for the purposes of the suit. To obviate this difficulty, it is enacted, by the 15 & 16 Vict. c. 86, § 44, as follows: —

"If in any suit or other proceeding before the Court it shall appear to the Court that any deceased person who was interested
* in the matters in question has no legal personal representative, *1514
it shall be lawful for the Court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court shall think fit, either specially or generally by public advertisements; and the order so made by the said Court, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court."

It is within the discretion of the Court either to act upon the foregoing section, or to decline proceeding with the suit until a regular representative of the estate in question is formally made a party. It appears that the Court will in general act upon this section when there is a difficulty in obtaining representation, and when the interest of the

[4] See York & North M. Band Co. v. Hodson, *supra*.

[5] Strickland v. Strickland, 12 Beav. 463.

deceased defendant was not of very great consequence in the cause, but that it will not do so when the object of the suit is to administer the estate sought to be thus imperfectly represented.[1]

Neither will the Court proceed without regular representation to the estate when the person to represent the estate would have the duties of a trustee to perform.[2]

It will be observed, that the words of the Act of Parliament as to the occasion when the Court can thus dispense with representation are as follows: "In any suit or other proceeding." Consequently the Court can, either upon a claim or a special case, or in any summary proceeding, should it so think fit, act upon this section.[3]

There is another section of the Act for amending the practice of the Court, affecting this branch of the practice of the Court, namely, the 49th of 15 & 16 Vict. c. 86;[4] by the concluding words of which it is enacted, that "when there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died, leaving a plaintiff on the record without an interest, the Court may, at the hearing of the cause, order the cause to stand revived as may appear just, and proceed to *1515 a decision of the cause if it shall *see fit, and to give such directions as to costs or otherwise as may appear just and expedient."

The circumstances to which these words of the section refer are peculiar, and cannot often occur, but when they do so the Court will be able to revive a cause at once without any preliminary proceeding on behalf of any of the parties to the suit.

The causes of abatement hitherto considered have been the death of one of the parties, but the Act refers also to abatement by marriage. The marriage of a female plaintiff produces an abatement of the suit, which can be remedied by the process mentioned in the section set forth. The marriage, however, of a female defendant produces no such result, but the husband becomes a party to and is named in the subsequent proceedings without any order of the Court.

It will be recollected, that the section refers not only to abatement by death, marriage, or otherwise, but also to cases when the suit becomes "defective by reason of some change or transmission of interest or liability." It is therefore necessary to consider what was the previous practice as to suits becoming so defective.

If after a suit was instituted, any circumstance occurred which, without abating the suit, occasioned an alteration in the interest of any of the parties, or rendered it necessary that new parties should be brought before the Court, the proper method of doing it was by supple-

[1] Abrey *v.* Newman, 10 Hare, 58; Long *v.* Stone, 1 Kay Ap. 12; Silver *v.* Stein, 1 Drew. 295. It seems that the person who would be administrator *ad litem* is the proper party to appoint. Dean of Ely *v.* Gayford, 16 Beav. 561.

[2] Fowler *v.* Bayldon, 9 Hare, 28.

[3] Swallow *v.* Binns, 17 Jur. 295; *In re* Stewart, 22 Law J., N. S. 369.

[4] *Ante*, p. 304, and note; Clements *v.* Bowes, Dr. 684.

mental bill.[1] Thus, if pending a suit affecting an * estate which *1516
was the subject of an entail, a tenant in tail, whose interests were likely to be affected by it, came into *esse*, he was brought before the Court by a supplemental bill.[1] So in a suit relating to the personal property of a married woman, where a decree or order had directed a settlement on the wife and her children, but before the completion of the settlement the wife died, it was held, that the children had a right to the benefit of the settlement, and to assert that right by supplemental bill.[2]

So, also, where a bill was exhibited against a man and his wife, and the husband died pending the suit, and a new interest thereupon arose to the wife, a supplemental bill was filed for the purpose of giving the wife an opportunity of putting in another defence in respect of her newly acquired interest.[3]

If a plaintiff, suing in his own right, made such an alienation of his property as to render the alienee a necessary party to the suit, but not at the same time to deprive himself of all right in the question, he

[1] An original bill cannot be amended by incorporating any thing therein, which arose subsequently to the commencement of the suit. This should be stated in a supplemental bill. Stafford *v.* Hewlett, 1 Paige, 200, 201; Thompson *v.* Hill, 5 Yerger, 418; Campbell *v.* Browne, 5 Paige, 34; Carow *v.* Mowatt, 1 Edw. Ch. 9; Downer *v.* Wilson, 33 Vt. 1.

Matters which have occurred since the original bill was filed, and which are material to perfect the plaintiff's case, may be introduced into the record by supplemental bill. Greenleaf *v.* Queen, 1 Peters, 148; Candler *v.* Petit, 1 Paige, 168; Pinch *v.* Anthony, 10 Allen, 447; [Riddle *v.* Motley, 1 Lea, 468; Williams *v.* Winans, 7 C. E. Green, 580. The difference between a supplemental bill, filed before demurrer, plea, or answer, and an amended bill, is merely nominal, and a demurrer to the former on the ground that it might be brought forward by amendment will not be entertained. Melton *v.* Withers, 2 S. C. 361. *Infra*, 1530, note 8].

When any event happens subsequently to filing an original bill, which gives a new interest or right to a party, it should be set out in a supplemental bill. Saunders *v.* Frost, 5 Pick. 276; Gove *v.* Lyford, 44 N. H. 548.

A plaintiff cannot file a supplemental bill to introduce facts which have occurred since the filing of the original bill, and upon which a decree can be had without reference to the original bill. He should dismiss his original bill, and file a new one. Milner *v.* Milner, 2 Edw. Ch. 114.

In Pinch *v.* Anthony, 10 Allen, 477, Chapman, J., said: "We have found no authority that goes so far as to authorize a party, who has no cause of action at the time of filing his original bill, to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill." See Land *v.* Cowan, 18 Ala. 297; Vaughan *v.* Vaughan, 30 Ala. 329.

A plaintiff cannot support a bad title by acquiring another after the filing of the original bill, and then bringing it forward, by supplemental bill. Tonkin *v.* Lethbridge, G. Coop. 43; Byrne *v.* Byrne, 1 Con. & Law. 189; S. C. 1 Dru. & W. 71; Davidson *v.* Foley, 3 Bro. C. C. 598; Pilkinton *v.* Wignall, 2 Mad. 240, 244; Pritchard *v.* Draper, 1 R. & M. 191; Winn *v.* Albert, 2 Md. Ch. 42; and see Attorney-General *v.* Portreeve of Avon, 3 De G., J. & S. 637, 650; Godfrey *v.* Tucker, 33 Beav. 280; Beardmore *v.* Gregory, 2 H. & M. 491.

The supplemental matter must not contradict the statements of the original bill. Tomson *v.* Judge, 2 Drew. 414; but see Allen *v.* Spring, 22 Beav. 615; Bolton *v.* Ridsdale, 2 W. R. 488; *ib.* 451.

Where, however, the plaintiff has stated in his bill a good inchoate title, which only requires some formal act to make it perfect, such act may be stated by supplemental bill. Mutter *v.* Chauvel, 5 Russ. 42; Sadler *v.* Lovett, 1 Moll. 162.

So, if the original bill is sustainable, and the supplemental bill only enlarges the extent and changes the kind of relief, the latter may be sustained. Jaques *v.* Hall, 3 Gray, 194; Mutter *v.* Chauvel, 5 Russ. 42; Edgar *v.* Chesseyer, 2 Green Ch. 258; Hasbrouck *v.* Shuster, 4 Barb. Ch. 285. Thus, the plaintiff in a bill to enforce a trust, in which he and his children are interested, may by supplemental bill enforce rights acquired by him by assignment from his children since the original bill was filed. Jaques *v.* Hall, *supra*.

[2] Jones *v.* Jones, 3 Atk. 217.

[3] Gaines *v.* Clarke, 1 Keen, 142. Murray *v.* Lord Elibank, 10 Ves. 84.

[4] See *ante*, p. 188.

brought the alienee before the Court by supplemental bill, or the alienee might himself file a supplemental bill against the original plaintiff and the other parties to the suit, to have the benefit of the proceedings.[4]

In like manner if a plaintiff, suing in his own right, was entirely deprived of his interest, but was not the sole plaintiff, the defect arising from this event was supplied by a bill of this kind.[5] Therefore if, after the bill filed, one of several plaintiffs totally alienated his right in the subject-matter, or became bankrupt, so that his interest became *1517 vested in his assignees, a supplemental bill was * filed by the remaining plaintiffs, either against or in conjunction with the alienee or assignees, to carry on the suit.

Upon the same principle it was held, that if a plaintiff became a lunatic, a supplemental bill was filed in the joint names of the lunatic and his committee;[1] or if, after the institution of the suit by a lunatic and his committee, the committee died and a new committee was appointed, the suit was continued by a supplemental bill on behalf of the lunatic and his new committee.

It is to be recollected here, that an assignment or alienation, *pendente lite*, is not permitted to affect the rights of the other parties, unless the alienation disables the party from performing the decree of the Court, as in the case of an assignment by a mortgagee of his interest in the mortgage, pending a suit to redeem, in which case the assignee must be brought before the Court by supplemental bill.[2]

Where, however, the assignment, *pendente lite*, was of an equitable interest, and not, as in the case of bankruptcy, by operation of law, there was not any absolute necessity for the assignee to be brought before the Court, nor does it seem to be material, whether the assignee was a plaintiff or defendant to the bill.[3]

In such a case, however, unless the alienee could be protected by

[4] See Binks *v.* Binks, 2 Bligh, 593; Webster *v.* Hitchcock, 11 Mich. 56. A party, who acquires an entirely new right or interest in the subject-matter of the suit, by purchase pending the litigation, may bring such right or interest before the Court by supplemental bill, or by an original bill in the nature of a supplemental bill. And unless he makes himself a party, he will not be allowed to come in and take a part in the proceedings in the cause without the consent of the other parties to the suit. Wilder *v.* Keeler, 3 Paige, 164; Mills *v.* Hoag, 7 Paige, 18; Van Hoak *v.* Throckmorton, 8 Paige, 33; Mason *v.* York & Cumberland R. R. Co., 52 Maine, 82, 107; [Tappan *v.* Smith, 5 Biss. 73; Lunt *v.* Stephens, 75 Ill. 507. But a purchaser of land by metes and bounds from a party to a partition suit cannot intervene in that suit. Griffin *v.* Wilson, 39 Texas, 213. Nor can a purchaser of land pending a suit in which the land is attached to secure a debt. American Exchange Bank *v.* Andrews, 12 Heisk. 206]. A new defendant cannot be added to a suit on petition. It must be done by a supplemental bill. Carow *v.* Mowatt, 1 Edw. Ch. 9. [*Ante*, 281, 287.]

Where a plaintiff assigns his interest in the subject-matter of the suit *pendente lite*, and obtains a reassignment thereof before any further proceedings are had in the cause, it is not necessary to bring the temporary assignee before the Court; but the party may proceed in the same manner as if no such assignment had been made. Scouten *v.* Bender, 1 Barb. Ch. 647.

[5] Ld. Red. 63.

[1] *Ante*, p. 85.

[2] Ld. Red. 74; James *v.* Harding, 3 W. R. 474; Williamson *v.* Jefferys, 12 W. R. 403; [Williams *v.* Winans, 5 C. E. Green, 394; *ante*, 280, 287]. Supplemental order held not necessary where residuary legatee, who had been served with notice of the decree, settled her interest; service of the notice of the decree on the trustees being sufficient. White *v.* Steward, 1 W. N. 83.

[3] Eades *v.* Harris, 1 Y. & C. 230, 234; see, however, Solomon *v.* Solomon, 13 Sim. 516; Johnson *v.* Thomas, 11 Beav. 501.

the ordinary course of petitioning for an order that the alienor may not take the fund he is entitled to in the suit out of Court, without notice to him, he, the alienee, usually made himself a party to the suit by supplemental bill against the other parties.[4] This was generally necessary wherever the alienee wished to attend under a decree,[5] though it seems that even in such cases the Court, under the old practice, gave permission to the purchaser, *pendente lite*, of the interest of a party to attend without filing a supplemental bill to establish his right. The order was, however, qualified so as not to prevent the plaintiff from having any remedies he might be entitled to against the purchaser. The order in such case was at the expense of the purchaser.[6]

If the interest of a plaintiff, suing in *autre droit*, entirely determined by death or otherwise, and some other person thereupon became entitled to the same property under the same title, as in the case of an executor or administrator upon the determination * of an *1518 administration *durante minori ætate*,[1] or *pendente lite*,[2] the suit was added to or continued by supplemental bill.

Formerly the rule was the same in cases of bankruptcy or insolvency; in which case, if a plaintiff, an assignee, died or was removed pending a suit, and a new assignee was appointed, a supplemental bill was necessary; but the necessity for a supplemental bill, in such cases, has now for some time been obviated.[3]

It is to be remarked, that in the cases above put, viz., of those which effect only a partial change in the interest of the plaintiffs, or of one of the plaintiffs, the parties to the suit are still, to a certain extent, able to proceed with it, though from the effect of the change of interest, occasioned by the subsequent event, the proceedings are not sufficient to attain their full object: also, that, in the case of the death of the party suing in *autre droit*, if the suit is continued by the individual succeeding to the character of the deceased plaintiff, there is no change of interest which can affect the parties, but only a change of the person in whose name the suit must be prosecuted.[4]

A material distinction prevailed under the old practice, which remains of some consequence under the present new regulations. It is to this effect: "Where a sole plaintiff, suing in his own right, was deprived of his whole right in the matters in question by an event subsequent to the institution of the suit, as where a plaintiff assigned his whole interest to another, the plaintiff was no longer able to prosecute for want of interest, and his assignees claiming by a title which might be litigated, the benefit of the proceedings could not be obtained by means of a sup-

[4] Foster v. Deacon, Mad. & Geld. 59; Wright v. Mack, 3 Iowa, 472.

[5] See Wilder v. Keeler, 3 Paige, 164; Jacad Brown v. Thomas, 6 Rep. 354, Sup. Ct. of Md.].

[6] Toosey v. Burchell, Jac. 159.

[1] Jones v. Basset, Prec. in Ch. 174; Stubbs v. Leech, 1 Cox, 133.

[2] Ld. Red. 64; Story Eq. Pl. § 340.

[3] See *infra*, 1511.

[4] Ld. Red. 64.

plemental bill, but was sought by what was called an original bill in the nature of a supplemental bill."[5]

This distinction was not artificial, but was attended by a considerable difference in its practical results;[6] for in those cases in which a supplemental bill only was filed, if there had been no decree, the suit might proceed after the supplemental bill had been filed, in the same manner as if the original plaintiff had continued such; but, in the case of an original bill in the nature of a supplemental bill, the whole case was open: "a new defence might be made, the pleadings and depositions could not be made use of in the same manner as if filed or *1519 taken in the same cause, and the * decree, if any had been obtained, was no otherwise of advantage than as it might be an inducement to the Court to make a similar decree."[1] Whilst in the case of a mere supplemental suit, the benefit of the original decree, if obtained, was expressly given to the new plaintiff by the supplementary decree, and he was declared entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and to take the steps necessary to render it effectual.[2]

The authorities are not quite clear as to the cases when the transmission of interest of a sole plaintiff rendered the one or the other forms of proceedings applicable, but there seems no doubt that wherever the interest of a plaintiff was transmitted by act of Law to a person who thereupon sued under the same title, the person on whom it so devolved was entitled to the benefit of the former proceedings in the suit, or, in other words, might file either a simple bill of revivor or a common bill of supplement.

Moreover, when the plaintiff sued in *autre droit* and his interest determined, his successor representing the same interest might proceed by a simple bill of supplement, and this rule applied although he did not claim under the former plaintiff.[3]

We have now to consider the case where a new party came in by the same title as the original plaintiff, but did not claim directly by assignment from him; thus, where a tenant in tail succeeded to a title to sue in Equity, upon the death of a preceding tenant in tail. In this case he might proceed by supplemental bill, by way of continuation of the original suit;[4] nor did it make any difference, provided he came in under the same title, that he came in by force of a new limitation in

[5] Ld. Red. 65; Sedgwick *v.* Cleveland, 7 Paige, 287, 290; Chase *v.* Searles, 45 N. H. 511, 522. The suit in such a case can no longer be prosecuted in the name of the original plaintiff, but the assignee must make himself a party by an original bill in the nature of a supplemental bill. Mason *v.* York & Cumberland R. R. Co., 52 Maine, 82, 107; Mills *v.* Hoag, 7 Paige, 18; Van Hook *v.* Throckmorton, 8 Paige, 33; [Tappan *v.* Smith, 5 Biss. 73; Butler *v.* Cunningham, 1 Barb. 85; Bowie *v.* Minter, 2 Ala. 406; Northmans *v.* Insurance Cos., 1 Tenn. Ch. 312].

[6] See Chase *v.* Searles, 45 N. H. 522.

[1] Ld. Red. 64; Attorney-General *v.* Foster, 2 Hare, 81; S. C. 13 Sim. 282; Zinc Co. *v.* Franklinite Co., 2 Beasley, 347.

[2] Ld. Red. 65; Attorney-General *v.* Foster, 2 Hare, 81; S. C. 13 Sim. 282.

[3] *Ante*, p. 1517.

[4] Lloyd *v.* Johnes, 9 Ves. 37; *post*, 1535, 1536, and note.

remainder, upon the determination of a preceding estate tail; he, in such case, was entitled to continue the suit in the same manner as a tenant in tail coming in by succession as issue in tail.

This doctrine is fully investigated by Lord Eldon, in the case of *Lloyd* v. *Johnes*,[5] and the result seems to be, that it is only on the ground that a tenant in tail is supposed to represent the inheritance and the interests of all those claiming in remainder after him, that a remainder-man coming in after the determination of the estate tail of the first plaintiff was permitted to carry on the same suit by supplemental bill, instead of being driven to his original bill; when, therefore, this ground failed, and the estate of * the original plaintiff was less than an *1520 estate tail, *e. g.*, an estate for life, a person coming in upon a remainder, on the determination of such prior estate, could not continue the suit, but must commence *de novo*, by original bill in the nature of a supplemental bill.[1]

So, also, an ecclesiastical person succeeding to a benefice, if he wished to obtain the benefit of proceedings instituted by his predecessor,[2] must have filed an original bill in the nature of a supplemental bill.

It is to be observed, that it is only in those cases where the remainder-man comes in upon the same title as the former plaintiff, that he will be permitted to sustain a simple supplemental suit. In *Lloyd* v. *Johnes*,[3] which has been already so frequently referred to, Lord Eldon says: "I distinguish between cases where the suit is founded on contract by the tenant in tail, and a suit to bind the land in respect of charges created by the author of the gift;[4] and, in *Tonkin* v. *Lethbridge*,[5] he determined, that another title accruing since the filing of the original bill will not enable even the same person to carry on a suit by simple supplemental bill, in a case where the title upon which he originally proceeded had failed.

The same principle which applies to suits *by* a tenant in tail applies where the suit is *against* him; and, therefore, if a bill claimed a charge upon the whole inheritance in strict settlement, and the first tenant in tail in being is made a party defendant, and he dies without issue, all

[5] 9 Ves. 57; and see Ld. Red. 72.

[1] Where the interest of the plaintiff wholly determines on his death, the suit cannot, on that event happening, be revived; but a new bill must be filed: Watts *v.* Watts, Johns. 631; and see Wordsworth *v.* Parkins, 12 W. R. 129, V. C. K., in which new suit, the benefit of the proceedings in the former suit may, if proved fit, be obtained. See Story Eq. Pl. §§ 349, 350; Ld. Red. 70, 97; Brady *v.* McCahey, 7 Conn. 214. Where a defendant, whose interest ceases on that event, dies, the suit may, it seems, be revived against the person who thereupon becomes entitled to his interest. Thus, where a defendant, a tenant in tail died, the suit was revived by the common order of revivor and supplement, against the next tenants in tail. Cresswell *v.* Bateman, 6 W. R. 2 m. 229, V. C. K., where the abatement occurred through the death of a defendant; see Reg. Lib. 1857, A. 424; and see Lloyd *v.* Johnes, 9 Ves. 58; Ld. Red. 67, 71; Sedgwick *v.* Cleveland, 7 Paige, 290. Where in a suit by church wardens for securing legacies given to a parish, some of the plaintiffs ceased to fill the office of church-wardens, an order was made by the Master of the Rolls, directing the suit to be carried on, in the names of such of the plaintiffs as continued in office, and the successors of the others. Smith *v.* Creasy, cited Seton, 1167. [*Ante*, 1512, n. 3.]

[2] Ld. Red. 72.

[3] 9 Ves. 57.

[4] See Sedgwick *v.* Cleveland, 7 Paige, 290-292; Story Eq. Pl. § 351.

[5] Cooper Rep. 43; see also Pritchard *v.* Draper, 1 R. & M. 191; Davidson *v.* Foley, 3 Bro. C. C. 598; and *ante*, p. 1515, note.

the proceedings might be had against the second tenant in tail, as if he had been originally a party, by means of a supplemental bill.[6] So, also, where a bill is filed for the purpose of raising a charge against the inheritance, divided into estates tail, against a remote remainder-
*1521 man, those intermediate not being * yet *in esse*; if, after the cause has proceeded to a certain length, an intermediate remainder-man comes into *esse*, the course is to file a supplemental bill against him, stating the former proceedings, and such statement is held sufficient to put the facts originally in issue, — in issue with regard to such defendant; and he may even have the benefit of the depositions of any witnesses that may have been already examined, if the witnesses should die.[1] The rule in this case, as applied to a defendant, is subjected to the same qualification that it is subject to where the tenant in tail is plaintiff, viz., that where a tenant in tail takes a different interest, or rather a similar interest not affected by the same circumstances, it is competent, both for and against him, to bring forward the equities belonging to those different circumstances, as contradistinguishing his case.

The reader is to be reminded, in this place, that when there is a decree against a tenant in tail, and he dies without issue, a subsequent remainder-man may appeal from the decree; for which purpose, however, he must make himself a party to the original suit by a supplemental bill, praying to have the benefit of the proceedings, for the purpose of appealing from the decree.[2]

"If by any event, the whole interest of a defendant is entirely determined, and the property is become vested in another, by a title not derived from the former party, as in the case of succession to a bishopric or benefice, or of the determination of an estate tail, and the vesting of a subsequent remainder in possession, the benefit of the suit against the person becoming entitled by the event described must be obtained by original bill in the nature of a supplemental bill."[3]

This rule, however, is only applicable when the estate or interest of the defendant is actually determined, and a new estate or interest accrues to another party. Where the estate or interest of the defendant is not determined, but only becomes vested in another, by an event subsequent to the institution of the suit; as in the case of alien-
*1522 ation by deed,[4] the defect in the suit may be supplied * by sup-

[6] Lloyd *v.* Johnes, 9 Ves. 58.

[1] Lloyd *v.* Johnes, 60; query, whether the death of the witnesses is, in such case, necessary to entitle the new defendants to the benefit of their depositions?

[2] Giffard *v.* Hort, 1 S. & L. 386, 410.

[3] Ld. Red. 67; Story Eq. Pl. § 350 and note; Chase *v.* Searles, 45 N. H. 511, 522. In a case, where, subsequent to the filing of the answer, the title of the defendants in a suit, under the foreclosure and sale of a mortgage executed by them, became vested in other parties, the latter were allowed to file a bill in the nature of a supplemental bill, against the parties to the original suit, in which they alleged the change of interest, and other facts applicable to their case, and prayed an account and an injunction against the plaintiff in the former bill, which was granted. Zinc Co. *v.* Franklinite Co., 2 Beasley, 325.

[4] It is to be recollected, that with respect to purchasers or incumbrancers becoming such after the bill filed, they will be bound by the decree, whether the plaintiff have notice of them or not; and, therefore, they need not be brought before the Court by supplemental bill, unless the legal estate has become vested in them, of which it is necessary to procure a conveyance. [See *ante*, 281.]

plemental bill, whether the suit is become defective merely, or abated as well as defective.[1]

The same rule also applies to cases where the interest of a person, sued in *autre droit*, is determined pending the suit, as in the case of an administration *durante minori ætate* or *ad litem*, or of an executor *pendente lite*.

It is to be observed that, till the appearance of a defendant to the bill, there is, strictly speaking, no cause in Court as against that defendant;[2] therefore, if the interest of a defendant, named as a party to the original bill, should determine before such defendant should have appeared, the suit cannot be continued against the person in whom his interest has become vested, by a mere supplemental bill;[3] but an original bill in the nature of a supplemental bill must be filed, which, although merely supplemental against the other defendants, must pray that the new party may answer the original bill as well as the supplemental matter, and pray distinct relief to which the plaintiff may consider himself entitled against the new defendant.[4]

It has always been the rule, that, when a defendant becomes bankrupt after decree, his assignees, cannot, by petition, obtain leave to attend, upon taking the account under the decree; they must either wait till the plaintiff brings them before the Court by supplemental bill, or file a supplemental bill themselves.[5]

With respect to creditor's suit the course was, where the creditor who filed the bill died, for his representative to revive the suit, which he could as of course.[6] If the representative did not revive the suit, it was almost a matter of course to permit another creditor, who had come in under the decree and established his claim as creditor, to take up the proceedings by supplemental bill.[7]

* It is to be observed, however, that as the representative of *1523 the deceased creditor has an interest in the prosecution of the

[1] Sedgwick *v.* Cleveland, 7 Paige, 290. For in these cases the new party comes before the Court exactly in the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings from the beginning of the suit. *Post*, 1544, and note. But the distinction is constantly to be borne in mind between cases of voluntary alienation and cases of involuntary alienation, as by the insolvency or bankruptcy of the defendant. In the latter cases, the assignee must be made a party; in the former, he may or may not, at the election of the plaintiff. Sedgwick *v.* Cleveland, 7 Paige, 290, 291; Pendleton *v.* Norton, 1 Barb. Ch. 246. But the Court cannot, upon a mere petition in the original suit, make a personal decree or order against a purchaser *pendente lite*, who is not a party to the suit, whereby property not in litigation in such suit can be affected; but to reach and affect such property, a new or supplemental bill against such purchaser is necessary. Livingston *v.* Freeland, 3 Barb. Ch. 519.

[2] In Massachusetts, the executors of a deceased defendant to a bill in Equity may be brought in by a bill of revivor, although no service had ever been made on the testator. Heard *v.* March, 12 Cush. 580.

[3] Nor can an order of revivor be obtained in such case against the person in whom his interest has become vested.

[4] Asbee *v.* Shipley, 6 Mad. 296; see also Crowtoot *v.* Mander, 9 Sim. 396; Stewart *v.* Nichols, 1 Taml. 307; Bland *v.* Davison, 21 Beav. 412; Williams *v.* Jackson, 7 W. R. 104; Hardy *v.* Hull, 14 Sim. 21; Foster *v.* Foster, 16 Sim. 647; Edington *v.* Banham, 2 Coll. 619.

[5] In such a case, however, the assignee should first apply to the plaintiff to file a supplemental bill; Philipps *v.* Clark, 7 Sim. 251.

[6] Livesay *v.* Livesay, 1 R. & M. 10.

[7] Heathfield *v.* Marquis Donegal, 1 S. & S. 491; Dixon *v.* Wyatt, 4 Mad. 392.

suit, in respect of the costs already incurred in it, no other creditor was at liberty to file a supplemental bill, without notice to such representative; and that the proper course was for the creditor desiring to prosecute the suit, to move that he might be at liberty to file a supplemental bill, if the representative of the deceased plaintiff did not revive within a limited time, and serve such order upon the representative.[1]

It seems that the motion for leave to file the supplemental bill was made upon notice, served both upon the representatives of the former plaintiffs, and upon the defendant,[2] and that it was held, that if the defendant had any objection to urge to the supplemental bill being *1524 filed,[3] he should have taken that opportunity of * stating it to the Court, and should not have waited to do so till he put in his answer to the supplemental bill.[1]

What has been stated concerning the former practice will be sufficient

[1] Dixon *v.* Wyatt, 4 Mad. 392.

[2] It is provided by rule in the Equity Courts of the United States, that whenever any suit in Equity shall become defective, from any event happening after the filing of the bill (as, for example, by a change of interest in the parties), or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any Judge of the Court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a Judge of the Court. Rule 57.

In Pedrick *v.* White, 1 Met. 76, it was held, in a case where an answer had been filed, issue joined, evidence taken, and publication passed, that a supplemental bill ought not to be filed as a matter of course, but only by leave of the Court upon sufficient cause shown; and the supplemental matter must be verified by affidavit, or other satisfactory proof. In Tappan *v.* Evans, 12 N. H. 330, the Court held that after decree a supplemental bill introducing new facts could not be filed as of right, but only by leave of Court, upon sufficient cause shown. See Eager *v.* Price, 2 Paige, 333; Lawrence *v.* Bolton, 3 Paige, 294; Dias *v.* Merle, 4 Paige, 259; Winn *v.* Albert, 2 Md. Ch. 42. Such was the practice in New York, in relation to injunction bills at least. Eager *v.* Price; Lawrence *v.* Bolton, *ubi supra*. And it is said to be most safe to apply for leave in all cases. 1 Hoff. Ch. Pr. 403; see Webster *v.* Hitchcock, 11 Mich. 56. In Barriclo *v.* Trenton Mut. Life and Fire Ins. Co., 2 Beasley, 154, 159, the Chancellor said: 'The objection that the bill was filed without the authority of the Court is not matter of demurrer, though the bill upon that ground may, in the discretion of the Court, be dismissed." [See, to the same effect, Buckingham *v.* Corning, 2 Stew. Eq. 238.] "The filing of a supplemental bill," says Mr. Justice Story, "is not always a matter of course, but sometimes special leave must be asked of the Court, as for example, when it seeks to change the original structure of the bill, and to introduce a new and different case." Story Eq. Pl. § 333; Coldough *v.* Evans, 4 Sim. 76; Jones *v.* Jones, 3 Atk. 110; Crompton *v.* Wombwell, 4 Sim. 628; Jenkins *v.* Eldredge, 3 Story, 300. The Court will sometimes *ex mero motu* direct a supplemental bill to be filed, if, upon the hearing, the justice of the case, in its own opinion, requires it to be done. Mutter *v.* Chauvel, 5 Russ. 42; see Wood *v.* Mann, 2 Sumner, 316; Veazie *v.* Williams, 3 Story, 54, 67.

On an *ex parte* application for leave to file a supplemental bill, the Court examines the question so far as to see that the privilege is not abused for the purposes of delay and vexation to the defendant. Eager *v.* Price, 2 Paige, 333. In a doubtful case the Court may direct notice to be given of the application to the parties who have appeared. Eager *v.* Price, *supra;* Winn *v.* Albert, 2 Md. Ch. 42. The application may be made either by motion or petition. A bill of this nature ought to be filed as soon as the new matter sought to be inserted therein is discovered. And if the party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review, founded on such facts. Pendleton *v.* Fay, 3 Paige, 204.

[3] See Pedrick *v.* White, 1 Met. 76; Pinch *v.* Anthony, 10 Allen, 477.

[1] See Dixon *v.* Wyatt, 4 Mad. 392; Pedrick *v.* White, 1 Met. 76. So an objection to a supplemental bill in Equity, on the ground that it seeks to maintain the suit upon facts which have occurred since the filing of the original bill, is waived by omitting to demur to it upon that ground, and consenting to go into a full hearing before a Master upon the merits of the case as set forth in the original and supplemental bill. Pinch *v.* Anthony, 10 Allen, 470; see Pingree *v.* Coffin, 12 Gray, 288, 323; Underhill *v.* Van Cortlandt, 2 John. Ch. 369.

to make the new enactments and orders intelligible. In the first place we have seen how, upon an abatement taking place, the present practice provides for an order to revive being obtained. There is no doubt that this section[2] will apply in all cases when, under the former practice, a simple bill of revivor was the proper course; but the section goes further than this, and applies in terms to cases where the suit has become defective by reason of "some change or transmission of interest and liability:" and it also provides, not only for an order to revive, but also for the "order to the effect of the usual supplemental decree." There were for some time doubts whether a supplemental order under this section could be obtained before decree, but it has been decided that it can;[3] and it would seem, therefore, that this section will apply to all cases when, under the former practice, upon a transmission of interest or liability, a simple supplemental bill could have been filed, and the plaintiff was thereby entitled to the benefit of the proceedings already taken place,[4] whether the defect occur before or after decree. Thus the section will apply, and an order to the effect of the usual supplemental decree will be obtained, on the birth of a child, who is a member of a class beneficially interested.[5]

The common order to revive and carry on the proceedings may * also be obtained, when the suit abates, or becomes defec- *1525
tive, by the bankruptcy of the plaintiff[1] or defendant;[2] where a

[2] 15 & 16 Vic. c. 86, § 52.

[3] Lash *v.* Miller, 4 De G., M. & G., 841; Pickford *v.* Brown, 1 Kay & J. 643; Hall *v.* Clive, 20 Beav. 575.

[4] Martin *v.* Hadlow, 9 Hare Ap. 52, where an order to revive and carry on the proceedings was made in an administration suit. In the case of Tate *v.* Lethead, 9 Hare, 51, when more than the usual supplemental decree was required, leave was given to file a supplemental claim.

[5] Fullerton *v.* Martin, 1 Drew. 238; Pickford *v.* Brown, *ubi supra*; Philpott *v.* Brown, 1 Jur. N. S. 698; Jebb *v.* Ingwell, 20 Beav. 461. For form of order, see Seton, 1166, No. 9; but see Garrett *v.* Lansfield, 11 W. R. 864; see also Leyland *v.* Leyland, 10 W. R. 140. An inquiry, whether the proceedings were beneficial to the infant, is not necessary. Neeley *v.* Palmer, 3 W. R. 291; Barrett *v.* White, 1 Jur. N. S. 526; Robinson *v.* Frampton, 1 W. R. 328. Though such an inquiry may be directed. Brookfield *v.* Bradley, Seton, 1170. The order was made in Granwell *v.* Garner, L. R. 8 Eq. 35, preferred by the usual "It appearing to be for the infants' benefit that they should be bound by the decree." If any step has been taken after the abatement, the Court, on being satisfied that it is beneficial for the infant, may, on making the order for service, direct the infant to be bound. Jebb *v.* Tassell, 20 Beav. 461, see also Freeman *v.* Whitbread, 12 W. R. 619. [Upon the birth of an infant tenant in tail, after a special case has been set down for hearing, the proper course for bringing the infant before the Court is to discharge the order for setting down, and amend the special case by making the infant a party. Thistlethwaite *v.* Garnier, 5 De G. & Sm. 73, and Savage *v.* Snell, L. R. 11 Eq. 264, the latter non-concurring with Palmer *v.* Flower, 18 W. R. 887. And see Barnaby *v.* Tassell, L. R. 11 Eq. 364, where the special case was amended at the hearing by adding a party in existence before application, and accidentally omitted.]

[1] Jackson *v.* Riga Railway Co., 28 Beav. 75; 6 Jur. N. S. 336; Macdonald *v.* Macfarlane, 6 W. R. 245, V. C. W.; and see Mostyn *v.* Emmanuel, 5 N. R. 464, V. C. W.; but see Maw *v.* Pearson, 12 W. R. 701, M. R., where the Court refused to make the order at the instance of the defendant after decree, though the assignees declined to proceed.

[2] Lash *v.* Miller, 4 De G., M. & G. 841; 1 Jur. N. S. 457; Cochrane *v.* Phillips, 3 W. R. 461, V. C. S.; Cross *v.* Thomas, 16 Beav. 502; 17 Jur. 536; Kitchen *v.* Humble, 8 Jur. N. S. 588; 10 W. R. 686, V. C. W.; Joberns *v.* Couch, Seton, 1166; and see *ib.* 1170. Such an order was made in the case of a deed of inspectorship: Croskey *v.* European & American Steam Co., 1 W. N. 23, 70, V. C. W.; or a deed of assignment: Overman *v.* Overman, 1 W. N. 142, 12 Jur. N. S. 326, M. R. Where the assignees have been brought before the Court, the bankrupt should not be served with any further proceedings in the cause. Robertson *v.* Southgate, 5 Hare, 224; Stahlschmidt *v.* Lett, 5 Hare, 595; 11 Jur. 885.

new assignee has been appointed;[3] where a sole plaintiff has been found lunatic;[4] where a defendant has become lunatic;[5] and where a new committee of a lunatic defendant has been appointed.[6] A similar order may also be obtained against the trustee of a settlement of the interest of a female plaintiff,[7] or defendant;[8] and, generally, in the case of an assignment *pendente lite*.[9]

The common order to revive may also be obtained where the suit relates to real estate, and the abatement is occasioned by the death of a sole plaintiff, who has devised his interest;[10] though the Court at first held otherwise;[11] and where the abatement or change of interest requires that the frame of the suit, with respect to parties, should be altered.[12] The Court, however, refused to make the common order against the curator of one of the plaintiffs who had been convicted, in a foreign country, of felony; although the curator, according to the law of the foreign country, fully represented him.[13]

The common order to revive has been made in the following cases:

On the application of the heir-at-law and administrator of a sole *1526 plaintiff, in a foreclosure suit;[14] on the application of the * personal representative,[1] or devisee,[2] of a sole plaintiff; on the application of the surviving plaintiffs, where the suit abated by the death of one of several co-plaintiffs;[3] on the application of a plaintiff against a co-plaintiff, on whom a new interest had devolved;[4] on the application of the plaintiff against a co-executor who proved the will subsequent to the institution of the suit;[5] and against a co-plaintiff who had executed an inspectorship deed;[6] on the application of one of

[3] Gordon *v.* Jesson, 16 Beav. 440.
[4] Dangar *v.* Stewart, 9 W. R. 266, V. C. K.
[5] Bryan *v.* Twigg, 3 Eq. Rep. 62, V. C. K.; 3 W. R. 42.
[6] Thewlis *v.* Farrar, Seton, 1166, No. 8.
[7] Atkinson *v.* Parker, 2 De G., M. & G. 221; 16 Jur. 1005.
[8] Noble *v.* Stow (No. 2), 30 Beav. 512; 8 Jur. N. S. 147.
[9] James *v.* Harding, 3 W. R. 474, V. C. W.; Wastall *v.* Leslie, Seton, 1170; Freeman *v.* Pennington, 3 De G., F. & J. 295; Williamson *v.* Jefferys, 12 W. R. 403, V. C. W.; Brandon *v.* Brandon, 3 N. R. 287, V. C. K.; but see Greenhalgh *v.* Rumney, 5 M. R. 463, V. C. W. It is not, however, generally necessary to bring an assignee *pendente lite* before the Court. See *ante*, 281; and *post*, 1516.
[10] Eyre *v.* Brett, 13 W. R. 732, M. R.; *ib.* 763, L. JJ.; 34 Beav. 441; and see Jackson *v.* Ward, 1 Giff. 30; 5 Jur. N. S. 782; Gilbert *v.* Tomlinson, 6 Jur. N. S. 532; 8 W. R. 467, V. C. S.
[11] Watson *v.* Loveday, 3 W. R. 386, V. C. W.; Dendy *v.* Dendy, 5 W. R. 221, V. C. W.; Williams *v.* Williams, 9 W. R. 296, V. C. K.; Brooke *v.* Brooke, 9 W. R. 804, V. C. K.; Laurie *v.* Crush, 32 Beav. 117; 9 Jur. N. S. 453, M. R.
[12] Jervoise *v.* Clark, 2 W. R. 337, V. C. K.; Johnson *v.* Hammersley, 24 Beav 498; see Greenhalgh *v.* Rumney, 5 N. R. 463, V. C. W.; see, however, Hall *v.* Clive, 20 Beav. 575; Pedder *v.* Pedder, 5 Jur. N. S. 1145, M. R.
[13] Grillon *v.* Rotch, 1 Dr. & Sm. 621; and see Stahle *v.* Winter, 3 W. R. 580, M. R.
[14] Ward *v.* Shakeshaft, 1 Dr. & Sm. 607; Fane *v.* Richards, 11 W. R. 524, M. R.
[1] Morritt *v.* Walton, 2 W. R. 544, V. C. K.; Flockton *v.* Slee, 5 Jur. N. S. 422; 7 W. R. 393, M. R., and Pindar *v.* Pindar, there cited; Seton, 1169; Eyre *v.* Brett, 13 W. R. 732, M. R.; but see Townend *v.* Toker, 14 W. R. 300, M. R.
[2] Jackson *v.* Ward, 1 Giff. 30; 5 Jur. N. S. 782; Gilbert *v.* Tomlinson, 6 Jur. N. S. 532; 8 W. R. 467, V. C. S.; Eyre *v.* Brett, 13 W. R. 734, M. R.; but see Townend *v.* Toker, 14 W. R. 300, M. R.; Bedford *v.* Bedford, 1 W. N. 121, M. R.; Colyer *v.* Colyer, L. R. 1 Ch. Ap. 482.
[3] Hall *v.* Clive, 20 Beav. 575; Smith *v.* Horsfall, 24 Beav. 331; Ure *v.* Lord, 2 Dr. & Sm. 363; 10 Jur. N. S. 1042; but see Hinde *v.* Morton, 2 H. & M. 368.
[4] Foster *v.* Bonner, 33 L. J. Ch. 384, V. C. K.
[5] Haldane *v.* Eckford, 1 W. N. 50; 14 W. R. 306, 328, V. C. W.
[6] Croskey *v.* European & American Steam Co., 1 W. N. 70, V. C. W.

several co-tenants, who had obtained an order for liberty to attend the proceedings, in a suit which had abated by the death of the sole plaintiff, his co-tenant;[7] and on application of the plaintiff against the devisee;[8] and against the personal representative of a defendant.[9] Where a married woman, who had obtained a protection order[10] was made a defendant, as a *feme sole*, and the protection order was afterwards discharged, the usual order to revive and carry on the proceedings against her and her husband, was made, on motion.[11]

When the order of revivor is made against the personal representative of an accounting party, the usual accounts of the estate of the deceased will, if required, be ordered to be taken, if they do not admit assets.[12]

In those cases where the Court will not make the order to revive and carry on the proceedings on an *ex parte* application by motion or petition, a supplemental bill must be filed, by and against the persons by and against whom the proceedings are sought to be carried on.[13]

An order of revivor may be made after the lapse of a long period, and such an order was made against the defendant's representatives ten years after a demurrer was allowed with leave to *amend;[1] but after a lapse of more than twenty years, and *1527 where all the parties to the original suit were dead, the order was refused;[2] and the right to such an order is not, it seems, barred by the lapse of time, but it is in the discretion of the Court.[3]

In some cases, where the suit abates by the death of a party who has no legal personal representative, the Court will either appoint some one to represent the estate of such party;[4] or will allow the suit to proceed in the absence of any such representative. In the latter case no order of revivor is necessary; in the former, the suit must be revived in the usual way, against the person appointed to represent the estate of the deceased party.[5] The cases in which the Court will dispense with the personal representative of a deceased party, or appoint some one to represent his estate, are the same as those in which it would have made a similar order, if the suit had been instituted after the death of the party, and have been before fully considered.[6] Where one of several

[7] Dobson v. Laithwaite, 10 W. R. 183, L. JJ.; reversing S. C. 30 Beav. 228; 8 Jur. N. S. 26.

[8] Lowe v. Watson, 1 Sm. & G. 123; Earl Durham v. Legard, 34 Beav. 442.

[9] Martin v. Hallow, 16 Jur. 961; 9 Hare Ap. 52; Pare v. Pare, 1 W. R. 362, V. C. K.; Martin v. Pearson, 3 W. R. 395, L. JJ. This order will not be made against executors until they have proved. Joyce v. Rawlins, 1 W. N. 152, 12 W. R. 785, M. R.

[10] Under 20 & 21 Vic. c. 85; *ante*, p. 87.

[11] Ralph v. Wenman, 4 De G. & J. 216; 15 Jur. N. S. 723; 6 Jur. N. S. 580, V. C. K.

[12] Edwards v. Batley, 19 Beav. 457; Cartwright v. Stephens, 20 Beav. 122; overruling Tate v. Lathwood, 9 Hare Ap. 51; S. C. *nom.* Yate v. Lightfoot, 16 Jur. 964.

[13] Dendy v. Dendy, 5 W. R. 221, V. C. W.; Williams v. Williams, 9 W. R. 296, V. C. K.; Brooke v. Brooke, 9 W. R. 804, V. C. K.; Guillon v. Roteh, 1 De. & Sm. 621; Greenhalgh v. Rumney, 5 N. R. 463, V. C. W.

[1] Dicks v. Stanhope, 1 Jur. N. S. 413, V. C. K.

[2] Bland v. Davison, 21 Beav. 312.

[3] Alsop v. Bell, 24 Beav. 451; Poor v. Cudlow, 2 Beasley (N. J.), 136; *post*, 1542, note.

[4] Under 15 & 16 Vic. c. 86, § 44; *ante*, pp. 201, 1514.

[5] [illegible] v. Putnam, 29 Beav. 20; and see Sebon, 1178, 1184.

[6] *Ante*, pp. 200, 202; and see Lancaster v. Nurse, 10 Jur. N. S. 1178; 11 W. R. 201, V. C. K., where the estate being insolvent, the

plaintiffs, claiming as next of kin, died before decree, without any legal personal representative, the Court ordered the suit to be revived, at the instance of the surviving plaintiffs, against the same defendants; and did not require any representative of the deceased plaintiff to be appointed;[7] but where one of three plaintiffs, suing as residuary legatees, died before decree, no order to revive was held to be necessary.[8]

The party obtaining the order to revive may, if a resident out of the jurisdiction, be ordered to give security for costs.[9]

The Court will not, in general, permit a suit to be revived, for the purpose of deciding the question of costs only;[10] the general rule being, that if a party dies before taxation of costs, there can be no revivor, in respect of costs only, against his personal representative.[11] This *1528 rule does not, of course, apply where any thing * else is directed by the decree, which remains unexecuted. "If, by the decree," says Lord Chief Baron Gilbert, "the party is to pay a sum of money, or if a duty is decreed, if he is to deliver over a bond, or deed, or writings, or if any thing is annexed to the decree besides costs, the suit may be revived."[1]

The rule applies only to costs which remain untaxed, at the time when the abatement takes place. Where the costs have been actually taxed, and the Master's certificate signed, there may be a revivor for them;[2] because when taxed, they become a judgment debt; and as at Law a judgment may be revived, so it may in Equity.[3] And where the plaintiff's solicitor, at the request of the defendant's solicitor, had agreed to postpone the taxation of costs, decreed to be paid to the plaintiff, on an undertaking that the plaintiff should not be prejudiced thereby, and the plaintiff died after the costs were taxed, but before

personal representatives of a deceased plaintiff, who had been beneficially interested, were dispensed with.

[7] Ure *v.* Lord, 2 Dr. & Sm. 263; 10 Jur. N. S. 1042; and see Smith *v.* Horsfall, 24 Beav. 331; Leycester *v.* Norris, 10 Jur. N. S. 1173; 13 W. R. 201, V. C. K.; but see Hinde *v.* Morton, 2 H. & M. 368.

[8] Hinde *v.* Morton, 2 H. & M. 368.

[9] Jackson *v.* Davenport, 29 Beav. 212; 7 Jur. N. S. 1224.

[10] L.d. Red. 202; Gilb. For. Rom. 181; but see Ridgely *v.* Bond, 18 Md. 433.

[11] Morgan *v.* Scudamore, 2 Ves. J. 313, 316; Andrews *v.* Lockwood, 15 Sim. 153, 156; 10 Jur. 277; but see S. C. 2 Phil. 398; 11 Jur. 956; Bowyer *v.* Beamish, 2 Jo. & Lat. 228; Malins *v.* Greenway, 7 Hare, 391; Robertson *v.* Southgate, 7 Hare, 109; 13 Jur. 533; Umpleby *v.* Waveney Valley Railway Co., 1 J. & H. 254; Beames on Costs, 131; Morgan & Davey, 384 *et seq.*; Travis *v.* Waters, 1 John. Ch. 85; see Story Eq. Pl. § 371. If the whole ground of the suit has been removed by the death of the plaintiff, the Court will not hear an argument merely to determine the question of costs. Johnson *v.* Thomas, 2 Paige, 377. The principle of the rule, that where a party dies there can be no revivor for costs, is, that the right to receive costs, or the liability to pay them, dies with the person. This principle does not apply to the case of bankruptcy. Ellison *v.* Sharp, L. R. 2 Ch. Ap. 355; Farrall *v.* Davenport, L. R. 3 Eq. 473. A bill of revivor cannot properly be brought upon a bill of discovery merely, after the answer is put in and the discovery is made; for in such a case the entire object of the suit has been obtained; and the plaintiff can have no motive for reviving it; and the other party has no interest in reviving it. Story Eq. Pl. § 371 *a*; Horseburg *v.* Baker, 1 Peters, 232, 236. A bill of revivor will not lie to revive a motion. Hendrig *v.* Clay, 2 A. K. Marsh. 464.

[1] Gilb. For. Rom. 181; Johnson *v.* Peck, 2 Ves. S. 465; see Ridgley *v.* Bond, 8 Md. 433.

[2] Lowten *v.* Corp. of Colchester, 2 Mer. 113, 114; Beames on Costs, 132, and cases cited; *ib.* n. (*c*); Story Eq. Pl. § 371.

[3] Lowten *v.* Corp. of Colchester, 2 Mer. 113, 114; Edgill *v.* Brown, 1 Dick. 62; Blower *v.* Morrets, 3 Atk. 772; Loader *v.* Price, 2 Fowler's Ex. Pr. 309.

the Master's certificate had been signed, his representatives were allowed to revive the suit: upon the ground that the undertaking, amounted to an agreement that the suit should be revived.[4] But the circumstances of the case were very special, and cannot be considered as impugning the general rule.

A distinction has been attempted to be made, between an abatement by the death of the party to pay the costs, and an abatement by the death of the party to receive them; holding, in the latter case, that there may be a revivor for costs;[5] but, in *Jopp* v. *Geering*,[6] Sir John Leach V. C. held, on demurrer, that if the defendant dies before the costs of a bill dismissed are taxed, a bill of revivor by his representatives for costs cannot be sustained.

The only exceptions to the general rule above laid down, that there can be no revivor for costs only, which have not been taxed before the abatement happened, are: where they are directed to be paid out of a particular estate or fund;[7] or are decreed against an executor, out of assets:[8] in which cases, they are considered as * a charge *1529 or lien upon the estate, and not upon the person, and, therefore, do not come within the principle of Courts of Law (on analogy to which the rule is founded), that "*actio personalis moritur cum persona*."[1] The fact that the bill prays specifically for costs, does not take the case out of the general rule.[2]

Where one of several defendants, against whom the bill had been dismissed with costs, to be taxed and paid by the plaintiff, died, it was held that the survivors were entitled to proceed with the taxation, without reviving the suit, where the surviving and deceased defendants had carried in a joint bill of costs;[3] but where the deceased defendant appeared separately, the Court refused to direct the taxation to proceed without a revivor.[4]

After service of an order under this section, if the defendant do not appear it is not necessary for the plaintiff to enter an appearance for him, but the suit may proceed in his absence.[5]

If the defect be one which cannot be cured by an order under the 52d section, it will be necessary either that a bill of supplement under the old practice should be filed, or that resort should be had to the remedy given by another section of the statute which will be next considered.

By section 53 of the 15 & 16 Vict. c. 86, it is enacted, that "It shall not be necessary to exhibit any supplemental bill in the said Court for the purpose only of stating or putting in issue facts or circumstances

[4] Tucker v. Wilkins, 7 Sim. 349.

[5] Beames on Costs, 133; and see Morgan v. Scudamore, 2 Ves. J. 313; 3 Ves. 195.

[6] 5 Mad. 375.

[7] Bower v. Marris, 3 Atk. 772; Kemp v. Mackrell, 3 Atk. 812; 2 Ves. S. 580; Johnson v. Leake, cited 3 Atk. 778; Jenour v. Jenour, 10 Ves. 562, 574.

[8] Beames on Costs, 132.

[1] Broom's Maxims, 869 *et seq.*

[2] Umpleby v. Waveney Valley Railway Co., 1 J. & H. 254.

[3] Hunter v. Daniel, 7 Hare, 281.

[4] Robertson v. Southgate, 7 Hare, 109; 13 Jur. 553; Malins v. Greenway, 7 Hare, 391.

[5] Ward v. Cartwright, 10 Hare Ap. 73.

which may have occurred after the institution of any suit; but such facts or circumstances may be introduced by way of amendment into the original bill of complaint in the suit, if the cause is otherwise in such a state as to allow of an amendment being made in the bill, and if not the plaintiff shall be at liberty to state such facts or circumstances on the record in such manner and subject to such rules and regulations with respect to the proof thereof, and the affording the defendant leave and opportunity of answering and meeting the same, as shall in that behalf be prescribed."

To carry out this section of the statute it is provided by order, that, where there is some defect or omission in the statements of the original bill, or facts or circumstances have occurred after the institution of the suit, which it is material to state on the pleadings, and the suit is not in such a state as to allow of amendment, the plaintiff may, at any time before decree,[6] file, at the Record and Writ Clerks' office, a written statement to be annexed to the bill, by which such defect or omis-
*1530 sion is rectified, or such new *facts or circumstances put in issue; and such proceedings by way of answer, evidence, and otherwise, may be had and taken upon the statement so filed, as if the same were embodied in a supplemental bill; but the Court may make any order which it thinks fit for accelerating the proceedings therein, in any manner which may appear just and practicable.[1]

After decree, such order can only be effected by filing a supplemental bill;[2] and inasmuch as, before decree, the bill may, in almost all cases, be amended, a supplemental statement is very rarely filed.[3]

A supplemental statement is only available for the purpose of stating new facts between the same parties; and cannot be used for the purpose of adding parties.[4]

A defendant, although he have the conduct of the suit, cannot file a supplemental statement;[5] nor will the Court, on the application of the defendant, order the plaintiff to file a supplemental statement.[6]

It was a rule of the Court, before the enactment of the 53d section, that matters which occurred after the institution of the suit could not be

[6] Commerell *v.* Hall, 2 Drew. 194; S. C. *nom.* Commerell *v.* Bell, 18 Jur. 141.

[1] 15 & 16 Vic. c. 86, § 53; Ord. XXXII. 2; *ante*, 1523, note.

[2] Commerell *v.* Hall, 2 Drew. 194; S. C. *nom.* Commerell *v.* Bell, 18 Jur. 141.

[3] For a case in which a supplemental bill was held justifiable, before decree, see Goucher *v.* Clayton, 11 Jur. N. S. 462; and see Braithwaite's Pr. 81; see *ante*, 1515, note; *post*, 1531, note; 1532, note.

[4] Commerell *v.* Hall, 2 Drew. 194; S. C. *nom.* Commerell *v.* Bell, 18 Jur. 141; Heath *v.* Chapman, 17 Jur. 570; 1 W. R. 344; Heath *v.* Lewis, 18 Beav. 527; Williams *v.* Jackson, 5 Jur. N. S. 264; 7 W. R. 104; Nicholson *v.* Gibb, 2 W. R. 337; Webb *v.* Wardle, 11 Jur. N. S. 278; *ante*, 1516, n.

[5] Lee *v.* Lee, 9 Hare Ap. 91; but he was allowed to file a supplemental bill, see 10 Hare Ap. 72; 17 Jur. 272; S. C. *nom.* Lys *v.* Lee, 4 De G., M. & G. 219; 17 Jur. 607; and see Berrow *v.* Morris, 10 Beav. 437. A supplemental bill may be brought on behalf of the defendant in the suit. [Morrison *v.* Searight, 4 Baxt. 479.] Where the matter is newly discovered evidence on the part of the defendant after the cause is at issue, or after publication is passed, or even after a hearing or decree, the defendant may, by a petition to file a supplemental bill, obtain relief, and an order allowing him to introduce the new evidence, either by putting the new matter at issue, or by enlarging publication, or by a rehearing, as the particular stage of the cause at which the discovery is made may require. Baker *v.* Whiting, 1 Story, 232, 235.

[6] Langdale *v.* Gill, 1 Sm. & G. 24; 16 Jur. 104.

introduced by amendment; the earlier part of this section applies to that rule, and enables such matters to be inserted in the bill by amendment.[7] If the bill cannot be amended, then a supplemental statement may be filed.[8] The latter part of the *order is not, however, *1531 frequently acted upon when an abatement takes place, as it has been held that the supplemental statement cannot be filed for the purpose of bringing forward new parties.[1] The object of such a statement seems to be simply to strengthen the case of the plaintiff by putting in issue new matter with reference to the decree originally asked for, but it is not a document by which the plaintiff can obtain a different decree, rendered necessary by subsequent events, or by which he can bring before the Court new parties.

In cases, therefore, to which the 52d section does not apply, and when the plaintiff also requires new parties to be brought before the Court, so that he cannot simply file a supplemental statement, he must fall back upon the old practice and file a supplemental bill or claim, and obtain a decree. It will, therefore, be necessary to state the former practice in supplemental bills of the description now to be considered.[2]

[7] Tudway *v.* Jones, 1 K. & J. 691; see Rogers *v.* Solomons, 17 Geo. 598.

[8] Nothing, which occurred prior to the filing of the original bill, ought to be added by way of supplement, unless the state of the cause is such that an amendment can no longer be obtained; but when the original bill cannot properly be amended, any new matter necessary to be put in issue can be introduced by supplemental bill. Goodwin *v.* Goodwin, 3 Atk. 370; Dodge *v.* Dodge, 29 N. H. 177; Veazie *v.* Williams, 3 Story, 54.

Where the object is to cure some defect in the original structure of the bill by adding other parties, or stating what ought to have been stated before, and not to introduce matter arising since the suit, the amendment, even after a hearing on bill, answer, and proofs, may, by the practice in New Hampshire, be made in the ordinary way, or by a supplemental bill, if that appear to be more convenient and just to the parties. Clark *v.* Kreps, 45 N. H. 272; Dow *v.* Jewell, 18 N. H. 340, 359; Doe *v.* Doe, 37 N. H. 268; Bellows *v.* Stone, 14 N. H. 175; Tilton *v.* Tilton, 9 N. H. 384.

If the Court, in a proper case, has given a party leave to file a supplemental bill, he will be permitted to introduce other matters into the supplemental bill, which might have been incorporated in the original bill by way of amendment. Stafford *v.* Hanford, 1 Paige, 200, 201; Bowne Clark *v.* Hall, 21 Miss. 520.

In Pedrick *v.* White, 1 Metcalf, 76, it was held, to warrant the leaving of a supplemental bill, it should be shown to the Court, either, 1st, That the matter, relied upon as supplemental, arose after the original suit was commenced; or, 2d, That the facts relied upon, first came to the plaintiff's knowledge, or were made known to him in such a manner, that he could avail himself of them, after the cause had passed the stage in which he might have had leave to amend; or, 3d, That the plaintiff has been prevented, through inadvertence, misapprehension, &c., of himself, agents, or his counsel, or other cause satisfactorily shown, from availing himself of the proposed matter of his supplemental bill, at an earlier stage of the cause. See Candler *v.* Petit, 1 Paige, 168; Stafford *v.* Howlett, 1 Paige, 201; Welf. Eq. Pl. 188; Walker *v.* Gilbert, 7 Sm. & M. 456. It was held in Barriclo *v.* The Trenton Mut. Life and Fire Ins. Co., 2 Beasley, 154, that matters, which are known to the plaintiff before the decree in the original suit will not support a supplemental bill; nor will matters which have arisen since, if they are merely cumulative evidence of the charges in the original bill.

[New events or new matters which do not change the parties before the Court, nor the rights and interests of the parties, but merely refer to and support those rights, and add a new means of holding the property, may be brought before the Court by supplemental bill proper. Williams *v.* Winans, 22 N. J. Eq. 573, 580; Riddle *v.* Motley, 1 Lea, 468; Smith *v.* St. Louis Mut. Life Ins. Co., 3 Tenn. Ch. 151; French *v.* Hay, 22 Wall. 246. And a bill which merely introduces supplemental matter to sustain the relief sought by the original bill is not a supplemental suit, but grafts the new matter into the original suit, and both records are treated as one record; and, in such cases, the defendant who has demurred to the original bill, may demur to the bill as supplemented. Williamson *v.* Lewkes, 9 Hare, 198, 204; Horton *v.* Thompson, 4 Tenn. Ch. 575; Beauquet *v.* Markham, 4 Sim. 573; Catton *v.* Carlisle, 5 Mad. 427. *Ante*, 1515, note 1.]

[1] Heath *v.* Lewis, 18 Beav. 527; Commerell *v.* Bell, 18 Jur. 141.

[2] Dixon *v.* Wyatt, 4 Mad. 495.

With respect to the form of a supplemental bill[3] the 49th Order
*1532 * of August, 1841,[1] directs, "That it shall not be necessary, in any bill of revivor or supplemental bill to set forth any statements in the pleadings in the original suit, unless the special circumstances of the case may require it."[2]

This order was never material, as the extent in which it was necessary in bills of this description to restate the pleadings in the original suit was still to be determined by the special circumstances of the case. As under the present practice in all simple cases, as, for instance, in the case of bringing before the Court a child who upon its birth becomes a member of a class beneficially interested, it will be sufficient for the plaintiff to obtain an order to the effect of a supplemental decree by the simple process already mentioned under the 52d section, it may be inferred, that, in the cases where it still remains necessary to file a supplemental bill or claim, it will be incumbent to put in issue as against the new defendant all the material facts of the original bill. It will not, however, be necessary to state the original bill at length, as it has been held, under the former practice, that a very brief statement is sufficient to put the whole case in issue as against the new defendants.[3]

Thus, in *Vigers* v. *Lord Audley*,[4] it was held, that, where a supple-

[3] A supplemental bill in form is like an original bill, except that it prays to have the benefit of the proceedings in the original suit, and to be taken as supplemental thereto. It should be signed by counsel, and filed and served in the same manner as an original bill. A supplemental bill, with the original bill attached to it as a schedule, has been allowed to be filed. Grey Coat Hospital *v.* Westminster Improvement Commissioners, 2 De G. & J. 61. It is stated by Lord Redesdale (Ld. Red. 99) that an original bill in the nature of a supplemental bill is an original bill, which, in its consequences, may draw to itself the advantage of the proceedings on the former bill. Such a bill is now usually framed, and will be filed, as an original bill, with a prayer that, "if necessary or proper, the bill may be taken as supplemental" to the former bill. Earl of Shrewsbury *v.* North Staffordshire Railway Co., 9 Jur. N. S. 787; 11 W. R. 742.

An original bill in the nature of a supplemental bill should recapitulate so much of the former bill as is necessary to show the bearing of the supplemental matter. Chase *v.* Searles, 45 N. H. 521, 522; Vigers *v.* Audley, 9 Sim. 72.

[1] The Supreme Court of the United States have adopted the same rule. See Equity Rules [*infra*, 2388, Rule 58].

[2] In Story Eq. Pl. § 343, it is said, that "A supplemental bill must state the original bill and the proceedings thereon; and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties; and in general, the supplemental bill must pray, that all the defendants may appear and answer to the charges it contains." Chase *v.* Searles, 45 N. H. 511, 521. In this case Bellows J. said: "There is a class of supplemental bills which operate merely as an amendment of the original bill; designed to remedy some defect in its structure, by stating matter that ought to have been stated before; or by bringing in a party that ought to have been made a party before; in which case the prayer should be that the new party, if a defendant, should answer the original bill. In neither case can it be necessary, in the supplemental bill, to restate the matter of the original bill; for, even as to the new defendant, he becomes, to all intents and purposes, a party to the original bill, and may make answer and put in issue its allegations as if originally made a party. This, in truth, is but another form of amending the original bill after it has passed the stage when amendments are ordinarily made in the usual mode, and the effect is substantially the same." See Thorn *v.* Germand, 4 John. Ch. 363; Shephard *v.* Merrill, 3 John. Ch. 422; Goodwin *v.* Goodwin, 3 Atk. 370; Dormer *v.* Fortescue, 3 Atk. 132; Ensworth *v.* Lambert, 4 John. Ch. 605; M'Gown *v.* Yerks, 6 John Ch. 450; Harrington *v.* Slade, 22 Barb. 161; Clark *v.* Keene, 46 N. H. 273; Gillett *v.* Hall, 13 Conn. 426, 434; Toppan *v.* Evans, 12 N. H. 330. See note (3), *ante*, p. 1531.

[Upon a supplemental bill, a *subpœna* is not required unless new parties are made; a rule upon parties already served to answer the supplemental bill is sufficient. Shaw *v.* Bill, 95 U. S. 10.]

[3] Attorney-General *v.* Foster, 2 Hare, 81.

[4] 9 Sim. 72.

mental bill is filed against a new defendant, it is not necessary to state in it all the circumstances of the case at length; all that is requisite is, that the plaintiff should state so much of the case as shows that he has an equity against such defendant.

With respect to the parties to a supplemental bill, if the bill has been rendered necessary by an alteration of interest of a defendant, *or by a person coming in *esse* who is necessary to be made a *1533 defendant, the supplemental bill may be exhibited by the plaintiff in the original suit, against such person alone, and may pray a decree upon the particular supplemental matter alleged against that person only;[1] unless, which is frequently the case, the interests of the other defendants may be affected by that decree, in which case such other defendants must be made parties.[2] In the case of *Dyson* v. *Morris*,[3] Sir J. Wigram V. C., though not called upon to make an express decision upon the subject, stated his opinion to be "That the cases in which the parties to the original bill were necessary parties to a supplemental bill, were those in which the interests of the original defendants required, that such new parties should be before the Court, and that the cases in which the parties to the original bill were not necessary parties to the supplemental bill, were those in which the new parties were brought before the Court in respect of the interest of the plaintiff, or of the new defendants." Acting upon this principle, in the case of *Jones* v. *Howells*,[4] where a person not a party to the original suit was brought before the Court by supplemental bill for the purpose of litigating questions with the defendants to the original suit, Sir J. Wigram V. C. held that such last-mentioned defendants ought to have been parties to the supplemental bill. Where a supplemental bill is merely for the purpose of bringing formal parties before the Court as defendants, the parties defendant to the original bill need not, in general, be made parties to the supplemental,[5] and the recent new rules

[1] A supplemental bill, for the purpose of bringing parties before the Court, who ought to have been parties to the original bill, may be filed at any period of the cause: and it is not unfrequently the case, that where a cause, at the hearing, has been ordered to stand over with liberty to add parties, it has been expressly directed that they should be added by supplemental bill: Jones v. Jones, 3 Atk. 110; though even the ordinary direction on such occasions, that the plaintiff shall be at liberty to add parties by amendment, has been held to authorize the filing of a supplemental bill for that purpose. Greenwood v. Atkinson, 5 Sim. 419; see Watt v. Crawford, 11 Paige, 479. Where an objection, for want of parties, is made out at the hearing, the plaintiff, instead of amending the original bill, may file a supplemental bill, merely to bring in the parties wanting; and defendants to the original bill need not, in such case, be made parties to the supplemental bill. Ensworth v. Lambert, 4 John. Ch. 605; Dow v. Jewell, 18 N. H. 340, 352. A supplemental bill for the purpose of adding new matter, or for bringing new parties before the Court, may be filed after as well as before the decree. Jenkins v. Eldredge, 3 Story, 307; Woodward v. Woodward, 1 Dick. 53; Boeve v. Skipwith, 1 Eq. Cas. Ab. 80; 2 Ch. Rep. 142; Dormer v. Fortescue, 3 Atk. 142; see North Amer. Coal Co. v. Dyett, 2 Edw. Ch. 115; Pleasants v. Logan, 4 Hen. & M. 489. As to supplemental bills, filed after decree, see *post*, 1536, note.

[2] Ld. Red. 35, 3d ed. 59; see also Bignell v. Atkins, Mad. & Geld. 369. If the decree against the new defendants will affect the interests of the original defendant, the latter should be made a party, otherwise not. Chace v. Searles, 45 N. H. 511, 523, 524.

[3] 1 Hare, 413.

[4] 2 Hare, 342; see also Feary v. Stephenson, 1 Beav. 42; Pinkus v. Peters, 5 Beav. 253; Wilkinson v. Lawkes, 9 Hare, 209.

[5] Ld. Red. 75; Greenwood v. Atkinson, 5 Sim. 419; Ensworth v. Lambert, 4 John. Ch. 605; M'Gown v. Yerks, 6 John. Ch. 450.

concerning parties[6] will, in most cases, prevent the necessity of making the parties to the original bill parties to the supplemental suit.

*1534 *It may be mentioned here, that a new party, representing the interest of a former party, who comes before the Court by a supplemental bill, whether filed by himself or by the plaintiffs, stands exactly in the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings from the beginning of the suit;[1] therefore it has been held that a purchaser of the interests of a party, *pendente lite*, on filing his supplemental bill, comes into Court *pro bono et malo*, and is liable to the costs of the proceedings from the beginning to the end of the suit. So, also, the assignees of a bankrupt who are brought before the Court by supplemental bill may be liable to the costs of the whole suit, if they improperly resist the plaintiff's demand.[2] It would appear that the plaintiff might file interrogatories for the examination of the new defendant as well with respect to the new matter as also with respect to the contents of the original bill, for under the old practice[3] such a defendant might have been called upon to answer both bills.

The proceedings upon a supplemental bill of this description are the same as the proceedings upon an original bill, and the defendant may adopt the same means of defence. Moreover, there are some objections which apply exclusively to proceedings of this description.

Thus, if a supplemental bill is brought upon matter arising before the filing of the original bill, where the suit is in that stage of proceeding that the bill may be amended, the defendant may demur,[4] although the bill contains an allegation that the facts were not known to the plaintiff till the original cause was at issue.[5] But an objection to the bill on this ground cannot be sustained at the hearing.[6] A defendant to a supplemental bill may also demur, if the same plaintiff files a supplemental bill claiming the same matter as his original bill, but upon a title totally distinct; as, where a plaintiff who had filed a bill to redeem a mortgage, as heir-at-law, was found not to be the heir, and he afterwards bought in the claim of a third person to the heirship, and filed a supplemental bill claiming under that purchase, a demurrer was allowed.[7]

A defendant may also demur, if a bill is brought against him as a *1535 supplemental bill, upon matter arising subsequent to the *time

[6] *Ante*, p. 191, note.

[1] Ld. Red. 68; Story Eq. Pl. § 342; Sedgwick *v.* Cleveland, 7 Paige, 290, 291; [Trabue *v.* Bankhead, 2 Tenn. Ch. 412].

[2] Whitcombe *v.* Minchin, 5 Mad. 91.

[3] Vigers *v.* Lord Audley, 9 Sim. 409. But, generally, a supplemental bill calls upon the defendant to answer the supplemental matter only. See American Life Ins. & Trust Co. *v.* Bayard, 3 Barb. Ch. 610; Same *v.* Sackett, *ibid.*

[4] Ld. Red. 202; Story Eq. Pl. § 614; Stafford *v.* Howlett, 1 Paige, 200.

[5] Colclough *v.* Evans, 4 Sim. 76, 80; but see Crompton *v.* Wombwell, 4 Sim. 628, 633; and Attorney-General *v.* Fishmongers' Co., 4 M. & C. 1, 9.

[6] Ranger *v.* Great Western Railway Co., 13 Sim. 368, 371; 7 Jur. 935.

[7] Tonkin *v.* Lethbridge, G. Coop. 43; *ante*, 1515, note; and see Pilkington *v.* Wignall, 2 Mad. 240, 244.

of filing the original bill, and he claims no interest in the matters in litigation by the former bill.[1]

A motion will not lie to take a supplemental bill off the file, for irregularity, on the ground that it does not state supplemental matter. The proper course in such case is to demur.[2] Besides those grounds of plea which are common to supplemental and original bills, if a supplemental bill is brought on matter which arose before the original bill was filed, and might have been introduced into the original bill, and this fact does not appear upon the supplemental bill, it may be pleaded.[3]

Pleas and demurrers to supplemental bills are subject to the same rules both with respect to their form and substance, and to the practice arising upon them, as pleas and demurrers to original bills.[4]

If a defendant to a supplemental bill neither demurs nor pleads to it, he must put in his answer as in the case of an original bill;[5] an answer to a supplemental bill is in a similar form, and is sworn to and filed in the same manner, as an answer to an original bill.

If the supplemental bill is filed after replication in the original suit, a separate replication may be filed in the supplemental suit;[6] but although the original suit is brought to a hearing after replication filed, the supplemental suit may, if desired, be brought to a hearing on motion for decree;[7] and where this course is adopted, the affidavits and other evidence filed in the case may be set forth at the foot of the notice of motion for the decree, and thus used in the supplemental suit.[8]

If the new matter in the supplemental bill is not admitted by the defendant's answer, it must be proved, otherwise the supplemental bill will be dismissed with costs. For this purpose, witnesses may be examined as to the new matter contained in the supplemental suit.[9]

It is to be recollected, that a supplemental suit is merely a continuation * of the original suit;[1] and that whatever evidence *1536

[1] Ld. Red. 202; and see Baldwin v. Mackown, 3 Ark. 517.

[2] Brayton v. Bright, 13 Pri. 316.

[3] See M'Elwain v. Willis, 3 Paige, 505; Story Eq. Pl. § 338 a; Stafford v. Hazlett, 1 Paige, 260; Lawrence v. Bolton, 3 Paige, 294; *infra*, 1539, note. Or a motion may, it seems, be made to take it off the files. Rayner v. Great Western Railway Co., 18 Sim. 568; 7 Jur. 636.

[4] Wright v. Vernon, 1 Dow. 68; see Story Eq. Pl. §§ 338 a, 611; Fulton Bank v. New York & Sharon Canal Co., 4 Paige, 127. Whether, in case of a supplemental bill filed without leave of the Court, the objection should be taken advantage of by demurrer or motion to dismiss, was started, but not decided, in Pedrick v. White, 1 Met. 76, 79. But in Barrister v. Trenton Mut. Life & Fire Ins. Co., 2 Beasley (N. J.) 154, 170, it was held that the objection in such a case could not be taken by demurrer, though the bill upon that ground may, in the discretion of the Court, be dismissed. See Lazier v. Price, 2 Paige, 435; 1 Hoff. Ch. Pr. 444.

[5] If such bill is filed without any sufficient grounds, the defendant must make the objection by plea, answer, or demurrer. Lawrence v. Bolton, 3 Paige, 294; Fulton Bank v. New York & Sharon Canal Co., 4 Paige, 127.

[6] Catton v. Earl of Carlisle, 5 Mad. 427.

[7] Gwyon v. Gwyon, 1 K. & J. 211.

[8] *Ibid.*

[9] Wilkinson v. Fowkes, 9 Hare, 592.

[1] A supplemental bill, when properly before the Court, is an addition to the original bill, and becomes part of it, so that the whole bill is to be taken as one amended bill. Gillett v. Hall, 13 Conn. 426; Hill v. Hill, 10 Ala. 527; Potter v. Barclay, 15 Ala. 439; Ramey v. Green, 18 Ala. 771; Cunningham v. Rogers, 14 Ala. 147; Harrington v. Slade, 22 Barb. 161; Mason v. York & Cumberland R. R. Co., 52 Maine, 107; Chouteau v. Rice, 1 Min. 106; Clark v. Keene, 46 N. H. 273; [Bradley v. Dibrell, 3 Heisk. 522; Dillon v. Davis, 3 Tenn. Ch. 394;] *ante*, 1541, note. But when new parties are brought into Court by the supplemental bill, it is, as to them, a

was properly taken in the original suit, may be made use of in both suits, even though not entitled in the supplemental suit; thus depositions taken in the original suit may be read at the hearing of both causes; and this was permitted in a case where the original bill was filed by the plaintiff, a married woman, in a wrong name (*i. e.*, as the widow of the testator, when her husband by a previous marriage was living), and the object of the supplemental bill was to correct this error, and to bring her husband before the Court.[2]

If there has been no decree in the original suit before the supplemental bill is filed, the original and supplemental suit may come on for hearing together (unless the supplemental bill is merely for discovery), and one decree will be made in both.[3] But if a decree has been obtained before the event by which the supplemental bill was rendered necessary, though it was only a decree *nisi*,[4] there must be a decree on the supplemental bill, for which purpose the supplemental cause must be set down for hearing alone; or it may be heard with the original cause for further directions;[5] in order to which, if necessary, the Court will, upon application, order the supplemental cause to be advanced.[6]

*1537 *When after a decree new matter is discovered which might have been material in the original suit, a supplemental bill in the

new suit. Morgan *v.* Morgan, 10 Geo. 297. A bill in the nature of a supplemental bill is not an addition to the original bill, but another original bill, to which a new defence may be made. Story Eq. Pl. § 353; Mitf. Pl. 72; Zinc Co. *v.* Franklinite Co., 2 Beasley, 347; see *ante*, 1531, note. The plaintiff in the original bill, in his answer to the supplemental bill, is not controlled by the averments of the bill, nor limited to the same grounds in support of his title. Zinc Co. *v.* Franklinite Co., *ubi sup.*

[2] Giles *v.* Giles, 1 Keen, 685.

[3] Ld. Red, 64–75; John *v.* Brown, Seton Dec. 385; Story Eq. Pl. § 343.

[4] Ld. Red. 64.

[5] Seton, 386; and see Attorney-General *v.* Hurst, *ib.* 132.

[6] *Ibid.*, and see Hand, 108. A supplemental bill may be filed, either before or after a decree, and may be in aid of a decree to help its being carried into full execution, or, that proper directions may be given on some matter omitted in the original bill, or not put in issue by it, or the defence made to it. O'Hara *v.* Shepherd, 3 Md. Ch. 306; Wilson *v.* Todd, 1 M. & C. 42, 47; [Morrison *v.* Searight, 4 Baxt. 479]. A supplemental bill, after a decree, however, must not seek to vary the principles of the decree, but taking that as the basis, seek merely to supply any omissions there may be in it, or in the proceedings which led to it, so as to enable the Court to give full effect to its decisions. O'Hara *v.* Shepherd, *supra;* Hodson *v.* Ball, 1 Phil. 177, 182; S. C. 11 Sim. 456.

If it does more than this, if it makes a new case, or is inconsistent with, or impeaches the decree, then it becomes a bill of review, or a supplemental bill in the nature of a bill of review, which cannot be filed without the leave of the Court. See *infra.* One of the tests of this is, whether the decree, if not referred to in the bill, could have been pleaded in bar of the relief prayed. Taylor *v.* Taylor, 1 M'N. & G. 397, 405; Bainbrigge *v.* Baddeley, 2 Phil. 705, 708; Toulmin *v.* Copland, 2 Phil. 711, 715, overruling S. C. 4 Hare, 41. Thus, where the plaintiff, who had obtained a decree for an account, in the common form, sought, upon a supplemental bill, alleging new facts, which had been discovered subsequently to the filing of the original bill, to obtain an account of what, but for their wilful neglect or default, the defendants might have received, the bill was ordered to be taken off the file for irregularity. Hodson *v.* Ball, 11 Sim. 456, 461; 1 Phil. 177, 182; and see observations of L. J. Turner on this case, 4 De G., M. & G. 221; see also Wilson *v.* Todd, 1 M. & C. 42, 46; Newdigate *v.* Newdigate, 8 Bligh N. S. 734; Toulmin *v.* Copland, 2 Phil. 711, 715; Tynte *v.* Hodge, 13 W. R. 172. But where a defendant, who had the conduct of the cause, filed a supplemental bill, for a similar object, it was not considered irregular; and a decree was made upon it. Berrow *v.* Morris, 10 Beav. 437; and see Shepherd *v.* Towgood, T. & R. 379, 393. If the supplemental bill has been improperly or unnecessarily filed, it will be dismissed at the hearing, although the plaintiff obtains a decree on the original bill. Eager *v.* Price, 2 Paige, 339.

nature of a bill of review may in some cases be filed, but a bill of this description cannot be filed without leave of the Court having been first granted.[1] In order to obtain permission for this purpose, a petition must be presented, supported by an affidavit to show that the "new matter could not be produced or used by the party claiming the benefit of it at the time when the decree was made. If the Court is satisfied that the new matter is relevant, and material, and such as might probably have occasioned a different determination, it will permit a bill of review to be filed."[2] If a supplemental bill in the nature of a bill of review is filed without the leave of the Court, it may be taken off the file for irregularity.[3] The bill prays "That the cause may be heard with respect to the new matter made the subject of the supplemental bill at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires."[4]

The proceedings upon a bill of this description are the same as those upon original bills in general.

If the supplemental bill is filed after decree, it must be brought to a hearing on independent evidence: but the defendant cannot, upon such hearing, object that the decree in the original suit was wrong; he must submit to the usual supplemental decree, and appeal in both suits.[5]

With respect to the person who upon a suit becoming abated has a right to the benefit of the former proceedings, either by a simple order to revive or by a supplemental bill, the original practice seems still to continue.

Where an abatement of a suit takes place before decree by the death of a sole plaintiff, the only person entitled to an order to revive, is the representative, real or personal, as the case may be, * of *1538 such plaintiff,[1] unless, indeed, the bill was originally filed by the plaintiff in a representative capacity, *viz.*, as executor or administrator of a person deceased; in which case the party to revive will be the individual in whom the representation of the deceased person is vested, and not the representative of the original plaintiff, unless such repre-

[1] Hudson v. Ball, 1 Ph. 177; Davis v. Bluck, 6 Beav. 393; Hungate v. Cassayne, 2 Phil. 23; and see 1 Phil. 484; O'Hara v. Stoddart, 3 Mad. Ch. 286; [Beckingham v. Cooling, 29 N. J. L. 253;] *ante*, 1525; *post*, *Bills of Review*.

[2] 1 Ed. Rep. 94. The passage quoted has reference to a bill of review, but the same proof is requisite to obtain leave for a supplemental bill in the nature of a bill of review, 1 Ed. Rep. 91; Jenkins v. Ellenborough, 3 Sim. 209, 214 *et seq.*; see Fairhurst v. Kneeman, 2 Bligh. O. S. 72. So as to a bill of review and supplement in the nature of a bill of review. Pendleton v. Fay, 2 Paige, 204.

[3] Wilson v. Todd, 1 M. & C. 42; Newdigate v. Newdigate, 8 Bligh N. S. 474; Tomlinson v. Copland, 2 Phil. 716; see Ranger v. Great Western Railway Co., 13 Sim. 368; Bowyer v. Bright, 13 Pri. 316; *ante*, 1536, note 6.

[4] 1 Ed. Rep. 91.

[5] Jenkins v. Cross, 15 Sim. 76.

[1] See Barnhart v. Brant, 17 How. U. S. 43. Where a bill for partition is filed, and the plaintiff subsequently dies, and his devisee thereupon files a bill to revive and continue the proceedings in the original suit, if no objection to this last bill that the plaintiff is an infant, and was therefore incapable of commencing an original suit for the partition of lands. McCasker v. Brady, 1 Barb. Ch. 329.

sentative is also clothed with the character of representative of the original testator or intestate.[2]

If the abatement has occurred in consequence of the death of one of several plaintiffs, the suit may be revived by the representative of the deceased plaintiff, either in conjunction with, or separately from, the surviving plaintiffs; who, however, if they refuse to concur in the application, must be served with the order.[3] It seems also, that, where one of several plaintiffs dies, unless the interest of the deceased plaintiff survives to the others the suit becomes wholly abated; so that it is necessary to serve all the parties to the original suit, with the order of revivor:[4] but one of the surviving plaintiffs may, if the other surviving plaintiffs refuse to join, obtain an order of revivor alone; serving the other surviving plaintiffs, as well as the representatives of the deceased plaintiff, with the order.[5]

In the case of a bill by a corporation sole, the death of the plaintiff occasions an abatement, but a material distinction arises with respect to the person entitled to revive or continue the suit. If the plaintiff was entitled to the subject-matter for his own benefit, the suit may be revived by his personal representative; but if the plaintiff was only entitled in his corporate capacity, for the benefit of himself and successors, his successor is the person who ought to continue the suit, which he must do by means of a supplemental bill.[6]

When the abatement is occasioned by the marriage of a female plaintiff,[7] the suit may be revived by the husband and wife jointly;[8] or, if the property in litigation be the wife's separate property, the suit may be continued on the part of the wife, by her next friend.[9]

*1539 *In such case, however, a simple order to revive could probably not be obtained, but a bill of supplement would be required.

Where the abatement has occurred before decree, the suit can only be revived by the plaintiff or those claiming under him.[1] In certain circumstances, however, a defendant, though he cannot revive the suit, may obtain an order that the plaintiff or his representatives may revive within a limited time, or that the bill may be dismissed.[2]

But although the general rule is strict, that, before decree, a defend-

[2] Huggins *v.* York Building Co., 2 Eq. Ca. Ab. 3, pl. 14; Stuart *v.* Barrowes, Drury, 265; O'Brien *v.* Mahon, 2 Jo. & Lat. 201. If, in a case of this nature, a suit has been revived by a wrong party, the proper course to be pursued by the right party is to revive *de novo*, *ibid.*; and see Rylands *v.* Latouche, 2 Bligh, 566.

[3] Fallowes *v.* Williamson, 11 Ves. 309; and see Pannell *v.* Hurley, 2 Coll. 241.

[4] Cave *v.* Cork, 2 Y. & C. C. C. 130.

[5] Finch *v.* Lord Winchelsea, 1 Eq. Ca. Ab. 2, pl. 7.

[6] But see *ante*, 1512, n. 3.]

[7] As to the effect on the suit of a marriage of a female defendant, see *ante*, p. 188.

[8] See Boynton *v.* Boynton, 21 N. H. 246.

[9] Trezevant *v.* Broughton, 5 W. R. 517, M. R.; Seton, 1165; Powell *v.* Heather, 1 L. T. N. S. 479.

[1] See Aldridge *v.* Dunn, 7 Blackf. 249. The rule, irrespective of any statute, is, that where a sole plaintiff or defendant dies before decree, the suit cannot be revived at the instance of the defendant, or of his legal representative. Benson *v.* Wolverton, 1 C. E. Green, 110. The statute of New Jersey has not altered the practice, except by providing a more expeditious mode of proceeding by order, instead of resorting to a bill of revivor. Benson *v.* Wolverton, *supra*.

[2] *Ante*, p. 812 *et seq.*; Harrington *v.* Becker, 2 Barb. Ch. 75.

ant cannot sustain a bill of revivor, the case is different after decree, and the suit may be revived at the instance of a defendant, if the plaintiffs, or those standing in their right, neglect to do it: for then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and have a right to prosecute it.[3]

Attempts have been made to limit the right of the defendant to revive, to cases in which there has been a decree for an account, in support of which a *dictum* of Lord Hardwicke, in an anonymous case in Atkyns,[4] has been relied upon: but it seems to be now held, that it is not in cases of account only that a defendant can revive, but that he may do so wherever he has an interest.[5] He must, however, have some interest under the decree: that is, an interest in the further prosecution of the suit.[6] Where the object of the revivor is not to continue the suit, but merely to put an end to an injunction, and to be allowed to proceed at Law, a bill of revivor by the defendant will be liable to a demurrer,[7] and the defendant must proceed to get rid of the injunction in the ordinary way.[8]

A defendant who wishes to revive a suit after decree, should, it seems, give notice of his intention to do so to the plaintiff or his * representatives.[1] It does not appear, however, that the neces- *1540 sary effect of a revivor, by a defendant, is to take from the plaintiff the conduct of the cause.

Where, in a creditor's suit, the plaintiff dies after decree, any creditor, who has proved his debt, may revive the suit, but he should first give notice to the plaintiff's representatives, if any.[2] And a similar order has been made where the plaintiff became bankrupt.[3]

It is to be observed, that the object of revivor by a defendant is merely to substantiate the suit, and to bring before the Court the parties necessary to see to the execution of the decree, and to be the objects of its operation, rather than to litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided. Parties to the original decree, who can neither execute the

[3] Ld. Red. 79; Kent v. Kent, Prec. in Ch. 197; 2 P. Wms. 263 n.; Anon., 3 Atk. 691; Lady Stowell v. Cole, 2 Vern. 295; Lord Stowell v. Cole, 3. 219; Story Eq. Pl. § 372; Williams v. Cole, 10 Ves. 400; Dewaynes v. Morris, 1 M. & C. 214. Where a sole plaintiff or defendant dies after decree, either party may revive the suit. Benson v. Wolverton, 1 C. E. Green, 140; Poer v. Cookesow, 2 Beasley, 136; Griffith v. Brannagh, 1 Bland, 548.

[4] Atk. 691.

[5] Finch v. Lord Winchelsea, 1 Eq. Ca. Ab. 2.

[6] After decree, if the defendant or his representative has an interest in the further prosecution of the suit, the suit may be revived at his instance; and a defendant having a beneficial interest is entitled to a bill of revivor, for the purpose of appealing from the decree. Poer v. Cookesow, 2 Beasley, 136. But if the right of appeal is lost, the plaintiff can have no right to a decree of revivor. Poer v. Cookesow, 1 McCarter, 361.

[7] Heywood v. Schmoles, 12 Ves. 311.

[8] Heywood v. Schmoles, *supra*; and see *post*, pp. 1542, 1543.

[1] Noble v. Stow, 30 Beav. 512; see, however, Lyn v. Lee, 4 De G., M. & G. 219; 10 Hare Ap. 72; 17 Jur. 272.

[2] Dixon v. Wyatt, 4 Mad. 392; Cook v. Bevan, 5 Russ. 282; Brown v. Lake, 2 Coll. 620; Williams v. Chard, 5 De G. & S. 9, 14; Johnson v. Hamersley, 24 Beav. 498; Lowes v. Lowes, 2 De G., M. & G. 784; Lashley v. Asapp, 9 W. R. 649, M. R.; Bell v. Bell, 12 W. R. 230.

[3] English v. Hayman, 9 Hare Ap. 88.

decree nor be the objects of its operation, are not necessary or proper parties to the bill of revivor.[4] A new party, representing the interest of a former party, who is brought before the Court by revivor, stands exactly in the same plight and condition as the former party; is bound by his acts; and may be subject to all the costs of the proceedings, from the beginning of the suit.[5]

It will be recollected, that the order to revive must be served upon the parties who, according to the former practice, would have been parties to the bill of revivor or supplemental suit, which would have been necessary under the former practice to remedy the defect in the cause; consequently it will be necessary to inquire who were parties to such proceedings.[6]

If the abatement was caused by the death or marriage of a sole plaintiff, and the suit is to be continued by the representatives of the original plaintiff, or by the husband and wife, all the defendants to the original bill were parties to it, and must therefore now be served with notice;[7] and so also, if the abatement was caused by the death or marriage of one of several plaintiffs, and the suit was continued by the surviving plaintiffs and the representatives of the deceased plaintiff,[8] or by *1541 the husband and wife in conjunction * with the other plaintiffs.

If the suit was continued, either by the surviving plaintiffs alone, or by the representatives of the deceased plaintiff alone, the representatives of the deceased plaintiff in the one case, or the surviving plaintiffs in the other, were made defendants to the bill of revivor, in conjunction with the original defendants: thus, if one of several tenants in common, plaintiffs, died, and a bill of revivor was filed by his representatives, the survivor, if not a co-plaintiff, must have been a defendant;[1] and so, if in the case of the marriage of a female, one of several plaintiffs, the suit was continued either by the husband and wife alone, or by the other plaintiffs alone, the other plaintiffs in the one case, and the husband and wife in the other, must have been defendants as well as the original defendants.

Where the abatement was caused by the death of a defendant the only parties necessary to be made defendants to the bill of revivor were the representatives of the deceased defendant.[2]

4 Story Eq. Pl. §§ 342, 376; Ld. Red. 79; Cooper Eq. Pl. 71; Peer *v.* Cookerow, 2 Beasley, 136; S. C. 1 McCarter, 361; *post*, p. 1545 and note.

5 Ld. Red. 68; Whitcomb *v.* Minchin, 5 Mad. 91; Anon., 1 Atk. 89; Story Eq. Pl. § 342; Sedgwick *v.* Cleveland, 7 Paige, 290; [Lewis *v.* Outlaw, 1 Tenn. 140; Berygon *v.* Fleming, 2 Lea, — ; Marlatt *v.* Warwick, 4 C. E. Green, 445; Fretz *v.* Stover, 22 Wall. 198]. But see Foxwell *v.* Greatorex, 33 Beav. 345, where the assignee of a bankrupt, who improperly continued the defence to a suit, was held only liable to pay the costs subsequent to the bankruptcy.

6 See *ante*, pp. 1509–1511, notes.

7 But if a defendant who has not answered is omitted, it will not be a ground of demurrer. Oxburgh *v.* Fincham, 1 Vern. 308.

8 Cave *v.* Cork, 2 Y. & C. 130.

1 Fallowes *v.* Williamson, 11 Ves. 306.

2 Where the suit abates by the death of one of the original defendants, and a third party subsequently acquires the interest of the deceased party by purchase from his heirs before the revival of the suit against such heirs, the suit must be revived by a bill of revivor and supplement against the purchaser. Harrington *v.* Becker, 2 Barb. Ch. 75. It is said, that if a suit abates by the death of the defendant, the plaintiff may bring a new original suit, or a bill of revivor, at his election; for he may be able to make a better case than by his first bill: Story Eq. Pl. (3d ed.) § 354, note; but this would not be regarded as reasonable in a case where the defendant had answered. Nicoll *v.* Roosevelt, 3 John. Ch. 60.

Where a bill of revivor was filed, after decree, all persons interested in carrying the decree into execution were made parties to the bill of revivor.[3]

It is said, that if a bill be exhibited against *baron* and *feme*, and the husband dies, the suit is abated, and a bill of revivor must be exhibited against the wife, because she is not obliged to abide by the answer which was put in for her under the power of her husband.[4] This, however, does not appear to be correct, unless where a new interest arises to the wife upon the death of her husband, in which case, as we have seen, a supplemental bill must be filed against the wife, for the purpose of affording her an opportunity of putting in another defence in respect of her newly acquired interest.[5]

Where a man and his wife are defendants, if the wife dies, there will be an abatement of the suit, and the administrator of the wife must be made a party by revivor.[6]

It may be noticed here, that a suit which has become entirely abated may be revived as to part, only, of the matter in litigation, or as to part, by one bill, and as to the other part, by another: thus, if the rights of a plaintiff in a suit, upon his death, become * vested, *1542 partly in his real and partly in his personal representative, the real representative may revive the suit so far as concerns his title, and the personal so far as his demand extends.[1]

But although a suit may be revived as to part of the matter in litigation, it cannot be revived as to part of the proceedings. Thus a revivor cannot be made to operate from a particular period of the cause only, but the whole proceedings, bill, answer, and orders made in the cause, must stand revived; for the revivor is but a continuance of the same suit, and it cannot be a continuation of the same unless it proceeds from where the other left off.[2]

The question, whether the Statute of Limitations is a bar to revivor has been much discussed. It seems, however, that the statute applies to suits before decree;[3] but that, after a decree for an account, it is in the discretion of the Court: and the order of revivor will be discharged, only where there appears to have been negligence or *laches* on the part of the applicant.[4] If the party, entitled to object to the order of revivor proceeds with the suit, before stating the objection, the objection will be waived.[5]

[3] Metcalfe v. Metcalfe, 1 Ken. 74. After a decree a bill of reviver cannot be filed to bring in a posthumous heir, and make him party to the decree so as to direct his estate to be sold for payment of debts. McConnel v. Smyth, 23 Ill. 611.

[4] Fitz. tenn. 119.

[5] See cases, p. 168.

[6] *Ante*, p. 178.

[1] 1 Ad. Ecc. 81; Ferrers v. Cherry, 1 Eq. Ca. Ab. 3 4.

[2] Dig. Rev. 174.

[3] 1 Ad. Ecc. 230; Hollingshead's case, 1 P. Wms. 742, 744; see 2 Sch. & Lef. 629; Earl of Egremont v. Hamilton, 1 B. & B. 516; Perry v. Jenkins, 1 M. & C. 118, 121; Bland v. Davison, 21 Beav. 312.

[4] Higgins v. Shaw, 2 Dr. & War. 356; Alsop v. Bell, 21 Beav. 451, 464; and see Parkinson v. Lewis, 28 Beav. 627, 630. The mere fact that three years have elapsed since the signing of a decree cannot be set up on demurrer to the bill of revivor. Peer v. Cockerow, 2 Beasley (N. J.), 136. The objection arising from the lapse of time is a mere matter of limitation, which must be pleaded, even though the objection appear upon the record. Peer v. Cockerow, *supra*.

[5] Jones v. Powell, 11 Beav. 398.

It may be useful to the practitioner, before concluding this section, to direct his attention to some of the ordinary effects of abatement and revivor upon the proceedings in the cause.

Where the abatement is total, *i. e.*, where it is caused by the death, bankruptcy, insolvency, or marriage of the plaintiff (being a female), the cause is completely suspended, and cannot be proceeded in, till it has been revived, or the defect, caused by the abatement, cured;[6] and, in general, all orders made pending such abatement, will be considered nugatory, and may be discharged. The same rule will also apply where the abatement has been caused by the death of one or more plaintiffs. Thus if, pending a total abatement, process of contempt is issued, it will be irregular, and may be discharged on motion with costs, and if a defendant is arrested on any process pending such abatement, he will be discharged from such arrest, with costs.[7] So, also, an order to dismiss a bill for want of prosecution, obtained pending an abatement, will be irregular.[8]

*1543 * It is to be observed, however, that, although the general rule is as above stated, there are many cases in which the Court will entertain applications, although the suit is abated.[1] Thus it will entertain a motion to discharge process of contempt issued or executed pending an abatement; so also, although no regular order to dismiss a bill for want of prosecution can be obtained before revivor, the Court is now enabled, if the plaintiff's representatives omit to revive the suit within a reasonable period, to make an order that they shall revive within a limited time, or else that the bill shall be dismissed.[2]

It has, also, where the right to money in Court has been clear under former orders and reports, made an order upon petition for payment of the money out of Court to the party entitled, without regarding the abatement,[3] or for the delivery of deeds and writings brought into Court, or it will direct an inquiry to whom they belong.[4]

An enrolment of a decree may also be made, and an order to do so, *nunc pro tunc*, may be made, notwithstanding an abatement.[5]

Where, however, the suit abates after a decree has been pronounced, but before it is passed, there must be a revivor before it can be passed.[6]

[6] See Johnson *v.* Thomas, 2 Paige, 377.

[7] Wilson *v.* Metcalfe, MSS.; see Gibbs *v.* Churton, C. P. Coop. 496.

[8] Sellars *v.* Dawson, 2 Anst. 458; S. C. *nom.* Sellas *v.* Dawson, 2 Anst. 458, n.; but see 1 Mer. 365; Boddy *v.* Kent, *ib.* 361, 365; Robinson *v.* Norton, 10 Beav. 484.

[1] Proceedings may be had in such case to preserve the property in dispute: Washington Ins. Co. *v.* Slee, 2 Paige, 358; or to set aside irregular proceedings in the Master's office: Quackenbush *v.* Leonard, 10 Paige, 131; or to punish a party for a breach of an injunction: Hawley *v.* Bennett, 4 Paige, 163.

[2] Ord. XXXII. 4; *ante*, p. 812; Adamson *v.* Hall, T. & R. 258, overruling S. C. *nom.* Adamson *v.* Hull, 1 S. & S. 249.

[3] Roundell *v.* Burrer, 6 Ves. 250; see also Beard *v.* Earl Powis, 2 Ves. 399; Methodist Epis. Church *v.* Jaques, 3 John. Ch. 1; and see Jones *v.* Williams, C. P. Coop. 488.

[4] Wharam *v.* Broughton, 1 Ves. 185; and see Andrews *v.* Lockwood, 2 Phil. 398; 11 Jur. 956; Alderman *v.* Bannister, 9 Beav. 516; Houghton *v.* Godschall, 2 C. P. Coop. t. Cott. 89.

[5] But see *ante*, p. 1020 note (1), where it is said that the effect of Ord. XXIII. 25, is to abolish the practice which existed before it was promulgated, of enrolling decrees *nunc pro tunc*.

[6] Bertie *v.* Lord Falkland, 1 Dick. 25.

It is to be recollected that the Statute of Limitations will run pending an abatement in all cases, except a decree to account.[7]

For the effect of an abatement upon a sequestration to enforce an answer to a decree, the reader is referred to former parts of the present Treatise.[8]

It is to be observed, that an abatement, although it suspends proceeding in a cause, does not put an end to them; therefore, where process of contempt has been executed, and a defendant is in custody upon it, and afterwards the suit abates, the defendant is not thereby entitled to his discharge out of custody, but he must move that the plaintiff may revive within a limited time, or that the bill may be dismissed and he may be discharged. So, also, an injunction is not absolutely dissolved by an abatement, but the defendant must, if he wishes to get rid of the injunction, move that the plaintiff may revive within a limited time, or that the * injunction may be dissolved.[1] With respect *1544 to motions of this description, Sir J. Wigram V. C. observed,[2]

"That by the abatement of the suit all orders made in it would naturally drop. When, therefore, the Court (before it will permit an injunction to drop, on the ground of the suit being abated) gives the representatives of a deceased plaintiff notice that the injunction will be dissolved, unless the suit is revived within a limited time, it makes no order against the representatives, but, as matter of indulgence merely, gives them notice that the natural consequences of the abatement of the suit will ensue, unless they take measures to prevent it. And when the Court makes an order in the abated suit that the injunction be dissolved, it decides only that it will no longer prevent the natural consequences of the abatement of the suit."

The same observations seem to apply to receivers appointed under an order of the Court, who are not usually discharged on abatement without an order of the like description.[3]

Where an abatement is partial, *e. g.*, where it is caused by the death of a defendant, it prevents those proceedings only by which the interest of the deceased defendant may be affected; for the death of a defendant makes an abatement *quoad* himself alone; therefore, if there be a decree against trustees and their *cestui que trust* to convey, and the *cestui que trust* dies, the trustees may be compelled to convey, notwithstanding his death.[4] So also, pending an abatement by the death of a defendant, process of contempt may be issued and executed against the other defendants; and, during such an abatement, the Court will, at the in-

[7] Hollingshead's Case, 1 P. Wms. 743.

[8] *Ante*, p. 1059.

[1] Jones v. Massey, Brown v. Warner, Turner v. Cole, all quoted in Cromack v. Dimes, 3 Beav. 242; Lee v. Lee, 1 Hare, 617, 622; Fisher v. Fisher, 4 Hare, 176; Leggett v. Dubois, 2 Paige, 211; Hawley v. Bennett, 4 Paige, 164; White v. Buckingham, 1 Hen. & M. 1; Kenner v. Hart, 1 Hen. & M. 204; Collier v. Bank of Newbern, 1 Dev. & Bat. Eq. 328; [Thompson v. Hill, 5 Yer. 418]. This will not apply to injunctions made perpetual by decree. See Askew v. Townsend, 2 Dick. 471, and [Justice v. McBloom, 1 Lea, 556].

[2] Lee v. Lee, 1 Hare, 622.

[3] See *post*, *Receivers*.

[4] Finch v. Lord Winchelsea, 1 Eq. Ca. Ab. 2.

stance of a creditor, take the prosecution of a decree from the plaintiff.

It has also been held, that the death of a defendant, after hearing but before judgment, does not necessarily prevent judgment, nor, in general, the drawing up of the decree;[5] but where, upon a motion to dismiss for want of prosecution, the plaintiff appears and undertakes to set the cause down for hearing within a limited time, in default of which the bill is to stand dismissed, and afterwards the defendant dies, and the time for setting the cause down expires before the suit can be revived, the order dismissing the bill is suspended during the abatement.[6]

*1545 *Where a bill against several defendants is retained, with liberty for the plaintiff to bring an action against one of them, the trial may take place during an abatement occasioned by the death of another defendant, provided such other is not directed by the decree to attend the trial, in which case a trial before the suit is revived against such defendant will be irregular.

Where the abatement of a suit is total, an order to revive places the suit and all the proceedings in it in precisely the "same plight, state, and condition that the same were in at the time when the abatement took place,"[1] and the new plaintiff may take the same proceedings in the cause that the original plaintiff might have done,[2] thus the plaintiff in a revived suit may amend the original bill, and issue an attachment against the defendant for not answering the amended bill.[3] So also, the new plaintiff may prosecute process of contempt against the defendant, taking it up where it left off at the abatement; and if a process has been issued before the abatement, it will be revived by the order to revive.[4]

The case is different where the abatement is occasioned by the death of a defendant; in such case, the process being personal, cannot be revived. In general, however, where an abatement is occasioned by the death of a defendant, the order to revive against the representatives of such defendant will place the suit as fully in the same position with regard to such representatives as can be done, with reference to the change of the individuals before the Court.

It will be necessary still to refer to a distinction which existed under the old practice, and which, though now nearly obsolete, will, in some cases, be necessary to an accurate comprehension of the existing practice.

[5] Davies *v.* Davies, 9 Ves. 461; Belsham *v.* Percival, 8 Hare, 157; 2 C. P. Coop. t. Cott. 176; Collinson *v.* Lister, 20 Beav. 355; 1 Jur. N. S. 835.

[6] Gregson *v.* Oswald, 1 Cox, 344.

[1] Gregson *v.* Oswald, 1 Cox, 343.

[2] *Ante*, p. 1540; Story Eq. Pl. §§ 342, 376; Peer *v.* Cookerow, 1 McCarter, 361; Benson *v.* Wolverton, 1 C. E. Green, 110. It is still the same suit, in which both parties are entitled to the benefit of all former proceedings. No answer is required, if the bill has already been answered, unless a discovery of assets is desired; the depositions of witnesses, if any have been taken, may be read; and if the cause has proceeded to final decree, it will remain in force against the new party. All that is open for litigation is whether the new party brought before the Court has the representative character imputed to him. Marlatt *v.* Warwick, 4 C. E. Green, 439; Peer *v.* Cookerow, 1 McCarter, 361.

[3] Ld. Red. 78; Philips *v.* Darbie, 1 Dick. 98.

[4] Hyde *v.* Forster, 1 Dick. 134.

A bill of revivor, properly so called, applied only in cases where a death intervened, and it was necessary to bring the proper representatives, whether real or personal, of the deceased party, before the Court; or where, by reason of the marriage of a female plaintiff, her rights were so modified that the suit could not be carried on by herself alone, but her husband became a necessary party.[5] In each of these cases there was no other fact to be ascertained, *than *1546 whether the new party brought before the Court had the character imputed to him. If he had, the revivor was of course:[1] but there were many cases, in which there were other facts which might be brought into litigation, besides the mere question of the character of the new party; and to such cases, therefore, the simple bill of revivor did not technically apply. Under such circumstances, an original bill in the nature of a bill of revivor was the appropriate process to bring these facts before the Court, and to put the original proceeding again in motion, and enable the new party to have the benefit of the former proceedings.[2]

With respect to the cases where the plaintiff after filing a supplemental bill was entitled to the benefit of the former proceedings, reference must be had to the former practice, from whence it appears that there might be this difference between an original bill in the nature of a bill of revivor and an original bill in the nature of a supplemental bill: upon the first, the benefit of the former proceedings was absolutely obtained; so that the pleadings in the first cause, and the depositions of witnesses, if any had been taken, might be used in the same manner as if filed or taken in the second cause; and if any decree had been made in the first cause, the same decree shall be made in the second:

[5] *Ante*, pp. 113, 114.

[1] Penn v. Cockerow, 1 McCarter, 361, 365; Story Eq. Pl. § 377. [A bill of revivor puts in issue nothing but the character of the new party brought in, and new defences, that is defences not made in the answer to the original bill, cannot be set up in an answer to a bill of revivor. Fretz v. Stover, 22 Wall. 198; Jackson v. Jackson, 2 Tenn. Leg. Rep. 275. The representative must take up the defence at the point where he finds it at the death of the person under whom he claims. Lewis v. Oakley, 1 Tenn. 140; Berrygan v. Fleming, 2 Leg. —.]

[2] 1 *Id.* Ibid. 70, 97; Prac. Reg. 90, 91; Brady v. McCosker, 1 Comst. 214; Welch v. Lewis, 31 Ill. 446; Story Eq. Pl. §§ 377, 378; [Hymes v. Van Riper, 11 C. E. Green, 337].

Whenever a plaintiff has a right to revive a suit, he may add to the bill of revivor such supplemental matter as is proper to be added. Pendleton v. Fay, 3 Paige, 204; Mowbray v. Marlborough, 2 E. L. 410. A bill of revivor and supplement is merely a compound of those two species of bills. So a bill not only continues a suit that has abated, but supplies any defects in the original bill arising from subsequent events. Westcott v. Cady, 5 John. Ch. 242. It must be framed and proceeded upon in the same manner as the two species of bills of which it is compounded. Ld. Red. 80. And the same defences are applicable, that would be, if they were separate. Lake v. Austwicke, 4 Jurist, 314.

[Where the papers of a suit were lost after the plaintiff had acquired a lien on property, it was held that he might preserve the equitable lien as against the representatives of a deceased defendant, by a bill of revivor and supplement. Alley v. Carroll, 6 Heisk. 221.]

If matters contained in a bill of revivor and supplement are irrelevant or improper, the defendant may take advantage of the objection either by plea or by demurrer, or by exceptions for impertinence. Pendleton v. Fay, 3 Paige, 204. But the insertion of supplemental matter in a bill of this nature will not authorize the defendant to demur to the whole bill. He should demur to the supplemental matter only. Randolph v. Dickerson, 3 Paige, 317; see Pendleton v. Fay, 3 Paige, 204; Lattimer v. Batchelder, 18 N. H. 141.

but in the other case a new defence might be made; the pleadings and depositions could not be used in the same manner as if filed or taken in the same cause; and the decree, if any had been obtained, was no otherwise of advantage than as might be an inducement to the Court to make a similar decree.[3]

A bill in the nature of a bill of revivor could not be brought, except by some person who claimed in privity with the plaintiff in the original bill:[4] thus, for example, if a bill was filed by a devisee under a will, and afterwards a subsequent will was proved, by which the same *1547 property was devised to another devisee; in such * a case, the latter devisee could not, by a bill in the nature of a supplemental bill, avail himself of the proceedings in the original suit; for there was no privity between the plaintiff in the original suit, and the plaintiff in the supplemental bill; but if the bill had been filed by the devisor himself for some matter touching the estate devised, then the second devisee might file a supplemental bill in the nature of a bill of revivor, notwithstanding the first devisee has already filed such a bill; for he derives his title solely from the devisor, independently of the first devisee.[1]

The material distinction as to the right to the benefit of the former proceedings will remain under the existing practice, though the technical distinction as to the names of the different bills will probably not be regarded hereafter; and in all the cases in which, under the former practice, an original bill in the nature of a bill of revivor might have been filed, the same benefit may now be obtained by a simple order to revive.

[3] Ld. Red. 72, and see *ante*, p. 1518.

[4] Story Eq. Pl. § 385; see *ante*, p. 1508, note.

[1] Oldham *v.* Eboral, Coop. Sel. Ca. 27; Rylands *v.* Latouche, 2 Bligh, 585; Tonkin *v.* Lethbridge, Coop. Rep. 43. Where a bill in the nature of bill of revivor is filed by any one, who was not a party to the original suit either as the representative of a deceased party or otherwise, all of the other parties to such original suit, who have any interest in the further proceedings therein, should be made parties to such bill, either as plaintiffs or defendants. The Farmers' Loan and Trust Co. *v.* Seymour, 9 Paige, 538.

FRAME AND END OF CERTAIN KINDS OF BILLS.

SECTION I. — *Cross-Bill, and Interrogatories for the examination of Plaintiffs.*

A CROSS-BILL is a bill brought by a defendant against the plaintiff (and, if necessary, other parties), in another suit, touching the same matter.[1] It frequently happens, that a complete decree cannot be made without a cross-bill, or cross-bills, to bring the whole matter in dispute completely before the Court. In such a case, it becomes necessary for some or one of the defendants to the original bill to file a bill against the plaintiff, and, if necessary, other defendants to that bill, or some of them, and bring the litigated point properly before the Court.[2]

[1] Ld. Red. 81; Moss v. Anglo-Egyptian Nav. Co., L. R. 1 Ch. Ap. 108; White v. Buloid, 2 Paige, 364. The cross-bill need not refer to the original suit; it is sufficient, if the subject-matter is the same. Falkland Islands v. Lafone, 3 W. R. 499, M. R.; *ib.* 561, L. JJ. It is treated as an auxiliary suit; or as a dependency upon the original suit; Slason v. Wright, 14 Vt. 208; Cross v. De Valle, 1 Wallace U. S. 1; and can be sustained only on matter growing out of the original bill. Daniel v. Morrison, 6 Dana, 186; Crabtree v. Banks, 1 Met. (Ky.) 482; Slason v. Wright, 14 Vt. 208; Rutland v. Paige, 24 Vt. 181; Galatian v. Erwin, Hopk. 48, 49; S. C. 8 Cowen, 561; [Rubber Co. v. Goodyear, 9 Wall. 807; Ayres v. Carver, 17 How. 591; Pringall v. Trevor, 30 Ark. 249]. New parties cannot be introduced into a cross-bill. Corse v. Shields v. Barrow, 17 How. U. S. 145; [Shaw v. Millsaps, 30 Miss. 480; Continental Life Ins. Co. v. Webb, 54 Ala. 688, 694;] see Lardner v. Ogden, 31 Miss. 132.

[In Vermont, new parties, when essential to the relief sought, may be introduced by cross-bill. Blodgett v. Hobart, 18 Vt. 414; and per Wheeler, U. S. Dist. Judge in that State, in Beaudro's Mss. Co. v. Prince, 14 Blatchf. 371. So in Illinois. Hurd v. Case, 32 Ill. 45; Jones v. Smith, 14 Ill. 229. But if the new party have no interest in the matter of the bill, a demurrer will lie. Kennedy v. Kennedy, 95 Ill. 130. In Tennessee, the Supreme Court has sustained a cross-bill bringing in new parties. Hollabaugh v. Beasley, 7 Heisk. 121. But the new parties are not thereby made parties to the original bill. Odam v. Owen, 2 Baxt. 450; Mayson v. Anderson, 3 Baxt. 260. And new parties cannot be brought in by the defendant's answer filed, under a statute, as a cross-bill. Odam v. Owen, 2 Baxt. 450; Hall v. Fowlkes, 9 Heisk. 745. Nor if unconnected with the original matter of litigation. Macey v. Childress, 2 Tenn. Ch. 441; Hergel v. Laitenberger, 2 Tenn. Ch. 251. And see Cobb v. Baxter, 1 Tenn. Ch. 405.

By the new orders, under the Judicature Act in England, a new party may be brought in by counter claim. Dear v. Sworder, 4 Ch. Div. 476. But a new party cannot be joined as a defendant to a cross-bill, or counter claim, against whom there is only a demand in one of two inconsistent alternatives. Buck v. Evans, 4 Ch. Div. 432.

A purchaser *pendente lite* may file a bill in the nature of a cross-bill to protect his rights. Whitbeck v. Edgar, 2 Barb. Ch. 106.]

[2] [The proper time for filing a cross-bill is at the putting in of the answer to the original suit, and, if not then filed, the delay must be accounted for, or the proceedings in that suit will not be stayed. White v. Buloid, 2 Paige, 164. See Josey v. Rogers, 13 Geo. 473; Irving v. De Kay, 10 Paige, 319, 322. In this last case, it is said that the matters of defence, upon which the cross-bill is founded, must be stated in the answer to the original suit. The rule, as to the time within which the cross-bill should be filed, will not be enforced where the Attorney-General is a party in respect to the interest of the State, nor where the sole object of the action is to settle the rights of legatees and devisees. Stevens v. Stevens, 9 C. E. Green, 77. Nor where the cross-bill is by one defendant against a co-defendant. Vanderveer v. Holcomb, 6 C. E. Green, 105. Nor where the defendant has been wrongfully kept in ignorance of the facts by complainant. Berryman v. Graham, 6 C. E. Green, 370.]

In Cartwright v. Clark, 4 Met. 104, it was held, that, as a general rule, a cross-bill must

*1549 *A cross-bill should state the original bill, and proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of cross-litigation, or the ground on which he resists the claims of the plaintiff to the original bill, if that is the object of the new bill.[1] But a cross-bill being generally considered as a defence,[2] or as a proceeding to procure a complete determination of a matter already in litigation, the plaintiff is not, at least as against the plaintiff to the original bill, obliged to show any ground of equity to support the jurisdiction of the Court.[3]

*1550 *A cross-bill may also be directed to be filed, when, at the

be filed before publication of the evidence in the original suit, unless the plaintiff in the cross-bill will go to the hearing upon the proofs already published. See also to the same point and effect, Field *v.* Schieffelin, 7 John. Ch. 252; Gouverneur *v.* Elmendorf, 4 John. Ch. 357; Sterry *v.* Arden, 1 John Ch. 62; White *v.* Buloid, 2 Paige, 164; Story Eq. Pl. § 395. In Jackson *v.* Grant, 3 C. E. Green, 145, leave to file a cross-bill was granted on petition after the time limited in the rule to close testimony.

[Generally, unless directed by the Court, a cross-bill cannot be filed after the hearing on the original bill. Roberts *v.* Peavey, 29 N. H. 392; Montgomery *v.* Olwell, 1 Tenn. Ch. 169. But a creditor, who has come in under a decree against a debtor, may, if necessary to his relief, file a cross-bill, even without the direction of the Court. Latouche *v.* Dunsany, 1 Sch. & Lef. 137. And so where the cross-bill is based on new matter happening since the decree, and while the cause is pending in the Appellate Court. Morrison *v.* Searight, 4 Baxt. 479.]

[1] Story Eq. Pl. § 401; see Allen *v.* Allen, 14 Ark. 666; Barker *v.* Belknap, 39 Vt. 168, 172. There cannot be a cross-bill in a State Court to an original bill pending in the Circuit Court of the United States. If any cross-bill is wanted in such a case, it should be brought in the same Circuit Court in which the original bill is depending, as it is not an original but an ancillary suit. Story Eq. Pl. § 400. Whenever a cross-bill is brought against co-defendants in a suit, the plaintiff in such suit must be named a defendant together with them. Coop. Eq. Pl. 85.

[2] Kemp *v.* Mackrell, 3 Atk. 812; Field *v.* Schieffelin, 7 John. 252; Galatian *v.* Erwin, Hopk. 48; S. C. 8 Cowen, 361; Cartwright *v.* Clark, 4 Met. 194; Nelson *v.* Dunn, 15 Ala. 201.

No decree can be founded upon new and distinct matters introduced by a cross-bill, which were not embraced in the original suit. May *v.* Armstrong, 3 J. J. Marsh. 262; Daniel *v.* Morrison, 6 Dana, 186; Galatian *v.* Erwin, Hopk. 48; S. C. 8 Cowen, 361; Field *v.* Schieffelin, 7 John. Ch. 252; Josey *v.* Rogers, 13 Geo. 478; Andrews *v.* Hobson, 23 Ala. 219; Gouverneur *v.* Elmendorf, 4 John. Ch. 357; Griffith *v.* Merritt, 19 N. Y. 529. But the cross-bill is not restricted to the issues of the original bill. Nelson *v.* Dunn, 15 Ala 201.

[3] Ld. Red. 81; Powell *v.* Hall, 3 De G. & S. 456; Cockrell *v.* Warren, 14 Ark. 346; Cartwright *v.* Clark, 4 Met. 104; Nelson *v.* Dunn, 15 Ala. 201.

Want of equity is no defence to a cross bill brought forward by way of defence. Lambert *v.* Lambert, 52 Maine, 544. [So held, where the bill was for divorce, and the ground of demurrer to the cross-bill, also seeking divorce, was that the defendant had not been a citizen of the State for the length of time required to sustain a bill of divorce. Sterl *v.* Sterl, 2 Ill. App. 223.] But where on the face of the cross-bill there is no equity, leave to the plaintiff to dismiss the original bill cannot prejudice the defendant. Jacoway *v.* McGarrah, 21 Ark. 347. [A defect of jurisdiction under the original bill is cured by a cross-bill founded upon matters of equitable cognizance. Sale *v.* McLean, 29 Ark. 612. But complainant cannot rely upon a cross-bill as stating a cause of action in his behalf, and must state the facts on which he seeks relief. Mercier *v.* Lewis, 39 Cal. 532.] And, if the cross-bill seeks relief, it is indispensable that it should be equitable relief, otherwise the bill will be demurrable: for, to this extent it is not a pure cross-bill; but it is in the nature of an original bill, seeking further aid of the Court, beyond the purposes of defence to the original bill; and under such circumstances, the relief should be such, as in point of jurisdiction the Court is competent to administer. Story Eq. Pl. §§ 398, 629; Coop. Eq. Pl. 86; Ld. Red. 81, and note; Calverley *v.* Williams, 1 Ves. J. 211, 213; Moss *v.* Anglo-Egyptian Nav. Co., L. R. 1 Ch. Ap. 108, 112; [Tobey *v.* Foreman, 79 Ill. 489; Cohen *v.* Woollard, 2 Tenn. Ch. 686. And see Mills *v.* Mason, 120 Mass. 244]. A cross-bill will also be open to a demurrer, when it seeks relief, which is of an equitable nature, and does not contain all the proper allegations, which confer an equitable title to such relief upon the party. Thus, a demurrer was allowed to a cross-bill to have usurious securities delivered up, because it did not offer to pay the sum really due. Story Eq. Pl. § 630; Mason *v.* Gardiner, 4 Bro. C. C. 436; see Coop. Eq. Pl. 215; Benfield *v.* Solomons, 8 Ves. 84. Such a bill will also be open to demurrer, if it is filed contrary to the practice of the Court, and under circumstances in which a pure cross-bill is not allowed. White *v.* Buloid, 2 Paige, 164; Field *v.* Schieffelin, 7 John. Ch. 250; Berkley *v.* Ryder, 2 Ves. 533, 537.

hearing of a cause, it appears that the suit already instituted is insufficient to bring before the Court all matters necessary to enable it fully to decide upon the rights of all the parties. This most commonly happens, where persons in opposite interests are co-defendants: so that the Court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject-matter of the suit. In such a case, the Court will direct a bill to be filed, in order to bring the rights of all the parties fully and properly before it; and will reserve the directions or declarations which it may be necessary to give or make, touching the matter not fully in litigation by the former bill, until this new bill is brought to a hearing.[1]

Where a defendant seeks the aid of the Court, for the purpose of enforcing his rights, he must file a cross-bill;[2] but when he

[1] Ld. Red. 81 83; Field *v.* Schieffelin, 7 John. Ch. 252; Cartwright *v.* Clark, 4 Met. 104; Rogers *v.* M'Machan, 4 J. J. Marsh. 37; Troup *v.* Haight, Hopk. 239; Patterson *v.* Hall, 9 Cowen, 747; Armstrong *v.* Pratt, 2 Wis. 249. One defendant cannot have a decree against a co-defendant without a cross-bill with proper prayer and process, or answer, as in an original suit. Talbot *v.* M'Gee, 4 Monroe, 379; Wilson J. in Barker *v.* Belknap, 39 Vt. 168, 173; Fletcher *v.* Holmes, 25 Ind. 458; but see Elliot *v.* Pell, 1 Paige, 263; [and *note*, 1479, n. 6].

[2] Hollenbeck *v.* Rankin, 2 De G., F. & J. 258; Howells *v.* Wilson, 13 W. R. 1011. In general, the defendant cannot have any positive relief against the plaintiff, even on the subject-matter of the suit, except by cross-bill. Scott *v.* Lalor, 3 C. E. Green, 301; Andrews *v.* Kibbee, 12 Mich. 94; Mason *v.* McGirr, 28 Ill. 322; McGlaughlin *v.* O'Rourke, 12 Iowa, 439; Morgan *v.* Tipton, 3 Md. Ch. 329; M'Connel *v.* Hodson, 2 Gilman, 649; Wiseman *v.* Smith, 6 Jones L., 124; Halliday *v.* Johnson, 12 Iowa, 544; M'Connel *v.* M'Clintock, 9 Iowa, 65; Miller *v.* Gregory, 1 C. E. Green, 244; Onderdonk *v.* Gray, 4 C. E. Green, 65, 66; Lobdell *v.* Starr, 4 C. E. Green, 150; Patterson *v.* Hall, 9 Cowen, 747; Jones *v.* Sayles, 14 Ill. 229; [Dreyer *v.* Livingston, 12 C. E. Green, 366; Norman *v.* Hutchinson, 54 Ill. 11; Andrews *v.* Gilman, 122 Mass. 471.

A mortgage cannot be reformed upon the pages of the answer to the bill to foreclose or redeem, the only remedy being by cross-bill. French *v.* Grigg, 3 C. E. Green, 200; Graham *v.* Berryman, 4 C. E. Green, 22; Wiseltine *v.* Cay, 1 Dutch. 180; Allen *v.* Ball, 10 C. E. Green, 194; King *v.* Enterprise Ins. Co., 45 Ind. 43; nor, where the bill is filed to set aside an assignment or conveyance, can the same be declared and established. Carmichael *v.* Brady, 11 Wisc. 448; nor can a defendant impeach the mortgage of a co-defendant. Bergen *v.* Bennett, 6 C. E. Green, 344; nor, in any manner, raise a question affecting the title to the property in dispute *pendente lite*. National Bank *v.* Sprague, 6 C. E. Green, 530; nor, on a bill to foreclose for purchase-money, obtain the benefit of the defence of fraud and resulting damage: O'Brien *v.* Hulfish, 7 C. E. Green, 471; or defect of title: *Infra*, 1653, n. 6.

But where the validity of a deed is put in question by a bill, the Court may decree title in the defendants without a cross-bill upon holding the deed to be valid: La Grange, &c. R. Co. *v.* Rainey, 7 Coldw. 420; and, where the decree is for an account, may give judgment in favor of the defendant for the balance found: Allen *v.* Allen, 11 Heisk. 387; Little *v.* Merrill, 62 Maine, 328. On foreclosure of a prior mortgage in a suit to which the subsequent mortgagee is a party, so much of the value of the homestead, included in the latter and not in the former mortgage, as may be necessary to pay the second mortgage debt, may be so applied without cross-bill. Shaver *v.* Williams, 87 Ill. 469. So, the Court will, without a cross-bill, reform a mortgage made by a client to his solicitor, drawn by the solicitor, and sought to be enforced, by disallowing oppressive provisions in ordering the account. Eyre *v.* Hughes, 2 Ch. Div. 148. And since the enactment of a statute authorizing the waiver of an answer under oath, the defendant to a bill to foreclose a purchase-money mortgage is entitled upon his answer, without cross-bill, to a deduction for a fraudulent representation by the vendor of the quantity of land sold. Dayton *v.* Melick, 12 C. E. Green, 362. So, to a deduction for a failure of title. Pitts *v.* Powledge, 56 Ala. 147.]

A cross-bill may be filed to answer the purposes of a plea *puis darrein continuance* at common law. Thus, where pending a suit, and after replication and issue joined, the defendant, having obtained a release, attempted to prove it *viâ* cross-bill, it was determined that the release not being in issue in the cause, the Court could not try the fact nor direct a trial at law for that purpose; and that a new bill must be filed to put the release in issue. Ld. Red. 80; Hoare *v.* Hayne, 3 Ch. Rep. 19; 3 Swanst. 472, 474;

*1551 relies * upon his rights, merely by way of defence to the relief sought against him, it is not necessary to do so.[1] In a suit for specific performance, however, if the defendant proves an agreement different from that insisted on by the plaintiff, the Court, without a cross-bill being filed, may decree the same to be executed.[2]

An answer to a cross-bill cannot, in general, be required, until the original bill has been answered.[3] The defendant to the cross-bill may, therefore, obtain, on motion of course,[4] or on petition of course at the Rolls, an order for a limited time to answer the cross-bill after the defendant to the original bill has put in an answer thereto.[5] Upon the same principle, the time for answering in the cross-suit has been extended until after the defendant in the original suit had complied with an order for the production of documents made in that suit.[6]

The plaintiff in the original suit may obtain the order for time to answer, above mentioned, at any stage of the suit, provided he is not already in contempt for want of answer in the cross-suit.[7] He will not, however, be entitled to the order if he omits to file interrogatories within the proper time, and in the mean time the interrogatories to the *1552 cross-bill have been filed;[8] or if he materially * amends his bill, after he knows that the cross-bill has been filed,[1] and requires an answer to the amendments: in which case, the plaintiff in the cross-suit

Miller *v.* Fenton, 11 Paige, 18. Upon the same principle, where the plaintiff, in a bill to redeem, has, after answer filed, assigned all his interest in the mortgaged premises, the defendant may avail himself of the fact by a cross-bill. Lambert *v.* Lambert, 52 Maine, 544.

The answer cannot be retained and affirmative relief given thereon, after the dismissal of the bill. McConnel *v.* Smith, 23 Ill. 607. [But the defendant may make his answer a cross-bill and have relief thereon. Thielman *v.* Carr, 75 Ill. 385.]

By statute in Mississippi, a defendant may make his answer a cross-bill against the plaintiff or his co-defendants, or all of them. Lardner *v.* Ogden, 31 Miss. 332. But a plaintiff cannot make his answer a cross-bill to the defendant's cross-bill. Brown *v.* Troup, 33 Miss. 35. [Under a similar statute, the answer can, strictly, be filed only against the parties to the original bill. *Ante*, 1548, n. (1). But if new parties are brought in without objection, relief may be granted as upon an original bill. Odam *v.* Owen, 2 Baxt. 446; Campbell *v.* Foster, 2 Tenn. Ch. 402. And see Hubbard *v.* Turner, 2 McLean, 539, where an answer filed as a cross-bill without any warrant of law, and replied to, was sustained as a cross-bill.]

As to the mode of enforcing the appearance of the defendant to a cross-bill, and as to substituted service, see Hoff. Ch. Pr. 355; Anderson *v.* Ward, 5 Monroe, 420.

[1] Hannah *v.* Hodgson, 30 Beav. 19. A cross-bill should never be brought, where the party can obtain, in the original suit, the same relief sought by the cross-bill. Braman *v.* Wilkinson, 3 Barb. S. C. 151; Tison *v.* Tison, 14 Geo. 167; Bullock *v.* Brown, 20 Geo 472; Bogle *v.* Bogle, 3 Allen, 158, 161. Such a bill seeking no discovery, and setting up no defence which might not have been as well taken by answer, will be dismissed with costs. Weed *v.* Small, 3 Sandf. Ch. 273; [Montgomery *v.* Olwell, 1 Tenn. Ch. 169; Wing *v.* Goodman, 75 Ill. 159]. Cross-bills are not necessary for the obtaining of credits, or mere matters of discharge; relief thereon can be obtained under the answer. Alston *v.* Alston, 34 Ala. 15; see Scott *v.* Lalor, 3 C. E. Green, 301. But a cross-bill, if seasonably filed, may be sustained for the purpose of obtaining an equitable set-off. Cartwright *v.* Clark, 4 Met. 104; see Troup *v.* Haight, Hopk. 239.

[2] Fife *v.* Clayton, 13 Ves. 546; 1 C. P. Coop. t. Cott. 351; and see *ante*, p. 380, note (3).

[3] See Van Valtenburg *v.* Alberry, 10 Iowa, 264. [See Equity Rule 72 of the U. S. Courts, *infra*, 2393.]

[4] See Bourne *v.* Hall, 5 Sim. 552.

[5] Harris *v.* Harris, T. & R. 165; Noel *v.* King, 3 Mad. 183; Waterton *v.* Croft, 5 Sim. 502; Holmes *v.* Baddeley, 7 Beav. 69; Lafone *v.* Falkland Islands Company, 2 K. & J. 276; and see Garwood *v.* Curteis, 12 W. R. 509; Turner *v.* Hill, and Hill *v.* Turner, cited 1 Smith Ch. Pr. 462. For forms of motion paper and petition, see Vol. III.

[6] Holmes *v.* Baddeley, *ubi sup.*

[7] Harris *v.* Harris, *ubi sup.*

[8] Garwood *v.* Curteis, 12 W. R. 509.

[1] Gray *v.* Haig, 13 Beav. 65; and see *ante*, p. 402.

may obtain, on motion of course, or on petition of course at the Rolls, an order that the proceedings in the original suit may be stayed, until the plaintiff in that suit has put in a full and sufficient answer to the cross-bill.[2] This order will be made, although the plaintiff in the cross-suit has put in an insufficient answer to the original bill, and been ordered to answer the amendments and exceptions at the same time.[3] An answer being considered sufficient until it is successfully excepted to, the time for taking subsequent proceedings begins to run immediately on the answer being put in.[4]

Where the plaintiff in the original suit does not file his answer to the cross-bill, before the expiration of the time for taking evidence in the original suit, the latter time will, on the application, by summons with notice,[5] of the defendant in the original suit, be enlarged till after the answer has come in;[6] but after the closing of the evidence in the original suit, evidence must not be entered into, in the cross-suit, concerning matters in issue in the original suit.[7] It may, however, be entered into concerning matters not in issue in the original suit;[8] and if no evidence has been gone into in the original suit, evidence may be entered into concerning matters at issue in the original suit.[9]

Either party may obtain, on motion of course, or on petition of course at the Rolls, an order, directing that, in each of the causes, the plaintiff and defendant respectively may be at liberty to read, * at *1553 the hearing, the evidence taken in the other of the causes, saving all just exceptions;[1] and where either party, plaintiff or defendant,

[2] Steward *v.* Roe, 2 P. Wms. 435; Long *v.* Burton, 2 Atk. 218. Noel *v.* King, 2 Mad. 392; Johnson *v.* Freer, 2 Cox, 371; *ante*, p. 402; Williams *v.* Carle, 2 Stockt. 543. As to staying proceedings in the original suit, see Talmadge *v.* Bell, 9 Paige, 410; White *v.* Buloid, 2 Paige, 164. The plaintiff in the original suit is not, in any case, obliged to stay proceedings thereon upon the filing of a cross-bill, except by a special order of the Court, Beauchamp *v.* Putnam, 34 Ill. 378, founded on notice of the application for delay, given to the plaintiff in the original suit: Cartwright *v.* Clark, 4 Met. 104; White *v.* Buloid, and Williams *v.* Carle, *ubi supra*; although the filing of a cross-bill is a matter of right: Beauchamp *v.* Putnam, *ubi supra*; [Griswold *v.* Seymour, 39 Miss. 137]. And it is not a matter of course for the Court to stay proceedings in the original suit, in any case, except where the defendant in the cross-suit is in contempt for not answering. White *v.* Buloid, and Williams *v.* Carle, *ubi supra*. All the plaintiffs in the cross-suit must join in the application to stay proceedings. For this purpose, it is necessary that the matters stated in the cross-bill should be sworn to by some person who knows the facts. Talmadge *v.* Bell, 9 Paige, 410.

[The cross-cause may be heard first, if it involves a preliminary question proper to be disposed of first. Randolph's Appeal, 66 Pa. St. 178.]

[3] Long *v.* Burton, 2 Atk. 218; Rattray *v.* Darley, 3 Atk. 724; and see Gray *v.* Haig, *ubi supra*.

[4] *Ante*, p. 786; Sibbald *v.* Lowrie, 2 K. & J. 277, n.; Lafone *v.* Falkland Islands Company, *ib.* 276. As to exceptions to answers, see *ante*, p. 758 *et seq.*

[5] For form of summons, see Vol. III.

[6] *Ante*, p. 976; Ramkissenseat *v.* Barker, 1 Atk. 21; Creswick *v.* Creswick, *ib.* 291; Aylet *v.* Easy, 2 Ves. S. 336; Dalton *v.* Carr, 16 Ves. 94; Cook *v.* Broomhead, *ib.* 133, Coates *v.* Pearson, 4 Mad. 262; Bourne *v.* Hall, 5 Sim. 552; and see Gardiner *v.* Mason, 4 Bro. C. C. 478; Edwards *v.* Morgan, 11 Pri. 399; Lowe *v.* Firkins, M'Le. 10; 13 Pri. 21.

[7] Pascall *v.* Scott, 12 Sim. 550; affirmed 1 Phil. 119.

[8] Wilford *v.* Bearsley, 3 Atk. 501.

[9] *Ibid.*

[1] Lubiere *v.* Genon, 2 Ves. S. 579; *ante*, pp. 868, 975; see Christian *v.* Wrenn, Bunb. 331. The order does not extend to an answer not put in evidence. Moore *v.* Harper, 1 W. N. 54; 14 W. R. 306.

If a cross-bill is taken as confessed, it may be used as evidence against the plaintiff in the original suit, on the hearing, and will have the same effect as if he had admitted the same facts in an answer. White *v.* Buloid, 2 Paige, 164. The plaintiff in a cross-bill cannot contradict the averments in his answer in the original suit. Hudson *v.* Hudson, 3 Rand. 117; Jackson *v.* Grant, 3 C. E.

obtains an order to use depositions of witnesses taken in another cause, the opposite party may likewise use the same, without motion, unless upon special reason, shown to the Court by the party obtaining such order, the opposite party is prohibited by the same order from so doing.[2]

The original and cross bill should be set down in the same Court; and will be heard together.[3] If they have been set down at different times, an order may be obtained, on motion of course, or on petition of course at the Rolls, that the cause last set down be advanced, so as to come on for hearing with the other.[4]

When the original and cross causes have been set down to be heard together, the plaintiff in the cross-suit cannot obtain an order of course to dismiss his bill.[5]

The plaintiff in a cross-suit, who is out of the jurisdiction[6] or has misdescribed himself in the bill,[7] will not be ordered to give security for costs to the plaintiff in the original suit; but may be required to give

Green, 145, 149, 150. And where the allegations of a cross-bill are inconsistent with the admissions of the answer to the original bill, they cannot be taken as true though unanswered. Savage *v.* Carter, 9 Dana, 414; see Dill *v.* Shahan, 25 Ala. 694.

[2] Ord. XIX. 5; *ante*, p. 871.

[3] Coleman *v.* Moore, 3 Litt. 355; Reed *v.* Kemp, 16 Ill. 455; [Ayres *v.* Carver, 17 How. 591; *Ex parte* Railroad Company, 95 U. S. 225. A cross-bill is a mere dependency and part of the original suit, and both parts may be controlled by one order. Stevens *v.* Stevens, 9 C. E. Green, 576. And the cross-bill so incorporates itself with the original bill that, if the cross-bill be set for hearing, the effect is to set the original cause also. Cocke *v.* Trotter, 10 Yer. 213. And upon appeal or writ of error, the Appellate Court proceeds upon both causes as one proceeding. *Ex parte* Railroad Co., 95 U. S. 225; Napier *v.* Elam, 6 Yer. 108; Woodrum *v.* Kirkpatrick, 2 Swan, 218. The dismissal of the original bill, as a general rule, carries with it the cross-bill. Continental Life Ins. Co. *v.* Webb, 54 Ala. 688; Thomason *v.* Neeley, 50 Miss. 310; Slason *v.* Wright, 14 Vt. 209; Donohoe *v.* Mariposa Mining Co., 1 Pac. L. J. 219, per Sawyer J. But not necessarily as a matter of course. Worrell *v.* Wade, 17 Iowa, 96. If the cross-bill sets up matter purely defensive, and prays for no affirmative relief, the dismissal of the original bill necessarily disposes of the cross-bill; but where the latter sets up, as it may, additional facts, not alleged in the original bill, relating to the subject-matter, and prays for affirmative relief against the plaintiff in the original bill on the case thus made, the dismissal of the original bill does not dispose of the cross-bill, but it remains for disposition as if it had been filed as an original bill. Dewees *v.* Dewees, 55 Miss. 315; Lowenstein *v.* Glidewell, 7 Ceut. L. J. 167, a decision of Caldwell, District Judge of the U. S. And this, whether the cross-bill be regarded as a cross-bill proper, an original bill in the nature of a cross-bill, or as an original bill. Ragland *v.* Broadnax, 29 Gratt. 401. In determining whether a bill is original and independent, or ancillary to a matter already before the Court, the Courts of the U. S. are not confined to the line which, in Chancery pleading, divides original bills from cross-bills and supplemental bills, but they may look to the essence of the matter, and to principles which, as regards parties, the Federal Courts have adopted in reference to their jurisdiction. Minnesota Co. *v.* St. Paul Co., 2 Wall. 632; Freeman *v.* Howe, 24 How. 450; Schenck *v.* Peay, 1 Woolw. 184. And see Chicago Artesian Well Co. *v.* Conn. Mut. Life Ins. Co., 57 Ill. 424, where the practice is pointed out in retaining, after the original ground of suit is satisfied, a cross bill, the subject-matter of which is germane to the suit, though not affecting the complainant himself. A cross-bill is so far an independent suit as to authorize an appeal from a decree dismissing it on demurrer for want of equity, before the final determination of the original bill. Lehmans *v.* Ford, 47 Ala. 733.] A question, which has been raised and adjudicated, upon a bill in Equity, cannot be reheard upon the cross-bill and answer. Barker *v.* Belknap, 39 Vt. 168, 176; Story *v.* Vermont C. R. R., 32 Vt. 551.

[4] Hinde, 415; *ante*, p. 975; Hand's Sol. Ass. 106. But the delay of the plaintiff in the cross-suit will not be permitted to delay the hearing of the original cause. White *v.* Buloid, 2 Paige, 164.

[5] Booth *v.* Leycester, 1 Keen, 247, 253, 255.

[6] *Ante*, p. 29; Vincent *v.* Hunter, 5 Hare, 320; and see Watteeu *v.* Billam, 3 De G. & S. 516; Tynte *v.* Hodge, 2 J. & H. 692; Washoe Mining Co. *v.* Ferguson, L. R. 2 Eq. 371.

[7] *Ante*, p. 359; Wild *v.* Murray, 18 Jur. 892.

such security to such of the defendants to the cross-suit as are not parties to the original suit.[8]

Cross-bills for discovery, in aid of the defence to a suit in Equity, are now of very rare occurrence: as a defendant can file interrogatories for the examination of the plaintiff.[9] Where, however, the defendant is required to answer, he cannot file such interrogatories until he has put in a sufficient answer.[10]

*These interrogatories are prepared and signed by counsel, *1554 filed in the Record and Writ Clerks' office, and delivered to the plaintiff or his solicitor, in the same manner as interrogatories for the examination of a defendant.[1] A concise statement of the subjects on which the discovery is sought must be prefixed thereto.[2]

The plaintiff is bound to answer the interrogatories, in like manner as if they had been founded on a bill of discovery filed by the defendant against the plaintiff on the day when such interrogatories were filed, and as if the defendant to such bill of discovery had, on the same day, duly appeared;[3] and the plaintiff must file his answer, and get such answer printed, and furnish printed copies thereof, in the same manner as a defendant is required to do, with respect to his answer.[4]

*The practice of the Court with reference to excepting to *1555 answers for insufficiency, or for scandal, extends and is applicable to answers put in to such interrogatories; but, in determining the materiality or relevancy of any such answer, or of any exception thereto, the Court has regard to the statements contained in the original bill, and in the answer which may have been put in thereto by the defendant exhibiting the interrogatories.[1]

An answer being considered sufficient until it is successfully excepted

[8] Sheppard v. Viner, 13 Sim. 187. Security for costs will not be required from a limited company plaintiff in a cross-suit. Accidental and Marine Insurance Co. v. Gibbon, 12 Jur. N. S. 888; 15 W. R. 97.

[9] 15 & 16 Vic., c. 86, § 19.

[10] *Ibid.* The former practice may still be followed. *Ibid.* Cross-interrogatories should be filed, if the defendant believes that the plaintiff has parted with his interest. Clark v. Malpas, 19 W. R. 614; M. R.

[1] 15 & 16 Vic., c. 86, § 19; *ante*, p. 482; Braithwaite's Pr. 39, 40. The Rules of the Court of Chancery in New Jersey, provide for the filing of interrogatories by the defendant to the plaintiff; for the answering of them by the plaintiff; for exceptions thereto; for reference of the exceptions to a Master; for an appeal from the Master's report to the Chancellor; for costs to the defendant if the exceptions are overruled; and to the plaintiff if any of the interrogatories are adjudged impertinent. Rule 77. By statute of Massachusetts, a suit in Equity, the plaintiff and defendant may at any time after the filing of the answer file in the clerk's office interrogatories for the discovery of facts and documents material to the support or defence of the suit, to be answered on oath by the adverse party. St. Mass. 1852, c. 40; Genl. Sts. c. 129, §§ 46, 57. See Wilson v. Webber, 2 Gray, 558; Amherst & Belchertown R. R. v. Watson, 8 Gray, 529. For form of interrogatories, see Vol. III.

[2] See form, Vol. III.

[3] 15 & 16 Vic., c. 86, § 19.

In answering interrogatories filed by a defendant for the examination of the plaintiff, the general rule applies that he who is bound to answer must answer fully. Interrogatories for the examination of a plaintiff are on a different footing from those for the examination of a defendant in this respect, that a plaintiff is not entitled to discovery of the defendant's case, but a defendant may ask any questions tending to destroy the plaintiff's claim. Hoffman v. Postill, L. R. 4 Ch. App. 673. In determining whether a question is one of fact, and therefore to be answered, it makes no difference that it is asked with reference to a written document. *Ibid.*; see Davis v. Eller, 2 H. & M. 726.

[4] Ont. 6 March, 1850, r. 11.

[1] 15 & 16 Vic., c. 86, § 19. For the practice as to exceptions, see *ante*, pp. 773–774; and as to exceptions for scandal, see *ante*, pp. 781–784, 788.

to,[2] a defendant is allowed to file these interrogatories as soon as he has filed his answer;[3] but if exceptions for insufficiency are filed to his answer, he cannot compel an answer from the plaintiff until the expiration of twenty-eight days from the time when his answer is found or deemed sufficient.[4] If the exceptions are ordered to stand over till the hearing, and neither allowed nor disallowed, the defendant should not file the interrogatories without the previous leave of the Court.[5]

The answer to a cross-bill for discovery only, or to interrogatories filed for the examination of a plaintiff, may be read and used by the party filing such cross-bill or interrogatories, in the same manner, and under the same restrictions, as the answer to a bill praying relief may be read and used.[6]

A cross-bill is under the present practice, unnecessary for the purpose of procuring the production of documents by the plaintiff.[7]

The costs of a cross-bill of discovery, filed by any defendant in aid of the defence to an original bill for relief, are costs in the original cause: unless the Court otherwise directs;[8] and the Court will not depart from this rule because such defendant, although successful in the suit, has not availed himself of the discovery sought by his bill.[9]

A plaintiff in an original suit, who obtains an order, as of course, to dismiss his bill, after putting in his answer to a cross-bill of discovery, is, it seems, entitled to the costs of that answer;[10] but he must not, in the application for such costs, suppress the fact of the bill of discovery being a cross-bill.[11]

*1556 *Where a cause and cross-cause are dismissed with costs, evidence taken in the former, and used in both, is to be paid for in the cause in which it was taken.[1]

The pendency of a cross-bill by one defendant, is no answer to a motion, to dismiss the original bill for want of prosecution, by another defendant.[2]

[2] *Ante*, p. 786; Sibbald *v.* Lowrie, 2 K. & J. 277, n.; and see Lafone *v.* Falkland Islands Co., *ib.* 276.

[3] Braithwaite's Pr. 40; Ord. XXXVII. 4.

[4] Braithwaite's Pr. 40.

[5] Mertens *v.* Haigh, 1 J. & H. 231.

[6] Ord. XIX. 6. As to reading answers, see *ante*, pp. 839 *et seq.*

[7] 15 & 16 Vic. c. 86, § 20; and see *post*, Chap. XLII., *Production of Documents.*

[8] Ord. XL. 14; Heming *v.* Dingwall, 2 Phil. 212; S. C. *nom.* Dingwall *v.* Heming, 11 Jur. 177; *ante*, p. 1458.

[9] Robinson *v.* Wall, 10 Beav. 73. As to the costs of cross-suits, see Morgan & Davey, 146. In a case, where all the objects sought by a cross-bill might have been attained by proper answers and proceedings under the original bill, and the cross-bill was thence unnecessary, it was dismissed without costs to either party. Bogle *v.* Bogle, 3 Allen, 158, 161.

[10] Westfield *v.* Skipwith, 1 Phil. 277; 7 Jur. 499; S. C. *nom.* Skipworth *v.* Westfield, 13 Sim. 265; and see Watts *v.* Penny, 17 Sim. 45; 13 Jur. 758.

[11] Watts *v.* Penny, 11 Beav. 435; 13 Jur. 578; *ante*, p. 1458.

[1] Corporation of Arundel *v.* Holmes, 4 Beav. 325; 5 Jur. 884.

[2] Windham *v.* Cooper, 14 W. R. 8, V. C. W. The dismissal of the plaintiff's bill does not, as a matter of course, operate to dismiss a cross-bill. Worrell *v.* Wade, 17 Iowa, 96. [*Ante*, 1553, n. 3.]

Section II. — *Bills of Discovery.*

Every bill may be a bill of discovery:[3] but the species of bill usually distinguished by that title is, a bill for the discovery of facts resting in the knowledge of the defendant, or of deeds or writings, or other things, in his custody or power, and seeking no relief in consequence of the discovery: though it may pray the stay of proceedings in another Court, till the discovery is made.[4]

This bill is commonly used in aid of the jurisdiction of some other Court: as, to enable the plaintiff to prosecute or defend a proceeding before the Privy Council,[5] or any other legal proceeding, of a nature merely civil,[6] before a jurisdiction which cannot compel a discovery on oath:[7] except that the Court has, in some instances, refused to give this aid to the jurisdiction of inferior Courts.[8] Formerly, the most common case of a bill of discovery was, in aid of an action, or the defence to an action, at Law; and notwithstanding that discovery may now be obtained at Law,[9] such a bill may still be filed, and discovery will be ordered, and an injunction granted in the mean time, on a *primâ facie* case being made.[10] A * bill for discovery, in aid *1557 of a compulsory arbitration,[1] or in aid of proceedings in the Court of Probate,[2] will be entertained.

A bill of discovery, in aid of an action at Law, will not be entertained, where the whole object of the bill is to obtain discovery of matters which would, if established, subject the defendant to penal consequences;[3] nor, it seems, where the discovery is sought in aid of an action for a mere personal *tort*.[4]

[3] See Dinsmore v. Crossman, 52 Maine, 441; Hilton v. Lathrop, 46 Maine, 247; Metler v. Metler, 4 C. E. Green, 457, 461.

[4] Ld. Red. 53; Lovell v. Galloway, 17 Beav. 1. As to bills of discovery, see Adams on Eq. 1; Cooper Eq. Pl. 58; Harr. by Newl. 57; Jeremy on Eq. 257; 1 Mad. Pr. 196, 2 Ed. 297, 3d ed.; Story Eq. Jur. § 1480; Story Eq. Pl. § 311; Wellons Eq. Pl. 118; and for forms of such bills, see 1 Van Hev. 48; Whitworth Eq. Prec. 343, 346, 376; Willis Eq. Pl. 316, 326; see Gord. Stats. Man. c. 113, § 4.

[5] Earl of Derby v. Duke of Athol, 1 Ves. S. 202, 205.

[6] Lord Montague v. Dudman, 2 Ves. S. 397, 398; Macauley v. Shackell, 1 Bligh N. S. 96; Glynn v. Houston, 1 Keen, 329, 337.

[7] Dunn v. Coates, 1 Ath. 288; Anon., 2 Ves. S. 451. As to discovery in aid of proceedings in a Foreign Court, see Best v. Yeats, 9 Sim. 189, 191; 2 Jur. 242; Cooper v. Del Re, cited in Mol. Eq. Pr. 84; Jeremy, 186, n. (g). In Mitchell v. Smith, 1 Paige, 287, Mr. Chancellor Walworth held, that a bill of discovery would lie in aid of a prosecution or a defence in a foreign Court. [A bill of discovery will not lie in England to aid a suit to recover land in India. Reiner v. Marquis of Salisbury, 2 Ch. Div. 378.]

[8] Ld. Red. 53.

[9] 14 & 15 Vic. c. 99, § 2; 17 & 18 Vic. c. 125, §§ 50–52.

[10] Lovell v. Galloway, 17 Beav. 1; 19 Beav. 643; Gorle v. Robinson, 3 Jur. N. S. 633, V. C. W.; Lloyd v. Adams, 4 K. & J. 467; Mellett v. Lanequist, 26 Beav. 609; 26 Beav. 466; Harris v. Collett, *ib.* 222; British Empire Shipping Co. v. Soames, 3 K. & J. 433; 3 Jur. N. S. 883; Barry v. Coskery, 2 J. & H. 1; Ingleby v. Shafto, 33 Beav. 31; 9 Jur. N. S. 1141. As to sealing the answer at Law, see Brown v. Thornton, 1 M. & C. 243, 246. [That the change in the law of evidence does not affect the jurisdiction of Equity to give discovery was held in Carmen v. McNabb, 48 Ala. 99, and Millsaps v. Pfeiffer, 44 Miss. 80. The contrary was ruled in Riopelle v. Doellner, 26 Mich. 102.]

[1] Under 17 & 18 Vic. c. 125, § 3, see Brit. & Empire Shipping Co. v. Soames, *ubi sup.*

[2] Ex parte Ingram, 7 W. R. 302.

[3] Glynn v. Houston, 1 Keen, 329; and see *ante*, pp. 563–569.

[4] Glynn v. Houston, *ubi sup.*

Where the Court has directed the trial of an issue, and has given directions for production of documents at the trial, a bill of discovery, in aid of the proceeding, cannot be filed, without the leave of the Court.[5]

A bill of discovery must state the matter touching which discovery is sought, the interest of the plaintiff and defendant in the subject, and the facts and circumstances upon which the right of the plaintiff to require the discovery from the defendant is founded.[6] The bill should pray that the defendant may make a full discovery of the matters therein stated.[7] It may also pray any equitable assistance of the Court, which is merely consequential upon the prayer for discovery;[8] but it should not pray general relief: for then it is a bill for relief.[9] If it prays that the defendant may abide such order or decree as the Court may think proper, it is a bill for relief;[10] but if it prays that he may abide such order as the Court may think proper, without the word decree, it is not a bill for relief.[11]

Where the bill seeks to stay proceedings in another Court, a motion for an injunction cannot be made, until the interrogatories have been filed.[12]

A bill of discovery, in aid of proceedings in another Court,
*1558 *cannot be maintained against a person, who is not a party to such proceedings;[1] and if the proceedings have not been commenced, the plaintiff must aver that it is intended to commence them immediately.[2]

A bill, seeking discovery of deeds or writings, sometimes prays relief, founded on the deeds or writings of which discovery is sought. Where the relief so prayed is such as might be obtained at Law, if the deeds or writings were in the custody of the plaintiff, he must annex to his bill an affidavit that they are not in his custody or power, and that

[5] Cooke *v.* Marsh, 18 Ves. 209; *ante*, p. 1113; and see Few *v.* Guppy, 1 M. & C. 487, 507.

[6] Cardale *v.* Watkins, 5 Mad. 18; Moodaly *v.* Moreton, 2 Dick. 652; 1 Bro. C. C. 468; Glover *v.* Hall, 2 Phil. 484, 492; Attorney-General *v.* Corporation of London, 2 M'N. & G. 247; McIntyre *v.* Mancius, 3 John. Ch. 47; Leggett *v.* Postley, 2 Paige, 601; March *v.* Davison, 9 Paige, 580; Walker *v.* Locke, 5 Cush. 90, 93; Peck *v.* Ashley, 12 Met. 478; Adams *v.* Porter, 1 Cush. 170; *ante*, p. 570, note.

[7] But the weight of authority is that it is not necessary in such bill to allege that the facts, a discovery of which is sought, are within the exclusive knowledge of the defendant. Metler *v.* Metler, 4 C. E. Green, 457. [See *ante*, 570, n. 2.]

[8] *Ante*, p. 547.

[9] Angell *v.* Westcombe, 6 Sim. 30. Where a creditor has exhausted his remedy at Law, he may maintain a bill against the debtor for discovery of assets and for relief. Treadwell *v.* Brown, 44 N. H. 551.

[10] Rose *v.* Gannel, 3 Atk. 439; Ambury *v.* Jones, Younge, 199; James *v.* Herriott, 6 Sim. 428.

[11] Baker *v.* Bramah, 7 Sim. 17; South Eastern Railway Co. *v.* Submarine Telegraph Co., 18 Beav. 429; 17 Jur. 1044.

[12] Fuller *v.* Ingram, 5 Jur. N. S. 510; 7 W. R. 302; and see Chilton *v.* Campbell, 20 Beav. 531; Lloyd *v.* Adams, 4 K. & J. 467; and as to the costs of the motion, see Lovell *v.* Galloway, 19 Beav. 643.

[1] Queen of Portugal *v.* Glyn, 7 Cl. & F. 466; Kerr *v.* Rew, 5 M. & C. 154; Balls *v.* Margrave, 3 Beav. 448.

[2] Mayor of London *v.* Levy, 8 Ves. 398, 404. [As a general rule, a bill of discovery must be in aid of some judicial proceeding commenced, or at least contemplated. United R. Cos. *v.* Hoppock, 1 Stew. Eq. 261. And see Buckner *v.* Ferguson, 44 Miss. 667, as to the requirements of the bill in Miss. A bill of discovery will not lie after judgment at law. Green *v.* Massie, 21 Gratt. 356; Thurmond *v.* Durham, 3 Yerg. 99; Earl of Leicester *v.* Perry, 1 Bro. C. C. 305; Patterson *v.* Bangs, 9 Paige, 627.]

he knows not where they are, unless they are in the hands of the defendant;[3] but a bill for discovery merely, or which only prays the delivery of deeds or writings, or equitable relief grounded upon them, does not require such an affidavit.[4]

If the title to the possession of the deeds and writings, of which the plaintiff prays possession, depends on the validity of his title to the property to which they relate, and he is not in possession of that property, and the evidence of his title to it is in his own power, or does not depend on the production of the deeds or writings of which he prays the delivery, he must establish his title to the property at Law, before he can come into a Court of Equity for delivery of the deeds or writings.[5]

A bill for discovery only is not brought to a hearing; and cannot, therefore, be dismissed for want of prosecution.[6] After the answer has been held, or is to be deemed, sufficient,[7] the defendant may obtain an order, on motion of course, or on petition of course at the Rolls, for taxation and payment of his costs;[8] but if the bill is a cross-bill, the costs will be costs in the original suit, unless the Court otherwise directs.[9] It is irregular, on the application for the * costs of a *1559 bill of discovery, to suppress all mention of the fact that it is a cross-bill: although the original cause may have been disposed of before the answer to the cross-bill was put in;[1] and this rule will not be varied, merely because a defendant does not make the whole matters of the bill of discovery available.[2]

Although the defendant is entitled to the costs of the suit, he may be ordered to pay the costs of an unsuccessful opposition to a motion for an injunction to stay the proceedings in another Court, in aid of the defence to which the bill is filed.[3] Where the defendant's first answer has been found insufficient, the costs of the exceptions to it may be ordered, on the *ex parte* application of the plaintiff, to be deducted from the costs payable to the defendant.[4]

[3] Walmsley *v.* Child, 1 Ves. S. 341, 344; Hook *v.* Dearman, 1 S. & S. 227, 230; see, however, Crosse *v.* Bellingham, 12 Sim. 35, 40; Watson *v.* Parker, 2 Phil. 5; and see *ante*, p. 792. In Maine, "bills of discovery, and those praying for an injunction, must be verified by oath:" Ch. Rule I. 37 Maine, 581. The rule relates to the pure and simple bill of discovery. Dingman *v.* Cressman, 54 Maine, 441; Hilton *v.* Lathrop, 46 Maine, 297.

[4] Ld. Red. 54; Godfrey *v.* Tanner, 1 Vern. 297; Whitbread *v.* Gibbing, 2 P. Wms. 341; Dawes *v.* Fortescue, 3 Atk. 124, 132; Attree *v.* Lord Exeter, 6 Ves. 288; King *v.* King, Mos. 162; *ante*, p. 391; Caton *v.* Coles, L. R. 1 Eq. 581, 584.

[5] Ld. Red. 54; Jones *v.* Jones, 3 Mer. 161, 170; Armitage *v.* Wadsworth, 1 Mad. 189, 193; Cross *v.* Tyrrell, 1 Mad. 179; Field *v.* Beaumont, 1 Sim. & St. 244, 250.

[6] Wooden *v.* King, 1 Atk. 285; South Eastern Railway Co. *v.* Submarine Telegraph Co., *ubi sup.*; *ante*, p. 810.

[7] *Ante*, pp. 786, 1457.

[8] Ld. Red. 201; Attorney-General *v.* Burch, 4 Mad. 178; see Fitzgerald *v.* Bolt, 9 Hare Ap. 65. As to the costs of a bill for discovery, see Morgan & Davey, 147 *et seq.*; *ante*, 1457, note.

[9] Ord. XL. 14; Heming *v.* Dingwall, 2 Phil. 212; and see, under 41st Ord. of Aug., 1841, Westfield *v.* Skipwith, 1 Phil. 277; S. C. *nom.* Skipworth *v.* Westfield, 13 Sim. 265; *ante*, pp. 1458, 1555.

[1] Watts *v.* Penny, 11 Beav. 435; 13 Jur. 578; 17 Sim. 45; 13 Jur. 758; *ante*, pp. 1343, 1414.

[2] Robinson *v.* Wall, 10 Beav. 73.

[3] Lovell *v.* Galloway, 19 Beav. 643; see also Angas, 8 Ves. 69; Bambaryy *v.* ——, 9 Ves. 104.

[4] *Ante*, p. 774; Hughes *v.* Clerk, 6 Hare, 195; but see Thomas *v.* Rawling, 27 Beav. 375.

Except under special circumstances, the Court will not permit a bill of discovery to be amended, by adding parties as plaintiffs;[5] or, after answer, by adding a prayer for relief.[6]

If the defendant to a bill of discovery is entitled to the privilege of peerage, or is a Member of Parliament, the Court may, upon the application of the plaintiff, after the time for answering has expired, and an appearance has been entered by the defendant, or by the plaintiff on his behalf, order the bill to be taken *pro confesso*, unless the defendant shall, within eight days after being served with such order, show good cause to the contrary;[7] and when such order has been pronounced, the bill, or an examined copy thereof, may be taken and read, in any Court of Law or Equity, as evidence of the same facts, and on behalf of the same parties, as could an answer admitting the contents of the bill.[8]

The Statute of Limitations may be pleaded to a bill of discovery:[9] though it was, at one time, considered this could not be done.[10]

*1560 * SECTION III. — *Bills of Interpleader.*

Where two or more persons claim the same thing, by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them.[1] A plaintiff, in a bill of inter-

[5] *Ante*, p. 405; Lord Cholmondeley *v.* Lord Clinton, 2 Mer. 71, 74.

[6] *Ante*, p. 408; Butterworth *v.* Bailey, 15 Ves. 358, 361; Jackson *v.* Strong, M'Lel. 245; Parker *v.* Ford, 1 Coll. 506; but see Hildyard *v.* Cressy, 3 Atk. 303; Crow *v.* Tyrell, 2 Mad. 397, 409; Lousada *v.* Templer, 2 Russ. 561, 565; Severn *v.* Fletcher, 5 Sim. 457.

[7] 11 Geo. IV. & 1 Will. IV. c. 36, § 13; *ante*, pp. 496, 530.

[8] 11 Geo. IV. & 1 Will. IV. c. 36, § 14; *ante*, p. 497; see 14 & 15 Vic. c. 99, § 14; *ante*, p. 865; and Reeve *v.* Hodson, 10 Hare Ap. 19, as to using certified copies in a Court of justice.

[The answer to a bill of discovery, when used as evidence, must be taken together, but its truth may be weighed, like other testimony, by its intrinsic character, subject to be set aside by what may be found in the answer itself, by the nature of the statements, or by other proof. Ormond *v.* Hutchinson, 13 Ves. 50; Allen *v.* McNew, 8 Hum. 46.]

[9] *Ante*, p. 640; Beames on Pleas, 275; Gait *v.* Osbaldeston, 1 Russ. 158; Mendizabel *v.* Machado, 1 Sim. 68, 77; Jermy *v.* Best, *ib.* 373, 375; Macgregor *v.* East India Co., 2 Sim. 452; Scott *v.* Broadwood, 2 Coll. 447, 456.

[10] Hindman *v.* Taylor, 2 Bro. C. C. 7, 10.

[1] Ld. Red. 48, 141; Shotbolt *v.* Biscow, 2 Eq. Ca. Ab. 173; Child *v.* Mann, L. R. 3 Eq. 806, 808; Bedell *v.* Hoffman, 2 Paige, 199; Atkinson *v.* Manks, 1 Cowen, 191; Bell *v.* Hunt, 3 Barb. Ch. 391; Strange *v.* Bell, 11 Geo. 103; Green *v.* Mumford, 4 R. I. 313; Providence Bank *v.* Wilson, 4 R. I. 507; Farley *v.* Blood, 30 N. H. 354; Hayes *v.* Johnson, 4 Ala. 267; Blair *v.* Porter, 2 Beasley, 267; Briant *v.* Reed, 1 McCarter, 271; Lord Cottenham, in Hoggart *v.* Cutts, 1 C. & P. 204; Shaw *v.* Coster, 8 Paige, 339; Horton *v.* Baptist Church & Society in Chester, 34 Vt. 309.

To justify a bill of interpleader, there should be either some specific chattel, or some definite sum of money, to which different parties in the same right, or in privity of estate, make claim, and the person bringing the bill should be a mere stakeholder, having no interest in the matter; so that when the Court decree an interpleader, the plaintiff can step out of the case altogether. Lincoln *v.* Rut. & Bur. R.R. Co., 24 Vt. 639. As to interpleader generally, see Crawford *v.* Fisher, 1 Hare, 436, 440; 6 Jur. 576; Glynn *v.* Locke, 3 Dr. & War. 11; Cochrane *v.* O'Brien, 2 Jo. & Lat. 380; Anon., 1 Vern. 351; 1 Eq. Ca. Ab. 80; Langston *v.* Boylston, 2 Ves. J. 101, 107; Dungey *v.* Angove, *ib.* 304, 310; Angell *v.* Hadden, 15 Ves. 244; Stevenson *v.* Anderson, 2 V. & B. 407, 410; Morgan *v.* Marsack, 2 Mer. 107, 110; Paris *v.* Gilham, G. Coop. 56; Farebrother *v.* Prat-

pleader, must not himself claim any interest;[2] and must not be under any liabilities to any of the defendants, * beyond those *1561 which arise from the title to the property in contest.[1]

In a bill of interpleader, the plaintiff must state his own rights, and the several claims of the defendants, and show his right to compel them to interplead.[2] The bill then prays, that they may interplead, so that the Court may adjudge to whom the thing belongs, and that the plaintiff may be indemnified. If any suits at Law are brought against him, he may also pray that the claimants may be restrained from proceeding, till the right is determined.[3]

The plaintiff in his bill should negative any interest in himself in the matter in controversy,[4] and show, that he is a mere stake-

tent, Dan. 64; Burnett *v.* Anderson, 1 Mer. 405; [illegible] *v.* Bolton, 18 Ves. 292; Gilyard *v.* Dougharty, 11 Sim. 139, 147; 4 Jur. 1080; Jones *v.* Thomas, 2 Sm. & G. 186; 18 Jur. 499; Nelson *v.* Barnes, 2 H. & M. 334; 10 Jur. N. S. 611; Affd. by L. C. 10 Jur. N. S. 842; 12 W. R. 1045. As to cases of bills brought by executors or trustees in the nature of bills of interpleader seeking instructions of the Court, see Houghton *v.* Kendall, 7 Allen, 72; Andrews *v.* Bishop, 5 Allen, 490; Loring *v.* Thorndike, 5 Allen, 257; Bowditch *v.* Soltyk, 99 Mass. 136.

[2] Maitland *v.* Haytes, 2 S. & S. 83; Moore *v.* Usher, 7 Sim. 384; Stuart *v.* Welsh, 4 M. & C. 499, 516; 4 Jur. 237; Hoggart *v.* Cutts, C. & P. 197, 203; Deplock *v.* Hammond, 2 Sm. & G. 141. The bill will lie, if the plaintiff has claimed an interest, where previously to the interpleader order, he withdraws such claim. Jacobson *v.* Blackhurst, 2 J. & H. 489; Atkinson *v.* Manks, 1 Cowen, 691; Adams *v.* Dixon, 19 Geo. 513; Lozier *v.* Van Saun, 2 Green Ch. 325. The petition in a bill of interpleader, strictly so called, can claim no relief against either of the defendants, but only ask for leave to pay the money or deliver the property to the one to whom it, of right, belongs, in order that he may thereafter be protected from the claims of both. Isdell *v.* Hedman, 2 Paige, 199; Bolton *v.* Bolton, 2 Paige, 209. But a party may be allowed to resort to a bill of interpleader and to ask the Court to tell him to which of several claimants of a fund or other thing in his hands he may pay or deliver it; although he might be liable, by great vexation and expense, to make himself secure. Farley *v.* Bagot, 60 N. H. 493, per Webb, J.; Lozier *v.* Van Saun, 2 Green Ch. 325. Such bills are not encouraged, on account of the delay and expense which they occasion. Gregg *v.* Maitland, 4 R. I. 315.

[The bill may be filed although the plaintiff has not been sued, or has been sued by one only of the claimants, and although the claims of one is enforceable at Law and the other in Equity. Nesbitt *v.* Kinnear, 10 Ir. Eq. 126. And the Court will take jurisdiction, if the parties consent, although the bill be not strictly maintainable. Swasey *v.* Warren, 101 Mass. 564. And see where the bill is filed in the interest of one of the parties, after a successful suit at Law by the other party over the right set up. Provident Institution *v.* White, 115 Mass. 112. So, if both defendants consent to interplead, and a decree is entered without objection for that purpose, the Court may, at the final hearing, fasten upon the fund in Court any equitable lien or trust which one of the parties may establish against the other, although the legal title and ownership be in the other. Whitney *v.* Cowan, 55 Miss. 626.]

The interpleader can justly be allowed only when no other question than the right of property is meant to be litigated. Sherman *v.* Partridge, 4 Duer (N. Y.), 646. So, where he has an interest or duty to protect one of the parties rather than the other; as an executor standing between two claimants, one of whom claims by title paramount to the testator's, and the other as a legatee under the will, is not in the position to sustain a bill of interpleader, his duty being clearly to protect the interest of the legatees. Adams *v.* Nixon, 19 Geo. 513.

[1] Crawshay *v.* Thornton, 2 M. & C. 1, 19; Pearson *v.* Cardon, 2 R. & M. 607.

[2] Ld. Red. 142; Dungey *v.* Angove, 2 Ves. J. 304; Johnson *v.* Atkinson, 3 Anst. 798; Nickolson *v.* Knowles, 5 Mad. 47; Lowndes *v.* Cornford, 18 Ves. 299; Cook *v.* Earl of Rosslyn, 1 Coll. 167; 5 Jur. N. S. 973.

[3] Ld. Red. 49; East India Co. *v.* Edwards, 18 Ves. 376; Croggon *v.* Symons, 3 Mad. 130; Warington *v.* Wheatstone, Jac. 202, 205. A bill of interpleader ought to be filed before, or immediately after the commencement of proceedings at Law, and should not be delayed until after a verdict or judgment has been obtained. Cornish *v.* Tanner, 1 Y. & J. 333; Union Bank *v.* Kerr, 2 Md. Ch. Dec. 460; [French *v.* Robichard, 50 Vt. 43].

[4] Story Eq. Pl. § 292; [State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 83]. But it is no objection to a bill of interpleader that the plaintiff's claim of interest, in litigation in respect to an interest in other property, not in the suit, and not now in litigation, may be prejudiced by the success of one of the parties. Crespigny *v.* Lee Wolf, 3 Sand. Ch. 391. Still, if the plaintiff has in any way lent

holder,[5] and that he is ignorant of the rights of the respective parties, who are called upon by him to interplead; or, at least, he must show that there is some doubt to which of such parties the debt or duty belongs; so that he cannot safely pay or render it to one, without risk of being made liable for the same debt or duty to the other.[6]

The bill should also show, that there are proper persons *in esse*, capable of interpleading, and of setting up opposite claims; for otherwise the objects of the bill would be unattainable.[7] The plaintiff should admit a title against himself in each of the claimants, and that each of them claims a right, and such a right, as they may interplead for.[8]

*1562 * If it appears from the bill, that one defendant is entitled to the debt or duty and that the other is not, both defendants may demur.[1] And so, where it appears that neither of the defendants is entitled to the debt or duty.[2]

As the sole ground on which the jurisdiction of the Court, in this case, is supported, is the danger of injury to the plaintiff from the doubtful title of the defendants,[3] the Court will not permit the proceeding to be used collusively to give advantage to either party: therefore, with a bill of interpleader the plaintiff must file an affidavit that there is no collusion between him and any of the parties.[4] The bill is demurrable, if the affidavit is not annexed,[5] or, at least, filed with

himself to further the claims of either of the parties who claim the fund in controversy, or to aid one in obtaining the possession thereof, to the exclusion of the other, he cannot sustain his bill. Marvin *v.* Elwood, 11 Paige, 365; Nash *v.* Smith, 6 Conn. 421.

[5] Shaw *v.* Coster, 8 Paige, 339; Badeau *v.* Rogers, 3 Paige, 209; Story, Eq. Pl. § 297; Lincoln *v.* Rut. & Bur. R. R. Co., 24 Vt. 639; Stuart *v.* Welsh, 4 M. & C. 305; Bignold *v.* Audland, 11 Sim. 23; Moore *v.* Usher, 7 Sim. 383; Toulmin *v.* Reid, 14 Beav. 499; Diplock *v.* Hammond, 2 S. & G. 141. The plaintiff cannot, after bill of interpleader filed, set up a right in himself to the fund in controversy. Anderson *v.* Wilkinson, 10 Sm. & M. 601.

[6] Shaw *v.* Coster, 8 Paige, 339; Mohawk & Hudson R.R. Co. *v.* Clute, 4 Paige, 384, 392; Adams *v.* Dixon, 19 Geo. 513; Farley *v.* Blood, 30 N. H. 360, 361; Parker *v.* Barker, 42 N. H. 93.

[7] Story Eq. Pl. § 295; Metcalf *v.* Hervey, 1 Ves. 248, 249; 2 Story Eq. Jur. § 821; Browning *v.* Watkins, 10 Sm. & M. 482.

[8] 2 Story Eq. Jur. § 821; Story Eq. Pl. § 295; Slingsby *v.* Moulton, 1 V. & B. 334; Atkinson *v.* Manks, 1 Cowen, 691; Quinn *v.* Green, 1 Ired. Eq. 229; Browning *v.* Watkins, 10 Sm. & M. 482. If one of two parties, defendants, withdraws all claim to the funds, a decree that they be paid to the other is of course. Knight *v.* Yarborough, 7 Sm. & M. 179.

[1] Shaw *v.* Coster, 8 Paige, 339; Ld. Red. 142; Story Eq. Pl. § 292; Mohawk & Hud. R.R. Co. *v.* Clute, 4 Paige, 284; Parker *v.* Barker, 42 N. H. 93; Briant *v.* Reed, 1 McCarter (N. J.), 271, 276. For the form of such demurrer, see Willis, 440, 441.

[2] Barker *v.* Swain, 4 Jones Eq. (N. C.), 220; Ld. Red. 58, 164, 165, 166.

[3] Mohawk & Hudson R. R. Co. *v.* Clute, 4 Paige, 392; Ld. Red. 49; Atkinson *v.* Manks, 1 Cowen, 703; Story, Eq. Pl. §§ 291, 292; Woods J. in Farley *v.* Blood, 30 N. H. 361; Badeau *v.* Rogers, 2 Paige, 209; Griggs *v.* Thompson, 1 Geo. Dec. 146; Blair *v.* Porter, 2 Beasley (N. J.), 267.

[4] Ld. Red. 49; Errington *v.* Attorney-General, Bunb. 303; Stevenson *v.* Anderson, 2 V. & B. 407, 410; Warington *v.* Wheatstone, *ubi sup.*; Wood *v.* Lyne, 4 De G. & S. 16; Bignold *v.* Audland, 11 Sim. 23; 5 Jur. 51; Hamilton *v.* Marks, 5 De G. & S. 638; *ante*, p. 394; 1 Smith Ch. Pr. (2d Am. ed.) 474; Eden Injunct. (2d Am. ed.) 401; Shaw *v.* Coster, 8 Paige, 339; 2 Hoff. Ch. Pr. 103; Tobin *v.* Wilson, 3 J. J. Marsh. 67; Biggs *v.* Kowns, 7 Dana, 411; Ld. Red. 49, 143; Atkinson *v.* Manks, 1 Cowen, 691; Story Eq. Pl. §§ 291, 297; Dungey *v.* Angove, 2 Sumner's Ves. 313; Mr. Hovenden's note (5); 2 Story Eq. Jur. § 809; Farley *v.* Blood, 30 N. H. 354, 361. By the practice in Connecticut it is not necessary to annex this affidavit of non-collusion. Nash *v.* Smith, 6 Conn. 421; see Jerome *v.* Jerome, 5 Conn. 352. The Chancery practice in Connecticut regarding bills of interpleader, differs not only in this, but also in other respects, from that of England and many of the States. Consociated Pres. Soc. of Green's Farms *v.* Staples, 23 Conn. 544. For forms of affidavit, see Vol. III.

[5] Metcalf *v.* Hervey, 1 Ves. S. 248; Ld.

it.[6] The affidavit may be sworn before the bill is actually filed.[7] Where there are several plaintiffs, they must all join in the affidavit, or the affidavit must show satisfactorily why the other plaintiffs do not join.[8]

Where the bill is filed by the officer of a public company, the affidavit must state, not only that the plaintiff does not collude, but that, to the best of his knowledge and belief, the company does not collude, with any of the defendants.[9]

*1563 The affidavit of the plaintiff's solicitor is not in general sufficient;[1] but in an injunction case, where the plaintiffs were abroad, the affidavit was allowed to be sworn by the solicitor, for the purposes of the injunction,[2] and the affidavit of the plaintiffs was afterwards filed and annexed to the bill, as of the day on which the bill was filed.[3] And where the plaintiff was too ill to make the affidavit, a joint affidavit by his son (a partner in his business), and his solicitor, deposing to his state of health, and that there was no collusion between them, or the plaintiff, and the defendants, was allowed to be filed with the bill.[4]

The Court gives credit to the affidavit; and will not permit evidence to be adduced to contradict it.[5]

Where a bill was filed by the owner of an estate, subject to a charge, as to which there were conflicting claims, no affidavit was required.[6]

Upon filing the affidavit of no collusion, no stamp need be affixed to it.[7] A copy of the affidavit, sealed at the Record and Writ Clerks' office (but not necessarily an office copy), should be annexed to each copy of the bill for service.[8]

The plaintiff in a bill of interpleader ought by his bill, to offer to pay into Court any money and interest which is due from him.[9] The omis-

Red. 143; Tobin *v.* Wilson, 3 J. J. Marsh. 67; Farley *v.* Blood, 30 N. H. 354; Shaw *v.* Coster, 2 Ldw. Ch. 405; Gibson *v.* Goldthwaite, 7 Ala. 281. An objection to the form of the affidavit should be made by demurrer. Hamilton *v.* Marks, 5 De G. & S. 6.8; Wood *v.* Lyne, 2 De G. & S. 16. The plaintiff need not swear that the bill is filed at his own expense: Metcalf *v.* Hervey, 1 Ves. S. 248. Eden Injunct. 2d Am. ed.) 401; nor that it was filed without the knowledge of either of the defendants. Stevenson *v.* Anderson, 2 V. & B. 410; Dungey *v.* Angove, 2 Simons's Ves. 313; Mr. Hayenden's note (b). The bill may be referred to in the affidavit, either as an exhibit, or as being thereunto annexed. Braithwaite's Pr. 27. For forms of demurrer, see 2 Van Hey. 77; Wms. 442.

[6] Shepherd *v.* Jones, 3 De G., F. & J. 56, S. C. *nom.* Jones *v.* Shepherd, 7 Jur. N. S. 228, L. JJ.; 29 Beav. 201; 7 Jur. N. S. 250.

[7] Walker *v.* Fletcher, 1 Phil. 115; 12 Sim. 420; 6 Jur. 4; Braithwaite's Pr. 27; but see Francome *v.* Francome, 14 W. R. 355, L. C.

[8] Braithwaite's Pr. 27, 28; Gibbs *v.* Gibbs, *ib.* 27; 5 W. R. 243, V. C. W.

[9] Bagnold *v.* Auckland, *ubi supra*; and see *ante*, pp. 392-395. For form of affidavit, see Vol. III.

[1] Wood *v.* Lyne, 4 De G. & S. 16.

[2] Lavabre *v.* Brown, 1 De G. & J. 204; 23 Beav. 607; and see Nelson *v.* Barter, 2 H. & M. 334; 10 Jur. N. S. 611, V. C. W., where, there being several plaintiffs residing in distant places, leave was given, on an affidavit by their solicitor; and an injunction granted for a limited time, on an undertaking to file the usual affidavit.

[3] Braithwaite's Pr. 27.

[4] Hartley *v.* Swayne (1860, H. No. 191), 28 July, 1860, V. C. K.

[5] Langston *v.* Boylston, 2 Ves. J. 101, 110; Hamilton *v.* Marks, 5 De G. & S. 648, 643; Manley *v.* Robinson, L. R. 4 Ch. Ap. 547. In a case where collusion was charged, the Court put the plaintiff under an undertaking as to damages. Manley *v.* Robinson, L. R. 4 Ch. Ap. 547; see Dungey *v.* Angove, 2 Ves. J. 304; Toulmin *v.* Reid, 14 Beav. 499.

[9] Vyvyan *v.* Vyvyan, 30 Beav. 65, 70; 7 Jur. N. S. 841.

[7] Braithwaite's Pr. 27.

[8] *Ibid.*; *ante*, pp. 396, 442.

[9] Ld. Red. 49, 143; Earl of Thanet *v.* Paterson, Barnard. 247; 2 Ves. J. 108;

sion of such offer does not, however, render the bill demurrable;[10] but the fund must be brought into Court before any order will be made in the cause.[11]

*1564 *The several demands against the plaintiff must be, substantially, the same in their nature and origin,[1] and they should be specifically set forth, so that this may appear;[2] and the bill must state that the defendants claim an interest in the whole subject-matter of the suit;[3] and so be framed that the decree may embrace the whole of it.[4] It need not set out the title of the defendants;[5] and the plaintiff is not justified in joining, as a defendant, a person who does not make any

Langston *v.* Boylston, 2 Ves. J. 101, 108, 109; East India Company *v.* Edwards, 18 Ves. 376, 378; Hyde *v.* Warren, 19 Ves. 322, 323; Waringt n *v* Wheatstone, Jac. 202, 205; Seton, 962, No. 1; Bignold *v.* Audland, 11 Sim. 23; 5 Jur. 51. Where the plaintiff had offered to pay over the fund on being indemnified, and, that being refused, had filed his bill with reasonable diligence, he was not charged with interest on the money deposited in Court. Richards *v.* Salter, 6 John. Ch. 445.

[10] Meux *v.* Bell, 6 Sim. 175; 1 Smith Ch. Pr. (2d Am. ed.) 467; Williams *v.* Wright, 20 Texas, 499; Nash *v.* Smith, 6 Conn. 421. In Williams *v.* Walker, 2 Rich. Eq. 291, it was held that the plaintiff should not only offer by his bill to bring the money or fund into Court, but he should obtain an order to that effect, and comply with it before proceeding in the cause; see also Parker *v.* Barker, 42 N. H. 78, 96; McGarnah *v.* Prather, 1 Black. 299; Shaw *v.* Coster, 8 Paige, 399; 2 Story Eq. Jur. § 809, which support the ground that an offer to bring the money into Court is necessary.

[11] Dungey *v.* Angove, 3 Bro. C. C. 36; Sieveking *v.* Behrens, 2 M. & C. 581; 1 Jur. 50; Meux *v.* Bell, *ubi sup.*; Pauli *v.* Von Melle, 8 Sim. 327; Ld. Red. 49, 143; Story Eq. Pl. § 291; Mohawk & Hudson R.R. Co. *v.* Clute, 4 Paige, 384; Shaw *v.* Coster, 8 Paige, 339; City Bank *v.* Bangs, 2 Paige, 570, 573; Nash *v.* Smith, 6 Conn. 421; Atkinson *v.* Manks, 1 Cowen, 691. If the plaintiff does not pay the money into Court he should at least give bond and security for its ultimate payment, according to the decree. Biggs *v.* Kowns, 7 Dana, 411. If the claim is for goods, it is sufficient to bring the value of them into Court. Burnett *v.* Anderson, 1 Mer. 405. Where land is the subject of the controversy, the plaintiff ought to make conveyances of the same ready for delivery to each of the claimants; and if he has not done so at the filing of the bill, and in the bill offered to deliver the deed to the party, who shall be decreed to be entitled, the Court will order such deeds to be made and filed in the case, subject to further order. Farley *v.* Blood, 30 N. H. 354. Whenever the bill contains a prayer for an injunction, the money must be brought into Court before the Court will ordinarily act upon this part of the prayer. Story Eq. Pl. § 297; Mohawk & Hudson R.R. Co. *v.* Clute, 4 Paige, 384, 391; Richards *v.* Salter, 6 John. Ch. 445; Biggs *v.* Kowns, 7 Dana, 410; Fowler *v.* Lee, 10 Gill & J. 358; Shaw *v.* Coster, 2 Edw. Ch. 405. The common order for an injunction on a bill of this nature is that it issue upon the plaintiff paving the money into Court. This is a condition precedent, and an order for an injunction, not containing it, will be discharged. If the money cannot be paid in in time to stay a trial, application should be made to the injunction officer to vary the order on the special grounds. Sieveking *v.* Behrens, 2 My. & C. 581. For form of order, see Seton, 962.

[1] Glyn *v.* Duesbury, 11 Sim. 139, 148; 4 Jur. 1080; Story Eq. Pl. § 293; Crawshay *v.* Thornton, 7 Sim. 391; Jew *v.* Wood, 3 Beav. 579; S. C. 1 Cr. & P. 185; City Bank *v.* Bangs, 2 Paige, 570; Slaney *v.* Sidney, 14 M. & W. 809.

[2] Ld. Red. 142, 143; Story Eq. Pl. § 293; Hoggart *v.* Cutts, 1 Cr. & P. 197, 205; 2 Story Eq. Jur. §§ 807–821; Briant *v.* Reed, 1 McCarter (N. J.), 271; Glyn *v.* Duesbury, 11 Sim. 139, 148; 4 Jur. 1080.

[3] Hoggart *v.* Cutts, C. & P. 197, 204; Bignold *v.* Audland, *ubi sup.*

[4] Hoggart *v.* Cutts, *ubi sup.*; Crawford *v.* Fisher, 1 Hare, 436, 440; 6 Jur. 576.

[5] East & West India Docks *v.* Littledale, 7 Hare, 57; Mealor *v.* Lord Talbot, 6 W. R. 97, V. C. W. It is not incumbent upon, nor indeed is it proper for the plaintiff to state the respective cases of the interpleading defendants; these must be stated by the defendants themselves in their answers, and they may also raise an objection to the suit on the ground, either that the case is not one proper for an interpleader bill, or that the plaintiff is acting in collusion with one of the defendants. Statham *v.* Hall, 1 T. & R. 30; Toulmin *v.* Reid, 14 Beav. 499; Briant *v.* Reed, 1 McCarter (N. J.), 271, 277; Balchen *v.* Crawford, 1 Sandf. Ch. 382; Yates *v.* Tisdale, 3 Edw. Ch. 74. It is sufficient that the bill shows the nature of the defendants' claims; it need not set out the facts on which those claims are based. Shaw *v.* Coster, 8 Paige, 339; Lozier *v.* Van Saun, 2 Green Ch. 325; Briant *v.* Reed, 1 McCarter (N. J.), 271, 277. For the form of a prayer in a bill of interpleader, see Vol. III.; Story Eq. Pl. (3d ed.) § 297, in note.

positive claim to the subject-matter of the suit, on the ground that he will not consent to its transfer to another claimant.[6]

Bills of interpleader may be filed in the case of tenants of lands chargeable with annuities, and liable to distress by their landlords, *and the claimants of the annuities;[1] and in other cases of *1565 disputed titles;[2] but the adverse claims must have arisen from acts done by the landlord, subsequent to the creation of the tenancy; and the Court only interferes, in these cases, on the ground of the privity which has been created by the act of the landlord, between the tenant and the other claimants.[3]

An agent may file a bill of interpleader where a contest has arisen between his principal and a person claiming through him;[4]

[6] Desborough *v.* Harris, 5 De G., M. & G. 439, 455; Jones *v.* Farrell, 1 De G. & J. 208; Symes *v.* Magnay, 20 Beav. 47. But see Lens *v.* Edwards, 5 Hare, 314. A claim made upon a party is sufficient ground for interpleader, although no legal proceedings have been actually commenced. Langston *v.* Boylston, 2 Ves. J. 101, 107, n. (1), in Sumner's ed. and cases cited; Dungey *v.* Angove, 2 Ves. 310; Angell *v.* Haddon, 15 Ves. 247, Mr. Hovenden's note (1); Richards *v.* Salter, 6 John. Ch. 445; Gibson *v.* Goldthwaite, 7 Ala. 281; Briant *v.* Reed, 1 McCarter (N. J.), 271, 276, 277; Duke of Bolton *v.* Williams, 2 Ves. J. 152; East India Co. *v.* Edwards, 18 Ves. 377. A bill of interpleader may be filed, though the claim of one of the defendants is actionable at Law and that of the other in Equity. Richards *v.* Salter, 6 John. Ch. 445; Yates *v.* Tisdale, 3 Edw. Ch. 71; Schuyler *v.* Pellissier, 3 Edw. Ch. 191; Dean *v.* Everitt, 2 Irish Eq. 28; Paris *v.* Gilham, Coop. 56. [Interpleader will lie by a garnishee under a *fi. fa.* against the judgment creditor. Webster *v.* McDaniel, 2 Del. Ch. 297.]

[1] Aldridge *v.* Thompson, 2 Bro. C. C. 149; Lord Thomond's Case, cited 9 Ves. 107; Angell *v.* Haddon, 15 Ves. 244; 16 Ves. 202.

[2] Id. Ibid. 142; Dungey *v.* Angove, 2 Ves. J. 304, 312; Mead *v.* Lord Talbot, 6 W. R. 97, V. C. W. An interpleader may be allowed where real estate is the subject of controversy. Taylor *v.* Reed, 20 N. H. 354; *ante*, Ch. I, by note (1).

[3] Id. Ibid. 142, n. (1); East India Company *v.* Edwards, 18 Ves. 376; Jee *v.* Wood, 3 Beav. 340, 342; 6 N. P. 180, 192; Cook *v.* Earl of Rosslyn, 3 Giff. 176; Dungey *v.* Angove, 3 Bro. C. C. (Perkins's ed.) 36, n. (1). A tenant cannot, as a general rule, entitle a bill of interpleader against his landlord merely on the ground that a stranger sets up an adverse title to the estate; for it would be extremely inconvenient, if a tenant were allowed (in his own right or that of others) to call in question the title of the person under whom he holds. Dungey *v.* Angove, 2 Ves. 304; Johnson *v.* Atkinson, 3 Anst. 800; Smith *v.* Tracy, 2 Anst. 581; Heming *v.* Moore, 4 Price, 7; Lowe *v.* Richardson, 3 Mad. 277; see Williams *v.* Halbert, 7 B. Mon. 184. Besides, in such case, the landlord and stranger cannot claim the same debt or duty. The rent due upon the demise to the tenant is a different demand from that which some other person may have upon the occupation of the premises. Ld. Eldon in Dungey *v.* Angove, 2 Ves. 310. To justify a bill of interpleader by a tenant, two persons must claim the same rent in privity of tenure, or of contract, as in the case of mortgagor and mortgagee, trustee and *cestui que trust*; Dungey *v.* Angove, 2 Ves. 312; Hoggart *v.* Catts, 1 Cr. & P. 197, 205; 2 Story Eq. Jur. §§ 811–821; White Water Valley Canal Co. *v.* Comegys, 2 Carter (Ind.) 469; lessor and his assignees subsequently to the lease: Cowlan *v.* Williams, 2 Ves. 107; Clarke *v.* Byne, 13 Ves. 383; devisee and the heirs of the lessor: Badeau *v.* Tylee, 1 Sandf. Ch. 270. An insurance company was allowed to file a bill of interpleader against a landlord, who brought an action on the policy, and against the tenant, who filed a bill to have the money laid out in rebuilding on the premises, and the plaintiff's costs were paid out of the fund in Court. Paris *v.* Gilham, Cooper, 56.

[The bill will not lie by a tenant against his landlord and a purchaser of the demised premises under attachment proceedings against the landlord: Dodd *v.* Bellows, 2 Stew. Eq. 127; nor by the holder of the legal title to land in possession against adverse claimants: Padgett *v.* Baker, 1 Tenn. Ch. 222; nor by a tenant against his landlord and a stranger who claims under title paramount: Snodgrass *v.* Butler, 54 Miss. 45.]

[4] Smith *v.* Hammond, 6 Sim. 10, 14; Oriental Bank *v.* Nicholson, 3 Jur. N. S. 857, V. C. S.; Stevenson *v.* Anderson, 2 V. & B. 407.

Interpleader by auctioneer, where there is a double claim for deposit: Mitchell *v.* Harris, 2 S. & S. 63; by a party taxed in two different towns for the same property which is liable to be taxed only once: Mohawk & Hudson R. R. Co. *v.* Cline, 4 Paige, 384; Thompson *v.* Dibbits, 1 Hopk. 272; Redfield *v.* Supervisors of Genesee Co., 1 Comst. 42; Green *v.* Mumford, 4 R. I. 313;

*1566 *but the agent or stakeholder must not offer to pay a less sum than that claimed by either party.[1] A mere stakeholder is justified, if there is the slightest doubt or risk arising from conflicting claims, in calling upon any person really interested, on either side, to indemnify him against such risk, and, if he refuses or neglects to do so, in filing a bill of interpleader;[2] but he is not bound to transfer a fund upon an indemnity.[3]

A bill of interpleader may be filed by the sheriff, where there are conflicting equitable claims on the property which he has seized;[4] but he must not be guilty of *laches* in applying to the Court; nor will he be protected if, at the time of making the seizure, he had notice that the goods were not the property of the person against whom the writ of *fieri facias* was issued.[5] A sheriff, who by virtue of an execution, levies upon property claimed by a third person adversely to the sheriff and creditor, cannot file a bill of interpleader against such third person and the plaintiff in the execution, to have them settle the right to the property between themselves.[6] Nor can a sheriff maintain a bill of interpleader against several creditors, where a controversy arises as to the application of the money in his hands, derived from the sale of a debtor's property on execution. His remedy is by an application to the summary jurisdiction of the Court from which the process issues.[7]

The plaintiff cannot sustain this bill where he is obliged to admit, that as to either of the defendants he is a wrong-doer.[8] Nor can the

by underwriters against different creditors of an insolvent debtor, claiming the fund proceeding from an insurance made for account of the debtor, some on the ground of special liens, and others under the assignment: Spring *v.* South Car. Ins. Co., 8 Wheat. 268; by a master of a vessel, where parties claim adversely under the bill of lading: Lowe *v.* ——, 3 Mad. 277; by a bank against separate and adversary parties who claim title to moneys therein deposited: City Bank of N. Y. *v.* Skelton, 2 Blatch. C. C. 14; or to shares in the stock of the bank: Providence Bank *v.* Wilkinson, 4 R. I. 597; by a receiver of funds arising from a sale of lands, made under order of Court, to which funds two or more persons make claim: Winfield *v.* Bacon, 24 Barb. 154; and by an attorney who has collected money, against several persons who claim it by a title derived from the persons who left the debts for collection, although he may be entitled to retain a part for his services: Gibson *v.* Goldthwaite, 7 Ala. 281.

An interpleader between principal and agent is admissible only where the claim is under a derivative and not under an adverse title. Crawshay *v.* Thornton, 2 M. & C. 23; Pearson *v.* Cardon, 2 R. & M. 606, 607, 610.

[1] Diplock *v.* Hammond, 2 Sm. & G. 141.

[2] Nelson *v.* Barter, 2 H. & M. 334; Affd. 10 Jur. N. S. 832; 12 W. R. 1043, L. C.

[3] East & West India Docks *v.* Littledale, 7 Hare, 57.

[4] Hale *v.* Saloon Omnibus Company, 4 Drew. 492.

[5] Tufton *v.* Hardinge, 6 Jur. N. S. 116; 8 W. R. 122, V. C. K.; and see Slingsby *v.* Boulton, 1 V. & B. 334; Sutton *v.* Furniss, 1 W. N. 153; 14 W. R. 600, M. R.

[6] Shaw *v.* Coster, 8 Paige, 339; Quinn *v.* Green, 1 Ired. Eq. 229; Quinn *v.* Patton, 2 Ired. Eq. 48; Parker *v.* Barker, 42 N. H. 76; but see Storrs *v.* Payne, 4 Hen. & M. 506; Lawson *v.* Jordan, 19 Ark. 297.

[7] Parker *v.* Barker, 42 N. H. 78; Shaw *v.* Coster, 2 Edw. Ch. 405; S. C. 8 Paige, 339; see Nash *v.* Smith, 6 Conn. 421. In Parker *v.* Barker, 42 N. H. 89, Mr. Chief Justice Bell said: "The fact that, with the exception of the doubtful cases in Connecticut, no case of an interpleader bill has been maintained by a sheriff, in a case of this kind, though the occasion for them must have been always extremely frequent, is conclusive that redress and relief must have been sought and found elewhere than in Courts of Equity. Besides, we think no community would have submitted to so tedious and expensive a method of settling the question, how money coming into an officer's hands by levy of an execution, should be disposed of."

[8] Shaw *v.* Coster, 8 Paige, 339; Quinn *v.* Green, 1 Ired. Eq. 229; Quinn *v.* Patton, 2 Ired. Eq. 48; Child *v.* Mann, L. R. 3 Eq. 806, 808; Crawshay *v.* Thornton, 2 M. & C. 19; [First National Bank *v.* Bininger, 11 C. E. Green, 345; Laing *v.* Zeden, L. R. 9 Ch. App. 736].

plaintiff have relief where it appears that the double claim has been caused by his own act or conduct.[9]

* A bill of interpleader may be filed against the crown;[1] and *1567 where the defendants are out of the jurisdiction.[2]

The bill will not lie, if there are proceedings already pending in which the rights of all parties can be ascertained;[3] but such proceedings must be a complete protection to the plaintiff. If the plaintiff has parted with the property, the bill will not lie, although he may have undertaken to pay over the value thereof to the parties who might be found to be entitled.[4]

An interlocutory injunction may be obtained upon a bill of interpleader.[5] The application for the injunction is made by motion in the usual manner. It need not be supported by an affidavit of merits; but the money or other property in dispute must be secured, by payment into Court, or in some other manner.[6] The injunction should be so framed as not to deprive the defendants of any legal rights they may have acquired.[7] The injunction will be granted, although the defendant alleges that the case is not a fit subject for interpleader, if the Court is satisfied that this is a question which must be tried in the cause.[8] Proceedings in one suit in Equity may be restrained by an injunction obtained in another suit.[9] Where there are two claimants to a fund,

[9] Crawshay *v.* Thornton, 2 M. & C. 1; Desbrow *v.* Harris, 5 De G., M. & G. 439. The plaintiff cannot have relief, by interpleader, where he is sued by a party for the price of goods he has purchased of him, and by a third party for the value of the goods in trover. Slaney *v.* Sudlow, 14 M. & W. 891; James *v.* Pritchard, 7 M. & W. 216.

[1] Reid *v.* Stearn, 6 Jur. N. S. 267, V. C. S.

[2] Stevenson *v.* Anderson, 2 V. & B. 407, 410; Martinez *v.* Hellaniti, G. Coop. 245, 248; *ante*, p. 150.

[3] Sieveking *v.* Behrens, 2 M. & C. 581, 591; 1 Jur. 50, Diplock *v.* Hammond, *sub nom.* Baldwin *v.* Rogers, 2 Paige, 210.

But it is no objection to the bill that a suit between the several parties, commenced by one of the claimants at the bar, is pending. Warington *v.* Wheatstone, 1 Jac. 202; Otis Bierce *v.* Bierce, 2 Paige, 570. [And the fact that one defendant is equitable and another legal is good ground for an interpleader. Oil Run Petroleum Co. *v.* Cobb, 6 W. Va. 522.] Where the party holding the fund may be discharged from all liability by payment and delivery to one, a bill of interpleader may be dispensed with. Schuyler *v.* Pellissier, 3 Edw. Ch. 191.

[4] Barnett *v.* Anderson, 1 Myl. 405; Sobbich *v.* Reeves, L. R. 2 Eq. 441, V. C. W. Where an administrator has power to hold the assets into possession, but they are in the hands of some of the distributees, who claim adversely to him, he cannot maintain a bill of interpleader against them. Martin *v.* Mayberry, 1 Dev. Eq. 161. An executor cannot file a bill of this character before he has proved the will. Mitchell *v.* Smart, 3 Atk. 606. But in a case in Connecticut where the plaintiff had paid over the money to one of the defendants, under a claim of right to which he was bound to submit, it was held that this did not prevent his sustaining the bill. Nash *v.* Smith, 6 Conn. 421, 427; see also, to the same effect, Jew *v.* Wood, 1 Cr. & P. 185; S. C. 3 Beav. 579.

[5] Warington *v.* Wheatstone, Jac. 202, 205; Seton, 962, No. 1; and see Dungey *v.* Angove, 3 Bro. C. C. 36; 2 Ves. J. 304; Creggon *v.* Symons, 3 Mad. 130. For forms of order, see Seton, 962; and see *post*, Chap. XXXVI. § 2, *Interlocutory Injunctions*. A defendant who wishes to obtain an injunction against a judgment, on the ground that he cannot safely pay it, may file a bill of interpleader against the persons appearing to be entitled, and pay the money into Court to be held for the party appearing to be entitled. Lowles *v.* Lee, 10 Gill & J. 358.

[6] Hamilton *v.* Marks, 5 De G. & S. 638, 643; and see Jones *v.* Gilham, G. Coop. 46; Vicary *v.* Widger, 1 Sim. 15; Walbanke *v.* Sparks, 1 Sim. 385. The order may be obtained *ex parte*, if none of the defendants have appeared; but if any have appeared, notice of the motion must be given to those who have entered an appearance.

[7] Sieveking *v.* Behrens, 2 M. & C. 581; 1 Jur. 50.

[8] Jew *v.* Wood, C. & P. 185. The injunction not only restrains execution, but also trial, and all other proceedings. Warington *v.* Wheatstone, Jac. 202.

[9] Prudential Assurance Co. *v.* Thomas, L.

and one files a bill against the stakeholder without making the *1568 other a * party, the stakeholder may file an interpleader bill and restrain the proceedings in the former suit.[1]

All parties should be served with notice of any application to dissolve the injunction.[2]

The only question which is strictly before the Court at the hearing is, whether the defendants should interplead.[3] It is not necessary for them to enter into evidence, as against each other.[4]

R. 3 Ch. Ap. 74; Warington *v.* Wheatstone, Jac. 202; Sieveking *v.* Behrens, 2 M. & C. 581; 2 Seton (3d ed.), 962.

[The practice noticed in the general statement of the text, that proceedings in one suit in Equity may be restrained by an injunction obtained in another suit, is not limited to interpleader suits. It has often been applied to the staying of concurrent suits in Equity after decree in one suit. *Ante*, 797, *et seq.* It has prevailed in the enjoining of suits in the same Chancery Court. *Re* Chadwell, 7 Heisk. 630; Fuentes *v.* Gaines, 1 Woods, 112; Erie R. Co. *v.* Ramsey, 45 N. Y. 637; Smith *v.* McLain, 11 W. Va. 654; Montgomery *v.* Whitworth, 1 Tenn. Ch. 174. And in another Chancery Court. Deaderick *v.* Smith, 6 Humph. 138; Parker *v.* Britt, 4 Heisk. 245; Douglass *v.* Joyner, 1 Baxt. 34; Basye *v.* Beard, 12 B. Mon. 587; Smith *v.* St. Louis Mutual Life Ins. Co., 3 Tenn. Ch. 502.

In 1 Hoff. Ch. Pr. 89, it is said that an injunction is not the proper mode of obtaining a stay of proceeding under a bill or decree in Chancery, whether the application be by parties or privies, or strangers, but the Court should be applied to by petition for an order, citing Dyckman *v.* Kernochan, 2 Paige, 26, and Newton *v.* Douglass, an unreported case. This statement has been construed as requiring the application to be in the original cause. Smith *v.* Amer. Ins. & Tr. Co., Clarke Ch. 307; Greenlee *v.* McDowell, 4 Ired. Eq. 483; Medlock *v.* Cogburn, 1 Rich. Eq. 477; Dederick *v.* Hoysradt, 4 How. Pr. 350; and recently in Wright *v.* Phillips, 56 Ala. 69. The New York cases are expressly overruled by Erie Railway Co. *v.* Ramsey, 45 N. Y. 637. And the language of Hoffman, and the cases based thereon are reviewed in Montgomery *v.* Whitworth, 1 Tenn. Ch. 174.]

[1] Prudential Assurance Co. *v.* Thomas, L. R. 3 Ch. Ap. 74; [School District *v.* Weston, 31 Mich. 86].

[2] Masterman *v.* Lewin, 2 Phil. 182, 186, 188.

[3] Cathcrall *v.* Davies, 1 Giff. 326; and see Masterman *v.* Lewin, *ubi sup.*; East and West India Docks *v.* Littledale, 7 Hare, 57; Cochrane *v.* O'Brien, 2 Jo. & Lat. 380; Toulmin *v.* Reid, 14 Beav. 499. A decree that the bill is properly filed is the only decree that the plaintiff is interested in obtaining. Atkinson *v.* Manks, 1 Cowen, 691. Sometimes the Court directs that an action already commenced may be proceeded in. 2 Seton, 964, 967; Aldridge *v.* Menser, 6 Ves. 418. Where one of the defendants in a bill of interpleader by his answer, made a claim against the plaintiff beyond the amount admitted to be due, and beyond that which was admitted by the other defendants, it was held that he must be permitted to proceed at Law to establish that part of his demand not in controversy with the other defendants. City Bank *v.* Bangs, 2 Paige, 570.

[4] Thames and Medway Canal Company *v.* Nash, 5 Sim. 280; Leonard *v.* Jamison, 2 Edw. Ch. 136. If one of the defendants does not appear, the bill may be taken as confessed against him. Farebrother *v.* Prattent, 5 Price, 305; S. C. Dan. 64; Farley *v.* Blood, 30 N. H. 364, 365; Richards *v.* Salter, 6 John. Ch. 445; Hodges *v.* Smith, 1 Cox, 357. Where a defendant suffers a bill to be taken as confessed against him, it is taken as an admission, that as to him the bill was properly filed, and that he has made a groundless claim against the fund. Badeau *v.* Rogers, 2 Paige, 209; see Aymen *v.* Gault, 2 Paige, 284.

The defendants may put in answers admitting or denying the facts stated in the bill. If the defendants, or either of them, deny the allegations in a bill of this nature, or set up distinct facts in bar of the suit, the plaintiff must reply to the answer, and close the proofs in the usual manner before he can bring his cause to a hearing. City Bank *v.* Bangs, 2 Paige, 570; Jones *v.* Gilham, 1 Cooper, 49. Where the plaintiffs had replied to the answers, and served *subpœnas* to rejoin, it was held that they could not move to have their costs paid out of the fund in Court, but must set down the cause for hearing. Jones *v.* Gilham, 1 Cooper, 49.

But where the defendants admit the facts stated in the bill, and on which the right to file a bill to interpleader rests, and set up no new facts as against the plaintiff, or in bar of his suit, it seems to be sufficient for him to file a replication, and to set the cause down for a decree to interplead, without waiting till the proofs are taken as between the defendants. City Bank *v.* Bangs, 2 Paige, 570. Where it appears by the answers to a bill of interpleader, that each defendant has claimed the fund in dispute, no further proof of the fact is necessary to entitle the plaintiff to a decree. Balchen *v.* Crawford, 1 Sandf. Ch. 380.

The amount or origin of the fund, &c., is not the object of inquiry as against the plaintiff, except in reference to fraud or collusion on his part. Atkinson *v.* Manks, 1 Cowen, 691.

Courts of Equity dispose of questions arising upon bills of interpleader * in various modes, according to the nature of the *1569 question, and the manner in which it is brought before the Court. An interpleading bill is considered as putting the defendants to contest their respective claims, just as a bill does which is brought by an executor or trustee to obtain the direction of the Court, upon the adverse claims of different defendants.[1] If, at the hearing, the question between the defendants is ripe for decision, the Court will make a decree. If that is not the case, proper inquiries, or trials of questions of fact, either before the Court itself or a Court of Common Law, will be directed, in order to bring the matter to a determination.[2]

Where the plaintiff has brought a bill of interpleader, properly and in good faith as against both the defendants,[3] he will be entitled to his costs both in Equity, and at Law where he has been sued, out of the funds[4] in his hands, when there are any such which can be made avail-

Where a decree goes on to order a reference to a Master by consent of parties, upon principles calculated to adjust the rights of those called upon to interplead, it will be considered a substitute for the ordinary proceeding by actual interpleader. Atkinson *v.* Manks, *ubi supra*. If the bill is dismissed, there can be no further proceedings by consent as between the defendants, for the Court has no jurisdiction. Jennings *v.* Nugent, 1 Moll. 134.

If after answer by both defendants, one makes default at the hearing, the Court will make a decree on hearing the case of the defendant who appears. Hodges *v.* Smith, 1 Cox, 357. On reference to the Master to settle the rights of the defendants to an interpleading suit as between themselves, the Court will give the benefit of a discovery as against each other, if they or either of them desire it. City Bank *v.* Bangs, 2 Paige, 570. Two defendants may read the answers of each other at the hearing, and are allowed in costs for a copy of each other's answer. Bowyer *v.* Pritchard, 11 Price, 103.

[The plaintiff in a bill of interpleader is a necessary party until he has fully rendered the debt, duty, or other thing required of him. Conway *v.* Pilcher, 28 Gratt. 229. But after he has paid the fund into Court, and the defendants have interpleaded, he is not entitled to interfere further in the suit. St. Louis Life Ins. Co. *v.* Alliance, &c. Life Ins. Co., 23 Minn. 7.]

[1] See Houghton *v.* Kendall, 7 Allen, 72. [Ed. Rep.] 142; Atwell *v.* Hamilton, 16 Ves. 222; Langley *v.* Dixon, 3 Beav. 213; Gilyard *v.* Lucas, 3 De G. & Sm. 11; *ante*, p. 1071; City Bank *v.* Bangs, 2 Paige, 570; Harmon *v.* Baptist Church and Soc. in Chester, 34 Vt. 317; Horton *v.* Smith, 1 Cox, 351; Bolton *v.* Williams, 4 Bro. C. C. 297; Barker *v.* Blount, 2 N. H. 414, 420; Goodlett *v.* King, 2 Bay (S. C.) 78, 85.

Under a judgment ordering certain parties to interplead, such other parties may be joined as, from their interest in the disputed property, are necessary to its proper determination. Lovatt *v.* Parker, 4 Drew. 1.

The defendants in such a bill will stand before the Court to litigate the questions of right pending between them to the same extent as if one had brought a bill against the other, alleging the same matter and for the same purpose. Horton *v.* Baptist Church and Soc. in Chester, 34 Vt. 317. They may compromise the controversy and so end the suit; or they may agree to a state of facts upon which the Court may make a decree without regard to the plaintiff in the interpleading suit. *Ibid.*

[If the defendants to a bill of interpleader agree that the bill is properly filed, the complainant is entitled to be dismissed with costs, and, if the case is ripe for decision between the defendants, a final decision will be made; if not, the Court will direct an action, an issue, or a reference to ascertain contested facts, as may be best suited to the nature of the case, or leave to the defendants the preparation of the case between them. State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100. And see First National Bank *v.* West River R. Co., 4 Vt. 633.]

[3] Badeau *v.* Rogers, 2 Paige, 209. [The rule applies to a strict bill of interpleader, and has no application where the bill is merely equivalent to a bill of interpleader. Laing *v.* Zeden, L. R. 9 Ch. App. 736.]

[4] Richards *v.* Salter, 6 John. Ch. 445; Caulfield *v.* Sterling, Hopk. 224; Aymer *v.* Gault, 2 Paige, 281; Spring *v.* South Carolina Ins. Co., 8 Wheat. 268; Atkinson *v.* Manks, 1 Cowen, 691; Thompson *v.* Elkins, Hopk. 272; City Bank *v.* Bangs, 2 Paige, 570; Child *v.* Mann, L. R. 3 Eq. 806, 809; Mason *v.* Hamilton, 5 Sim. 19; Campbell *v.* Stevenson, 1 S. & S. 462; Aldridge *v.* Mercer, 6 Ves. 418; Aldridge *v.* Thompson, 2 Bro. C. C. 150 and n. (*a*). Where the right to compel the defendants to interplead is not disputed, it seems that the plaintiff may obtain his costs on motion. Jones *v.* Gillham, 1 Cooper, 49. Where the right is disputed, costs will not be given to the plaintiff before the hearing. Jones *v.* Gillham, *ubi supra*.

able; and for this purpose he has a lien on such funds; but if there be no such funds, then costs will be given against the party who caused the necessity for the suit.[5] And where a decretal order for interpleader has been made on motion, a direction for payment of the plaintiff's costs will be then given, or made on a subsequent application for that purpose, by motion.[6]

*1570 *The defendants who have occasioned the suit will, in general, be ordered to pay the costs;[1] and this may be directed, although they may subsequently have withdrawn their claim.[2] A defendant may be ordered to pay the costs of a co-defendant, without previously directing them to be paid by the plaintiff, and to be repaid to him by the defendant.[3]

If the bill is unnecessarily filed, or the plaintiff improperly conducts himself, he will not be entitled to his costs.[4] The costs of any useless proceedings taken by the plaintiff will be ordered to be paid by him.[5] If the bill is dismissed on the ground that it is not a proper case for interpleader, it is usually dismissed with costs.[6] It may, however, be dismissed without costs as to any defendants who may have occasioned the litigation.[7] If the plaintiff proceeds in the suit after the defendants have withdrawn their claims, he will not be allowed his subsequent costs.[8]

Under special circumstances the defendants will be allowed their costs respectively out of the fund.[9]

If the defendants in a proper case for demurring put in their answers insisting that the bill is improperly filed, they will be allowed on a dismissal of the bill only the costs to which they would have been entitled upon the allowance of a demurrer.[10]

Costs are generally given as between party and party.[11] But in *Dungey* v. *Angove*,[12] which was a case of fraudulent collusion, the

[5] Campbell *v.* Solomans, 1 S. & S. 462; Paris *v.* Gilham, 1 Cooper, 56; Farley *v.* Blood, 30 N. H. 374, 375; Aldridge *v.* Mesner, 6 Sumner's Ves. 418, 419; see Dunlap *v.* Hubbard, 19 Ves. 205, Mr. Hovenden's note.

[6] Aldridge *v.* Mesner, 6 Ves. 418; see, however, Jones *v.* Gilham, *ubi sup.*

[1] Cowtan *v.* Williams, 9 Ves. 107; Dowson *v.* Hardcastle, 2 Cox, 278. In the adjustment of the controversy between the defendants, the party whose claim is adjudged groundless will be compelled to pay the costs, which have been taken in the first instance from the fund, to the rightful claimant of the fund. Thompson *v.* Ebbets, 1 Hopk. 272; Badeau *v.* Rogers, 2 Paige, 209; Canfield *v.* Sterling, 1 Hopk. 224; Mason *v.* Hamilton, 5 Sim. 19; Aldridge *v.* Mesner, 6 Ves. 418; Brymer *v.* Buchanan, 1 Cox, 425, note. In Edensor *v.* Roberts, 2 Cox, 281, the plaintiff was ordered to pay the costs of some of the defendants and to be repaid them by others. On further directions, the Court will order the defendants, by whom the suit has been occasioned, to pay the costs of the plaintiff, and of the other defendants. Dowson *v.* Hardcastle, 2 Cox, 279; S. C. 1 Sumner's Ves. 368; Cowtan *v.* Williams, *ubi supra*; Farley *v.* Blood, 30 N. H. 374.

[2] Mason *v.* Hamilton, 5 Sim. 19.

[3] Seton, 967; *ante*, p. 1406; and see Edensor *v.* Roberts, 2 Cox, 281; Meux *v.* Bell, 1 Hare, 73, 98; 6 Jur. 123.

[4] Bedell *v.* Hoffman, 2 Paige, 199; Badeau *v.* Rogers, 2 Paige, 209; Shaw *v.* Coster, 8 Paige, 339; Crawford *v.* Fisher, 1 Hare, 436; Brymer *v.* Buchanan, 1 Cox, 425, note.

[5] Crawford *v.* Fisher, 1 Hare, 436, 444; 6 Jur. 576.

[6] Cook *v.* Earl of Rosslyn, 3 Giff. 175; 7 Jur. N. S. 1070.

[7] Cochrane *v.* O'Brien, 2 Jo. & Lat. 380; Glynn *v.* Locke, 3 Dr. & W. 11.

[8] Symes *v.* Magnay, 20 Beav. 47; Hale *v.* Saloon Omnibus Company, 4 Drew. 492.

[9] Atkinson *v.* Marks, 1 Cowen, 691.

[10] Shaw *v.* Coster, 8 Paige, 339.

[11] Dunlop *v.* Hubbard, 19 Ves. 205; Dowson *v.* Hardcastle, 2 Cox, 279.

[12] 2 Ves. J. 818.

plaintiff and his solicitor were ordered to pay the defendant to a bill of interpleader which was dismissed, *all* his expenses as between attorney and client.

The lower scale of costs applies, if the fund or estate is under the amount or value of 1000*l*.[13]

* Where the decree at the hearing has terminated the suit as *1571 to the plaintiff, it will not abate by his death.[1]

A defendant in an interpleader suit may, after decree, file a supplemental bill, to bring a new party before the Court, without making the other parties to the suit parties to it.[2]

A defendant to a bill of interpleader, who is out of the jurisdiction, may be ordered to give security for costs.[3]

The statutes under which interpleader may be obtained at Common Law,[4] only apply where the conflicting claims are of a legal character;[5] and do not take away the concurrent jurisdiction of the Court of Chancery.[6]

Although a bill of interpleader, strictly so called, lies only, where the party applying claims no interest in the subject-matter; yet there are many cases where a bill in the nature of a bill of interpleader will lie by a party in interest, to ascertain and establish his own rights, where there are other conflicting rights between third persons. As, for instance, if a plaintiff is entitled to equitable relief against the owner of property, and the legal title thereto is in dispute between two or more persons, so that he cannot ascertain to which it actually belongs, he may file a bill against the several claimants in the nature of a bill of interpleader for relief.[7]

So a vendee of personal property may file a bill in the nature of an interpleader, against his vendor and a third person, who claims the property, and pray a decree upon their titles, that he may be secure in the payment of the purchase-money.[8]

In such cases the plaintiff seeks relief for himself, whereas in an interpleader bill strictly so called, the plaintiff asks only that he may be at liberty to pay the money, or deliver the property to the party, to whom it of right belongs, and may thereafter be protected against the claims of both.[9]

Where one of the defendants in a bill of interpleader, in his answer, makes a claim against the plaintiff of a sum beyond the amount ad-

[13] Gibbs *v.* Gibbs, 4 Jur. N. S. 371; 6 W. R. 445, V. C. K.; Regul. to Ord. II. 1 67; *ante*, p. 1443.

[1] Ld. Red. 60; Anon., 1 Vern. 351.

[2] Lyne *v.* Pownall, 1 Sim. N. S. 113; 15 Jur. 162.

[3] Smith *v.* Hammond, 6 Sim. 10, 15; *ante*, p. 29.

[4] 1 & 2 Will. IV. *c.* 58; and see 1 & 2 Vic. *c.* 45; 24 & 25 Vic. *c.* 126, § 12 *et seq.* For the practice as to interpleader at Law, see Chitty's Arch. 1480 *et seq.*

[5] Langton *v.* Horton, 3 Beav. 464.

[6] Oriental Bank *v.* Nicholson, 3 Jur. N. S. 857, V. C. S.; 2 Story Eq. Jur. § 824.

[7] Mohawk & Hud. R.R. Co. *v.* Clute, 4 Paige, 384; Thomson *v.* Libbets, 1 Hopk. 272; Parks *v.* Jackson, 11 Wend. 443; Bedell *v.* Hoffman, 2 Paige, 199; Mitchell *v.* Hayne, 2 S. & S. 63; Goodrich *v.* Shotbolt, Prec. Ch. 338, 436; City Bank *v.* Bangs, 2 Paige, 579; Fowler *v.* Lee, 10 Gill & J. 358.

[8] Darden *v.* Burns, 6 Ala. 362.

[9] 2 Story Eq. Jur. § 824; Story Eq. Pl. § 297, *b*.

mitted to be due and paid into Court, and which is not claimed by the other defendants, he will be permitted to proceed at Law to establish his right to that part of his demand, which is not in controversy with the other defendants.[10]

*1572 *The duty of a plaintiff in a bill in the nature of a bill of interpleader, which is brought by an executor or trustee to obtain the direction of the Court as to the disposition of a fund in his hands, is performed when he has brought the parties in interest before the Court, and he is not entitled to take part in the argument of the questions involved.[1]

Section IV. — *Bills to Perpetuate Testimony.*

A bill to perpetuate the testimony of witnesses must state the matter touching which the plaintiff is desirous of taking evidence; and must show that he has some interest in the subject; and pray for leave to examine witnesses touching the matter so stated: to the end that their testimony may be preserved and perpetuated.[2] Witnesses will not be examined to perpetuate testimony unless a bill has been filed for that purpose.[3]

Any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honor, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may file a bill to perpetuate any testimony which may be material for establishing such claim or right; and if the Crown has any interest in the matters in question, the Attorney-General must be made a defendant to the bill, to represent such interest.[4]

A bill to perpetuate testimony must show that the facts, to which the testimony of the witnesses proposed to be examined is conceived to relate, cannot be immediately investigated in a Court of Law or Equity, or that, before the facts can be adjudicated upon, the evidence of a material witness is likely to be lost by his death or departure *1573 from the realm.[5] The bill is, it seems, demurrable, *unless it

[10] City Bank *v.* Bangs, 2 Paige, 570. [Or he may file a cross-bill, and call for an account. Owen *v.* Apel, 68 Ill. 391.]

[1] Houghton *v.* Kendall, 7 Allen, 72. By Chancery Rule in Massachusetts, "In bills by executors or trustees, to obtain the instructions of the Court, and in bills of interpleader, or in the nature of interpleader, no solicitor or counsel for the plaintiff shall appear or be heard or act for or in behalf of any or either of the defendants." Rule 27.

[2] Ld. Red. 51; Mason *v.* Goodburn, Rep. t. Finch, 391; Lord Dursley *v.* Fitzhardinge, 6 Ves. 251, 259; Allan *v.* Allan, 15 Ves. 130, 135; Rose *v.* Gamel, 3 Atk. 439; Ellice *v.* Roupell, 32 Beav. 299; 9 Jur. N. S. 530. As to suits to perpetuate testimony, see Adams on Eq. 23; Coop. Eq. Pl. 52; Harr. by Newl. 52; Hubback, 104; Jeremy on Eq. 273; 1 Mad. Pr. 185, 2d ed.; 253, 3d ed.; Story Eq. Jur. § 1505; Story Eq. Pl. § 300; Taylor on Evid. § 490; Welford Eq. Pl. 139; and for forms of bills, see 1 Van Hey. 464; Whitworth Eq. Prec. 352; Willis Eq. Pl. 311; and Vol. III.

[3] Ord. IX. 6.

[4] 5 & 6 Vic. c. 69.

[5] Ld. Red. 52; Duke of Dorset *v.* Girdler, Prec. in Ch. 531; and see the cases collected 1 S. & S. 93, n.; Teale *v.* Teale, *ib.* 385; Ellice *v.* Roupell, 32 Beav. 299; 9 Jur. N. S. 530, 533.

alleges: that the plaintiff has an interest,[1] which is not capable of being barred by the defendant;[2] that the matter cannot be made the subject of present judicial investigation;[3] and that the defendant has, or claims to have, an interest to contest the title of the plaintiff, in the subject of the proposed testimony.[4]

A bill to perpetuate testimony is a bill of discovery, only to the extent of enabling the plaintiff to obtain the relief asked by the bill; and he, therefore, can only require an answer from the defendant as to the facts and circumstances alleged by the bill as entitling him to examine the witnesses.[5]

An affidavit of the circumstances, by which the evidence intended to be perpetuated is in danger of being lost, must be filed with the bill.[6]

Bills to perpetuate testimony as to legitimacy were formerly of not unfrequent occurrence;[7] now, however, a declaration of legitimacy, or of the validity or invalidity of a marriage, may be obtained in the Court of Divorce and Matrimonial Causes.[8]

The Court has jurisdiction to entertain a suit, for the purpose of perpetuating testimony, to be used in a foreign Court.[9]

A suit to perpetuate testimony is prosecuted against the defendant in the usual way; but it cannot be set down for hearing.[10]

Where the defendant put in a voluntary answer, denying the plaintiff's case, leave was given to either party to examine witnesses, as to the point in issue.[11]

If the plaintiff neglects to proceed with the suit, the defendant cannot move to dismiss for want of prosecution: but may move that the plaintiff be ordered to take the next step, within a limited time, or to pay him the costs of the suit.[12] If the defendant neglects to take the steps proper to be taken by him within the prescribed time the Court will, it seems, order the examination of the witnesses to proceed.[13]

* The defendant, as well as the plaintiff, is entitled to examine *1574 witnesses under the order.[1]

[1] Allan v. Allan, 15 Ves. 130, 135; Earl of Belfast v. Chichester, 1 J. & W. 459; Sackett v. Aylesworth, 1 Vern. 105; *ante*, p. [illegible].

[2] Lord Dursley v. Fitzhardinge, 6 Ves. 252; *ante*, p. 317.

[3] 14 Rul. 160; Lord North v. Lord Gray, 1 Ld. Ca. 14; Cox v. Coleby, 6 b. 55; Parry v. Rogers, 1 Vern. 441.

[4] 14 Rul. 54; Lord Dursley v. Fitzhardinge, 6 Ves. 251, 260.

[5] Illing v. Ewspell (No. 2), 32 Beav. 308; 9 Jur. N. S. 530.

[6] 14 Rul. 55, 160; Earl of Suffolk v. Green, 1 Atk. 450; Finigo v. Carew, 1 P. Wms. 116; Shirley v. Earl Ferrers, 3 b. 77; and see *ante*, p. 304.

[7] Lord Dursley v. Fitzhardinge, *ubi sup.*

[8] 21 & 22 Vic. c. 93; Taylor on Evid. 1480.

[9] Martin v. Mottram, 2 Phil. 203, 208; 11 Jur. 93; and see 19 & 20 Vic. c. 113; 22 Vic. c. 20.

[10] Ord. IX. 7. If it is set down the bill will be dismissed with costs, but without prejudice to the plaintiff using the evidence. Hall v. Hobbleden, 2 P. Wms. 162; Anon., Amb. 237; 2 Ves. S. 498; Vaughan v. Fitzgerald, 1 Sch. & Lef. 316; Morrison v. Arnold, 19 Ves. 671; Elton v. Rempell, *ubi sup.*

[11] Bligh v. Keeh, 7 Jur. N. S. 63, V. C. S.

[12] Wright v. Tatham, 2 Sim. 459; Beavan v. Carpenter, 11 Sim. 22; *ante*, p. 810.

[13] Cooney v. Ardil, 1 Dick. 353; Lancaster v. Lancaster, 5 Sim. 459.

[1] [Steward v. Steward, 2 V. & B. 116; Earl of Aboyne v. Powell, 1 Mer. 131; Skaine v. Powell, 15 Sim. 81; 9 Jur. 1084; but see Campbell v. Attorney-General, 14 W. R. 45, V. C. S.; 14 Jur. N. S. 922, where the witnesses were ordered to be examined *de bene esse*, the defendant having neglected to appear.]

The evidence in a suit to perpetuate testimony is taken before one of the Examiners of the Court, or an Examiner specially appointed, in the presence of all parties; and the cross-examination and re-examination follow immediately upon the examination in chief; or the evidence may be taken, either wholly or partially, by affidavit: the witness being, however, subject to cross-examination.[2]

When the witnesses have been examined the cause is at an end;[3] and if the defendant has not examined any witnesses in chief, he may then obtain, on motion of course, or on petition of course at the Rolls, an order for his costs to be paid by the plaintiff;[4] but if he examines witnesses in chief, he is not entitled to any costs.[5] By obtaining the order of course for his costs, which recites that the testimony of the witnesses has been taken, the defendant waives any objection he might otherwise have been entitled to make on the ground that he has had no sufficient opportunity of cross-examining the witnesses.[6]

The evidence having been taken, it is transmitted to the Record and Writ Clerks' office in the usual way; and it is presumed that office copies may be obtained at once.[7] An order may, when required, be obtained for the evidence of any witness to be used in any suit in Equity, or trial at Law, after the death of the witness;[8] or in case he is too infirm,[9] or cannot be compelled,[10] to attend at the hearing or trial; but formerly copies of the depositions could not be obtained for the purpose of perfecting a title to an estate.[11] If the production required is beyond the control of the Court, it seems that the originals will not be ordered to be produced, unless it is shown that certified or examined copies will not be sufficient.[12]

The order is obtained on motion, of which notice must be given; and must be supported by evidence of the death of the witness, or
*1575 * that he is too ill, or cannot be compelled, to attend to give evidence.[1]

A bill to perpetuate testimony cannot by amendment be converted into a bill of discovery.[2]

[2] See Ord. 5 Feb., 1861, r. 16; 15 & 16 Vic. c. 86, §§ 31, 38; Ord. XIX. 3, 7, 8, 9; *ante*, p. 903 *et seq.* For forms, see Vol. III.

[3] Morrison *v.* Arnold, 19 Ves. 670; Vaughan *v.* Fitzgerald, 1 Sch. & Lef. 316.

[4] Foulds *v.* Midgley, 1 V. & B. 138; Wright *v.* Tatham, 2 Sim. 459; Beavan *v.* Carpenter, 11 Sim. 22; *ante*, pp. 941, 1343. For forms of order, see Seton, 1270, No. 5; and for forms of motion paper, see Vol. III.

[5] Skrine *v.* Powell, 15 Sim. 81; 9 Jur. 1054. As to the costs of a suit to perpetuate testimony, see Morgan & Davey, 147 *et seq.*

[6] Watkins *v.* Atchison, 10 Hare Ap. 46; see form of order, Seton, 1270, No. 5.

[7] See *ante*, p. 938, note (5).

[8] Barnsdale *v.* Lowe, 2 R. & M. 142; Morrison *v.* Arnold, *ubi sup.*

[9] Morrison *v.* Arnold, *ubi sup.*; Biddulph *v.* Lord Camoys, 19 Beav. 467; 20 Beav. 402; Watkins *v.* Atchison, 10 Hare Ap. 45.

[10] Biddulph *v.* Lord Camoys, *ubi sup.*

[11] Teale *v.* Teale, 1 S. & S. 385.

[12] Attorney-General *v.* Ray, 2 Hare, 518; 3 Hare, 335; 6 Beav. 335; see also Anon., 13 Beav. 420; *ante*, p. 872.

[1] For form of notice of motion, see Vol. III.

[2] Ellice *v.* Roupell (No. 1), 32 Beav. 299; 9 Jur. N. S. 530, 533.

SECTION V.[1]— *Bills of Review, and Bills in the nature of Bills of Review.*

The object of a bill of review, and of a bill in the nature of a bill of review, is to procure the reversal, alteration, or explanation of a decree made in a former suit.[3] If the decree has been signed and enrolled, a bill of review must be filed,[4] if not, a bill in the nature of a bill of review.[5] An order under the Trustee Relief Act, being in the nature of a decree, can be impeached in this manner.[6]

A decree taken by consent cannot be set aside by a bill of review, or a bill in the nature of a bill of review:[7] unless, by clerical * error, something has been inserted in the order, as by *1576 consent, but which had not been consented to.[1]

A bill of this character can only be brought upon error in Law appearing on the face of the decree[2] without further examination of matters of fact; or upon some new matter which has been discovered after the decree, and could not possibly have been used when the decree was made.[3]

[3] It is said that a bill of review does not constitute a part of the original cause, but is an independent proceeding, in Cole *v.* Miller, 32 Miss. 89. The appearance of the defendant to such a bill is enforced in the same manner as to an original bill. The case proceeds upon such bill as an original bill. 2 Hoff. Ch. Pr. 12.

[4] Singleton *v.* Singleton, 8 B. Mon. 340; Greenwich Bank *v.* Loomis, 2 Sandf. Ch. 70; Clapp *v.* Thaxter, 7 Gray, 384; Frazer *v.* Sypert, 5 Sneed, 100; Simpson *v.* Downs, 5 Rich. Eq. 421; Elliot *v.* Babcom, 11 Gray, 286. This enrolment of the decree is essential to what is called by way of pre-eminence, a bill of review. See Coop. Eq. Pl. 91. In most of the State Courts of Equity, and certainly in the United States Courts, all decrees in Equity, as well as judgments at Law, are matters of record, and are deemed to be enrolled, as of the term of the Court at which they are passed, whether they are actually enrolled or not. So that in those Courts a bill of review is the ordinary and appropriate proceeding. Dexter *v.* Arnold, 5 Mason, 303, 309, 311; Whiting *v.* Bank of U. States, 13 Peters, 6, 13; Goodhue *v.* Churchman, 1 Barb. Ch. 589; Greenwich Bank *v.* Loomis, 2 Sandf. Ch. 70. In Massachusetts, a decree becomes matter of record, and takes full effect on the day it is formally drawn out and duly filed. Thompson *v.* Gooding, 5 Allen, 81. A bill of review lies only to a final decree. Mallary *v.* Bell, 2 Munf. 524; [Banks *v.* Anderson,] 2 Hen. & M. 29. Whiting *v.* Bank of U. States, 13 Peters, 6, 14. And a bill in the nature of a bill of review lies only after a final decree, and not upon an interlocutory decree. Jenkins *v.* Eldredge, 3 Story, 293; see Baker *v.* Whiting, 1 Story, 218, 231-233. [But see Hyman *v.* Smith, 10 W. Va. 298. A bill of review will not lie on an order for the appointment of a receiver. Johnston *v.* Hamner, 2 Lea, —; S. C. 2 Memph. L. J. 147.] A bill of review is held not to accord with the system of Chancery Practice in Texas. Seguin *v.* Maverick, 24 Texas, 526. But a petition in the nature of a bill of review, to impeach a judgment for fraud, is maintainable. *Ibid.*

[5] Ord. XXXI. 9; Ld. Red. 83, 90; Taylor *v.* Sharp, 3 P. Wms. 371; see Wiser *v.* Blachly, 2 John. Ch. 489; Mead *v.* Arms, 3 Vt. 148; Robinson *v.* Sampson, 26 Maine, 11, 13, 14; Baker *v.* Whiting, 1 Story, 218, 233. Clerical and obvious errors may be corrected without a bill. See *ante*, p. 1028. As to bills of this description, see Coop. Eq. Pl. 88; 2 Mad. Pr. 536, 2d ed.; 709, 3d ed.; Story Eq. Pl. § 403; Welford Eq. Pl. 231; and for forms of such bills, see 1 Van Hey. 571.

[6] *Re* Smyth, 11 W. R. 850, V. C. K.

[7] Webb *v.* Webb, 3 Swanst. 658; [Thompson *v.* Maxwell, 95 U. S. 391; Badlington *v.* Harvey, 95 U. S. 99. *Infra*, 1585, n. 1]; *ante*, p. 973; and see Smith *v.* Turner, 1 Vern. 274; see Lansing *v.* Albany Ins. Co., Hopk. 102; Cornish *v.* Keesee, 24 Ark. 528. A bill of review will not lie where the plaintiff himself has dismissed his bill: Jones *v.* Zollicoffer, 1 Car. Law Repos. 376; nor for the correction or modification of a decree taken *pro confesso*: Cornish *v.* Keesee, 24 Ark. 528.

[1] Anon., 1 Ves. J. 93.

[2] See remarks of Lord Eldon in Perry *v.* Phelips, 17 Ves. 178; [Brown *v.* Severson, 12 Heisk. 381].

[3] Ord. XXXI. 10; Mellish *v.* Williams, 1 Vern. 166; Standish *v.* Radley, 2 Atk. 178; Norris *v.* Le Neve, 3 Atk. 26, 35; S. C. on appeal, *nom.* Le Neve *v.* Norris, 2 Bro. P. C. ed. Toml. 73; Young *v.* Keighly, 16 Ves. 348; Ord *v.* Noel, 6 Mad. 127; Thomas *v.* Rawlings, 34 Beav. 50; Calder *v.* Shields, 2 Stew. & P. 417; Dexter *v.* Arnold, 5 Mason, 303; Triplett *v.* Wilson, 6 Call, 147; Kennedy *v.* Ball, Litt. Sel. Ca. 125; Quarrier *v.*

If the bill is filed on the ground of error, the decree complained of must be contrary to some statutory enactment, or some principle or rule of Law or Equity, recognized and acknowledged, or settled by decision, or be at variance with the forms and practice of the Court;[4] but the bill cannot be maintained, where the error is in mere matter of form;[5] or the propriety of the decree is questioned.[6]

*1577 *If the bill is filed on the ground of new matter, discovered

Carter, 4 Hen. & M. 242; Wiser *v.* Blachly, 2 Johns. Ch. 488; Mead *v.* Arms, 3 Vt. 148; Edwardson *v.* Maseby, 4 J. J. Marsh. 500; Brewer *v.* Boman, 3 J. J. Marsh. 492; Hollingsworth *v.* McDonald, 2 Harr. & J. 230; Her *v.* Heath, 3 How. (Miss.) 276; Bledsoe *v.* Carr, 10 Yerg. 55; Massie *v.* Graham, 3 McLean, 41; Gullett *v.* Housh, 7 Blackf. 52; U. States *v.* Samperyac, 1 Hemp. 118; Foy *v.* Foy, 25 Miss. 207; Whalan *v.* Cook, 29 Md. 1, 7; Fitton *v.* Macclesfield, 1 Vern. 292; James *v.* Fisk, 9 Sm. & M. 144; [Vaughan *v.* Cutrer, 49 Miss. 782; Crooker *v.* Houghton, 61 Me. 337]. These two causes for a bill of review may properly be joined in the same bill. Winchester *v.* Winchester, 1 Head (Tenn.), 460.

To authorize a bill of review for new matter which has arisen "in time after the decree," it must be matter which was in existence at the time the decree was rendered, but was not known to the party till afterwards. Bledsoe *v.* Carr, 10 Yerg. 55; Winchester *v.* Winchester, *ubi supra;* U. States *v* Samperyac, 1 Hemp. 118; Bush *v.* Madeira, 14 B. Mon. 212. In South Carolina, a bill of review does not lie for error in Law apparent upon the face of the decree: Manigalt *v.* Deas, 1 Bailey Eq. 284; nor in Texas, Seguin *v.* Maverick, 24 Texas, 526.

In Cooke *v.* Bamfield, 3 Swanst. 607, a third sort of bill of review is mentioned, viz., such as seeks to reverse a decree as being partly for the plaintiff and partly against him, and so not large enough for him; it being the course of the Court to allow a party to review a decree made for himself, if it be less beneficial to him than in truth it ought to have been. See Ingalls *v.* Lord, 1 Cowen, 240; Hughes *v.* Stickney, 13 Wend. 280; Parker *v.* Newland, 1 Hill (N. Y.), 87.

[4] Green *v.* Jenkins, 1 De G., F. & J. 454, 473.

[A decree which goes beyond the allegations of the bill, or fails to dispose of matters of equity raised by the pleadings, is erroneous on its face, and may be reviewed. Moore *v.* Huntington, 17 Wall. 417; Mosely *v.* Partee, 5 Heisk. 38; Randall *v.* Payne, 1 Tenn. Ch. 148, 452.]

[5] Ld. Red. 85; and see 1 De G., F. & J. 472, and cases, *ib.* 476–478; [Berdanatti *v.* Saxton, 2 Tenn. Ch. 699.]

[6] Perry *v.* Phelips, 17 Ves. 173, 176; Tommey *v.* White, 1 H. L. Ca. 160; Haig *v.* Homan, 8 Cl. & F. 320; Trulock *v.* Robey, 15 Sim. 265, 276; 2 Phil. 395. It is no ground of review that the matters decreed are contrary to the proofs in the cause. Mellish *v.* Williams, 1 Vern. 166; Bartlett *v.* Fifield, 45 N. H. 81; Whiting *v.* U. States Bank, 13 Peters, 6, 13, 14; Barnam *v.* McDaniels, 6 Vt. 177; Webb *v.* Pell, 3 Paige, 368; Young *v.* Henderson, 4 Hayw. 189; Dougherty *v.* Morgan, 6 Monroe, 153; Love *v.* Blewit, 1 Dev. & Bat. Eq. 108, 110; Eaton *v.* Dickinson, 3 Sneed (Tenn.), 397; Getzler *v.* Saroni, 18 Ill. 511.

Questions of fact are not open for discussion, on a bill of review for errors in law. Evans *v.* Clement, 14 Ill. 206. A bill of review will not lie where the original bill contains no equity. Todd *v.* Lackey, 1 Litt. 271; but see Griggs *v.* Gear, 3 Gilman, 2; nor unless the plaintiff shows himself aggrieved by the decree: Lansing *v.* Albany Ins. Co., Hopk. 102; nor after a demurrer has been allowed to a former bill of review; Respass *v.* McClanahan, Hardin, 342. The error must appear on the decree and pleadings; for the evidence in the case at large cannot be examined to ascertain whether the Court misstated or misunderstood the fact. Dexter *v.* Arnold, 5 Mason, 303; [Barker *v.* Barker, 2 Woods, 241; Burts *v.* Beard, 11 Heisk. 472; Drake *v.* Drake, 12 Heisk. 704;] P. & M. Bank *v.* Dundas, 10 Ala. 661. But taking the facts as they are stated to be on the face of the decree, it must be shown that the Court have erred in point of law. If, therefore, the decree does not contain a statement of the material facts on which the decree proceeds, it is plain that there can be no relief on a bill of review, but only by appeal to some superior tribunal. Story Eq. Pl. § 407. It is on this account that in England decrees are usually drawn up with a special statement of, or reference to, the material grounds of fact which support the decree. In the United States Courts the decrees are usually general, without any statement of facts. See *ante*, 1001 *et seq.*, and notes; Burdoine *v.* Shelton, 10 Yerger, 41. But for the purpose of examining all errors of law, the bill, answer, and other proceedings are in our practice as much a part of the record before the Court as the decree itself; for it is only by a comparison with the former, that the correctness of the latter can be ascertained: Story Eq. Pl. § 407; Dexter *v.* Arnold, 5 Mason, 311, 312; Hollingsworth *v.* McDonald, 2 Harr. & J. 230; Webb *v.* Pell, 3 Paige, 368; Whiting *v.* U. States Bank, 13 Peters. 6, 13, 14; [Putnam *v.* Day, 22 Wall. 60;] Ludlow *v.* Kidd, 2 Ohio, 372; Stevens *v.* Hey, 15 Ohio, 313; Saum *v.* Stingley, 3 Clark (Iowa), 514; Bartlett *v.* Fifield, 45 N. H. 81; and all these may be looked into to find errors apparent on the face of the decree: Saum *v.* Stingley, 3 Clark (Iowa), 514; Holman *v.* Riddle, 8

since the decree, the new matter must be relevant and material, and such as might probably have occasioned a different determination;[1] and no bill of review, or supplemental or new bill in the nature of a bill of review, grounded upon new matter discovered after the decree, can be brought without the special leave of the Court, first obtained for that purpose.[2] The new matter need not necessarily be evidence upon matters in issue in the original suit: although, if the pleadings were properly framed, it would rarely happen that it would not be, in some degree, evidence of such matters then in issue.[3]

* The application for leave to file the bill is usually made by *1578

Ohio, N. S. 384. In Seguin v. Maverick, 24 Texas, 526, it is said that "as our decrees do not recite the facts, as under the English Chancery practice, upon a bill of review, the decree can at most be reversed, and not corrected to accord with the facts; therefore a bill of review does not accord with our system."

[The only questions open on a bill of review for error apparent are such as arise upon the pleadings, proceedings, and decree, and the evidence cannot be looked to; and if the evidence be set out in the bill, a demurrer should be sustained on that ground alone, or the evidence might, on motion, be stricken out. Buffington v. Harvey, 95 U. S. 99; Livingston v. Noe, 1 Lea, 55.

A bill of review for error apparent is in the nature of a writ of error, and, upon opening the enrolment, the parties are at liberty to proceed as at a rehearing. Smith v. Clay, Amb. 647; Cattrall v. Purchase, 1 Atk. 240; Kenner v. Smith, 8 Yerg. 296; Payne v. Beach, 2 Tenn. Ch. 708. As to the practice on opening the enrolment on bill of review for new matter, Moore v. Moore, 1 Dick. 90; S. C. 2 Ves. 597; Cook v. Bamfield, 3 Swanst. 607.

No errors can be assigned except those which are specifically pointed out by the bill. Moore v. Moore, 2 Ves. 596; Green v. Jones, 1 De G., F. & J. 470; La Caussade, &c. R. Co. v. Bailey, 7 Cold. 447; Livingston v. Noe, 1 Lea, 62.]

[1] 1 Ed. Rep. 84; Taylor v. Sharp, 3 P. Wms. 371; Bennet v. Lee, 2 Atk. 529; Lord Portsmouth v. Lord Effingham, 1 Ves. S. 429; Young v. Keighley, 16 Ves. 348; Wilson v. Webb, 2 Cox, 21; Hampden v. Courtney, 2 Pull. 28; 2 C. P. Coop. t. Cott. 85, 412; Hastings v. Jervis, 8 Jur. N. S. 970; 30 W. R. 854; P. C.; Thomas v. Hastings, 10 Jur. N. S. 1152; 12 W. R. 948; 1 Jur. N. S. 1152; Cresswell v. Jackson, 11 L. T. N. S. 555; M. R.; Wyer v. Blachly, 2 John. Ch. 488; Livingston v. Hubbs, 2 John. Ch. 124; Kennedy v. Ball, 6 Litt. 124; Jenkins v. Eldridge, 3 Story, 299; Mitchell v. Berry, 1 Met. (Ky.) 602; Parkhurst v. Kinsman, 2 Blatch. C. C. 72; Pendleton v. Fay, 2 Paige, 204; Mowry v. Pritchard, 14 W. R. 172, V. C. S.

[The new proof should not be merely cumulative, but should be of such clear and decisive a character as, when satisfactorily met, to compel a reversal, without reference to the evidence in the original cause. Parmalee v. Lewis, 24 Mich. 242; Burson v. Dosser, 1 Head, 765; Long v. Granberry, 2 Tenn. Ch. 85.]

[2] Ord. XXXI. 11; Gould v. Tancred, 2 Atk. 533; Houghton v. West, 2 Bro. P. C. ed. Toml. 88; Moore v. Moore, 2 Ves. S. 596; Davis v. Bluck, 6 Beav. 393, 398; Anon., 2 P. Wms. 283; Perry v. Phelips, 17 Ves. 178; Webb v. Pell, 1 Paige, 564; Pendleton v. Fay, 3 Paige, 204; Edwardson v. Maseby, 4 J. J. Marsh. 500; Wilkinson v. Parish, 3 Paige, 653; Love v. Blewit, 1 Dev. & Bat. Eq. 108, 112; Simpson v. Watts, 6 Rich. Eq. 364; Pfeltz v. Pfeltz, 1 Md. Ch. 455; Hughes v. Jones, 2 Md. Ch. 289; Elliott v. Balcom, 11 Gray, 286. The granting of such a bill of review for newly discovered evidence is not a matter of right, but it rests in the sound discretion of the Court. It may therefore be refused, although the facts, if admitted, would change the decree, where the Court, looking at all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable. Dexter v. Arnold, 5 Mason, 315; Thomas v. Harvie, 10 Wheat. 146; Wood v. Mann, 2 Sumner, 316; Hollingsworth v. McDonald, 2 Harr. & J. 229; Jackson v. Ludeling, 3 Story, 290, 325, 324; Massie v. Graham, 3 McLean, 41; P. & M. Bank v. Lowndes, 10 Ala. 651; Winchester v. Winchester, 1 Head, 460; Hughes v. Jones, 2 Md. Ch. 289; [Harris v. Edmondson, 3 Tenn. Ch. 211].

But a bill of review brought to reverse a decree for error apparent on the face thereof, may be filed without the leave of the Court. Elliott v. Balcom, 11 Gray, 286; Anon., 2 P. Wms. 283; Perry v. Phelips, 17 Ves. 178; Dexter v. Arnold, 5 Mason, 309; see Webb v. Pell, 1 Paige, 564; Edwardson v. Maseby, 4 J. J. Marsh. 500; Bleight v. M'Elroy, 4 Monroe, 145; Creed v. Lancaster Bank, 1 Ohio St. 1.

* [1] Ed. Rep. 84, and see Young v. Keighley, ubi supra; Parrish v. Oldham, 3 Rich. Eq. 241; Barrs v. Otter, 46 22 ; Story Eq. Pl. §§ 416, 416, and notes. [1] Ed. Rep. 84; Dexter v. Arnold, 5 Mason, 315. [2] [Where new to be established, that matter discovered after a decree has been made, though not capable of being used as evidence at any thing which was previously in issue in the cause, but constituting an entirely new issue, may be the subject of a bill of review on of

petition,[1] but it may also be made on motion. Upon the application, the Court must be satisfied that the new matter has come to the knowledge of the applicant and his agents for the first time since the period at which he could have made use of it in the suit, and that it could not, with reasonable diligence, have been discovered sooner; and that it is of such a character that, if brought forward in the suit, it would probably have altered the judgment.[2] The petition or notice of motion must be served on the other parties to the cause.

If the bill is filed without leave having been first obtained, it *1579 * may be demurred to for irregularity;[1] or it may be ordered to

a supplemental bill in the nature of a bill of review. Welf. Eq. Pl. 238; Story Eq. Pl. § 416. In Love *v.* Blewit, 1 Dev. & Bat. Eq. 108, 110, it was held, that if the newly discovered evidence is in writing or of record, a review will be granted, notwithstanding the fact to which such evidence relates may have been in issue before; but otherwise, if the newly discovered evidence is merely parol proof. Head *v.* Head, 3 A. K. Marsh. 121; see Randolph *v.* Randolph, 1 Hen. & M. 180; Jenkins *v.* Eldredge, 3 Story, 299, 312; Respass *v.* McClanahan, Hardin, 346; Vaughn *v.* Hann, 6 B. Mon. 338; Bush *v.* Madeira, 14 B. Mon. 212; U. States *v.* Samperyac, 1 Hemp. 118. [See Barnes *v.* Dewey, 58 Ind. 418.]

[1] Dexter *v.* Arnold, 5 Mason, 303. As to the costs of the application, see Partington *v.* Reynolds, 6 W. R. 615, V. C. K.; Whelan *v.* Cook, 29 Md. 1. The petition should state the nature of the suit, the decree, and the errors of law, or the new matters, as the case may be, upon which the application is founded, and should pray for liberty to file a bill of review, to bring such decree into review. If the application is founded upon the discovery of new matter, the petition must describe the new evidence distinctly and specifically; and state when it was discovered, and its bearing on the decree. Dexter *v.* Arnold, 5 Mason, 303; Massie *v.* Graham, 3 McLean, 41. It is not sufficient that the petitioner expects to prove certain facts. He must state the exact evidence to establish them. [Livingston *v.* Noe, 1 Lea, 55.] On the hearing of such a petition, affidavits may be admitted on both sides, if necessary, to explain the nature of the evidence. Dexter *v.* Arnold, *ubi supra;* Hollingsworth *v.* McDonald, 2 Harr. & J. 230; [Long *v.* Granberry, 2 Tenn. Ch. 85]. Upon an application of this kind, the Chancellor exercises his judgment as to the propriety of interfering or meddling with the decree for the cause disclosed, and grants or refuses leave to file a bill of review accordingly. Hollingsworth *v.* McDonald, 2 Harr. & J. 230; Elliott *v.* Balcom, 11 Gray, 286. The Court on permitting a bill of review, or a bill in the nature of a bill of review, to be filed, should, where there was no fraud in the first trial, impose such terms as to the use of testimony formerly delivered in the suit, but since become inaccessible to the parties, as under the circumstances may be equitable. Singleton *v.* Singleton, 8 B. Mon. 340. The Court may refuse a review for the benefit of the party applying, and grant it for the protection of the interests of others. Hodges *v.* Milliken, 1 Bland, 511.

[2] Hosking *v.* Terry, *ubi sup.;* and see Patterson *v.* Slaughter, Amb. 293; Lord Portsmouth *v.* Lord Effingham, *ubi sup.;* Willan *v.* Willan, 16 Ves. 72, 87; Young *v.* Keighly, *ubi sup.;* Ord *v.* Noel, 6 Mad. 127; Partridge *v.* Usborne, *ubi sup.;* Davis *v.* Bluck, 6 Beav. 393, 399; Toulmin *v.* Copland, 4 Hare, 41, 45; Hungate *v.* Gascoyne, *ubi sup.;* *Re* Smyth, 11 W. B. 850, V. C. K.; Dexter *v.* Arnold, 5 Mason, 303; Haskell *v.* Raoul, 1 McCord Ch. 29; Hollingsworth *v.* McDonald, 2 Harr. & J. 230; McCracken *v.* Finley, 1 Bibb, 455; Harvey *v.* Murrell, Harper Eq. 257; Lansing *v.* Albany Insurance Co., Hopk. 102; Dias *v.* Merle, 4 Paige, 259; McCall *v.* Graham, 1 Hen. & M. 13; Pendleton *v.* Fay, 3 Paige, 204; Greenlee *v.* McDowell, 4 Ired. Eq. 481; Stevens *v.* Dewey, 27 Vt. 638; Livingston *v.* Hubbs, 3 John. Ch. 124; Wiser *v.* Blachly, 2 John. Ch. 488; Barrow *v.* Rhinelander, 3 John. Ch. 120; Love *v.* Blewit, 1 Dev. & Bat. Eq. 108, 110; Massie *v.* Graham, 3 McLean, 41; Jenkins *v.* Prewit, 7 Blackf. 329; Stevens *v.* Hey, 15 Ohio, 313; Jenkins *v.* Eldredge, 3 Story, 299, 314, 315; Resposs *v.* McClanahan, Hardin, 342; Hamersley *v.* Lambert, 2 John. Ch. 124, 125; Wood *v.* Mann, 2 Sumner, 316; Kennedy *v.* Ball, 6 Litt. 125; Mitchell *v.* Berry, 1 Met. (Ky.) 602; Whelan *v.* Cook, 29 Md. 1; [Brainard *v.* Morse, 47 Vt. 320; Perkins *v.* Partridge, 3 Stew. Eq. 559. But not if the petitioners are infants. Hoghton *v.* Fiddey, L. R. 18 Eq. 573]. The new matter must at least have been discovered since publication. Hodges *v.* Milliken, 1 Bland, 511, Story Eq. Pl. § 413; Dexter *v.* Arnold, Livingston *v.* Hubbs, M'Cracken *v.* Finley, Wiser *v.* Blachly, *ubi supra.* It is now the established exposition of Lord Bacon's ordinance on this point, that the new matter shall not have been discovered until after publication has passed. Story Eq. Pl. § 413; Love *v.* Blewit, 1 Dev. & Bat. Eq. 108, 110; Callen

[1] Bainbrigge *v.* Baddeley, 2 Phil. 705; 10 Jur. 765, M. R.; Henderson *v.* Cook, 4 Drew. 306; [Jackson *v.* Jackson, 2 Tenn. Leg. Rep. 275; Knight *v.* Atkisson, 2 Tenn. Ch. 385;] or it may be dismissed on motion. Carroll *v.* Parran, 1 Bland, 135.

be taken off the file: the application for which purpose is made by motion, of which notice must be served on the plaintiff.[2]

A bill of review or a bill in the nature of a bill of review, is only proper where a decree has been made finally determining the rights of the parties: and does not lie where a mistake has been made in directing the fund to be carried to a separate account.[3] It can only be filed by a person who was a party or privy to the former suit;[4] and where any other person considers himself aggrieved by the decree, he must proceed by original bill.[5]

A bill of review, brought upon new matter, may, it seems, be permitted, even after the decree has been affirmed by the House of Lords;[6] but it seems doubtful whether after affirmance by the House of Lords, a bill of review can be filed upon error in the decree.[7]

If, upon a bill of review, a decree had been reversed, another bill of review may be brought upon the decree of reversal.[8]

*Where twenty years have elapsed from the time of pro- *1580 nouncing a decree, which has been signed and enrolled, a bill of review cannot be brought,[1] unless the plaintiff was under disa-

v. Shields, 2 Stew. & P. 417. The ordinance of Lord Bacon still governs bills of review. Massie *v.* Graham, 3 McLean, 41; see Clapp *v.* Thaxter, 7 Gray, 384, 386, 387.

A bill of review will not be allowed upon a decree *pro confesso* had upon knowledge of all the facts constituting the defence of the party. McDaniel *v.* James, 23 Ill. 407.

The same proof is requisite to obtain leave to file a supplemental bill in the nature of a bill of review. Ld. Red. 91; see Parkhurst *v.* Kinsman, 2 Blatch. C. C. 72. So in reference to a bill of revivor and supplement in the nature of a bill of review. Pendleton *v.* Fay, 2 Paige, 204. The finding of facts by the Court on a petition for leave to file a bill of review is not conclusive at the hearing on the bill. Elliott *v.* Balcom, 11 Gray, 286. Newly discovered evidence, which goes merely to impeach the testimony of witnesses, is inadmissible. Livingston *v.* Hobbs, 3 Johns. Ch. 124. [Nor is new evidence to sustain the character of a witness. Long *v.* Cranberry, 2 Tenn. Ch. 85. The bill should bring before the Court a record of the proceedings and decree sought to be reviewed: a reference to them is not sufficient: Owen *v.* Cooper, 18 Ind. 521; Comer *v.* Hines, 38 Ind. 573; and must state the matters of grievance: Kellum *v.* Bailey, 1 Dill. 281.] As to the costs of the application, see Partington *v.* Reynolds, 6 W. R. 615, V. C. K.

[2] Davis *v.* Beach, 5 Beav. 393, 398; Hodson *v.* Ball, 11 Sim. 456; 1 Phil. 177, 179; and see Toulmin *v.* Copland, 4 Hare, 41, 52, where after many proceedings were stayed. [So, where the complainant, having obtained leave to file the bill on certain grounds, filed the bill embracing those grounds and alleging that the decree was erroneous for two other reasons, it was, on motion, ordered to be taken from the files. Buckingham *v.* Cowing, 29 N. J. Eq. 253, citing Milligan *v.* Mitchell, 1 M. & C. 433; Hodson *v.* Ball, 11 Sim. 456; S. C. on appeal, 1 Ph. 177.]

[3] Noble *v.* Stow, 29 Beav. 409. Cases of miscasting and miscounting may be explained and reconciled by order, where the matter demonstratively appears from the decree itself to be erroneous. Seton, 399 and cases cited; Massie *v.* Graham, 3 McLean, 41.

[4] Wyatt's P. R. 95; Gilb. For. Rom. 186; Webb *v.* Pell, 3 Paige 368; Kennedy *v.* Bell, Litt. Sel. Ca. 125. And even persons having an interest in the cause, if not aggrieved by the particular errors assigned in the decree, cannot maintain a bill of review, however injuriously the decree may affect the rights of third persons. Thomas *v.* Harvie, 10 Wheat. 146; Whiting *v.* Bank of U. States, 13 Peters, 6. But with this exception it may be generally stated, that all the parties to the original bill ought to join in a bill of review. Bank of U. States *v.* White, 8 Peters, 252; Dexter *v.* Arnold, 5 Mason, 308; Friley *v.* Hendricks, 27 Miss. 412. Upon a bill filed to contest a will, the verdict of a jury taken therein will be binding on all persons interested in the will, although not parties to the suit, and such persons may come in by a bill in the nature of a bill of review, to review or reverse the decree. Singleton *v.* Singleton, 8 B. Mon. 340.

[5] Pierce *v.* Brady, 23 Beav. 64; Noble *v.* Stow, *ubi sup.*

[6] See Barbon *v.* Searle, 1 Vern. 416; Willan *v.* Willan, 16 Ves. 72, 89; Ld. Red. 88; Coop. Eq. Pl. § 91; Story Eq. Pl. § 418; Stafford *v.* Bryan, 2 Paige, 45; Campbell *v.* Penn, 3 Munf. 227; Singleton *v.* Singleton, 8 B. Mon. 340.

[7] Taylor *v.* Sharp, 3 P. Wms. 371.

[8] Ld. Red. 88; see Story Eq. Pl. § 418. Stafford *v.* Bryan, 2 Paige, 45.

[1] Ld. Red. 88, 204; Smythe *v.* Clay, 1 Bro. P. C. ed. Lond. 454; Sherrington *v.*

bility;[2] and after a demurrer to a bill of review has been allowed, a new bill of review, on the same ground, cannot be brought.[3]

In a bill of this nature, it is necessary to state the former bill and the proceedings thereon,[4] the decree,[5] and the point in which the party exhibiting the bill of review conceives himself aggrieved by it, and the ground of law or new matter discovered, upon which he seeks to impeach it. If the decree is impeached on the latter ground, the bill must state the leave obtained to file it,[6] and the fact of the discovery. The bill may pray simply, that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution.[7] If it has been carried into execution, the bill may also pray the further decree of the Court, to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand.[8] If any person not a party to the original suit has become interested in the subject-matter, he must be made a party to the bill of review.[9]

*1581 *If the decree has not been signed and enrolled, it is, as we have seen, impeached by a bill in the nature of a bill of review.[1] As a decree not signed and enrolled may be altered upon a rehearing

Smith, 2 *id.* 62; Edwards *v.* Carroll, *ib.* 98; Lytton *v.* Lytton, 4 Bro. C. C. 441, 458. The twenty years are to be computed from the date of the decree, and not from the time of the enrolment. Deloraine *v.* Brown, 3 Bro. C. C. 621 n., 640; Scarisbrick *v.* Lord Skelmersdale, 4 Y. & C. 79, 106. This limitation of twenty years does not apply to persons having contingent interests, or not existing, or being under disabilities. Wyatt P. R. 98; Kay *v.* Watson, 17 Ohio, 27; Ld. Red. 205, n. (*b*).

In the United States Courts, bills of review for errors apparent on the face of decrees, are limited to five years, that being the limitation of writs of error upon judgments at Law. Thomas *v.* Harvie, 10 Wheat. 146; see Noland *v.* Urmston, 17 Ohio, 170; Gullett *v.* Housh, 7 Blackf. 52; Massie *v.* Graham, 3 McLean, 41; Boyd *v.* Vanderkemp, 1 Barb. Ch. 273. It is not necessary to plead that the bill is not filed within the proper time. It ought to appear on the face of the bill that it is so, or that the plaintiff is within the saving of the statute. Sheppard *v.* Lane, 6 Munf. 529; U. States *v.* Samperyac, 1 Hemp. 118; Contee *v.* Pratt, 9 Md. 67; see Bucknor *v.* Forker, 7 Dana, 51, where it was held, that a bill of review will not be sustained for error of law, after a lapse of time, which would bar a writ of error, unless the delay is sufficiently accounted for. Mitchell *v.* Berry, 1 Met. (Ky.) 602; Creath *v.* Smith, 20 Mis. 113.

But it seems to be a general rule, that a supplemental bill for newly discovered matter should be filed as soon after the new matter is discovered as it reasonably may be. Story Eq. Pl. § 423. If, therefore, a party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review founded on those facts; for it was his own *laches* not to have brought them forward at an earlier stage of the cause. Pendleton *v.* Fay, 3 Paige, 204; Dias *v.* Merle, 4 Paige, 259; Gullett *v.* Housh, 7 Blackf. 52; Ridgeway *v.* Toram, 2 Md. Ch. 303; Hughes *v.* Jones, *ubi supra.* But where there has been no *laches*, a petition asking leave to file a supplemental bill in the nature of a bill of review, may be filed at any time before the decree is enrolled. Ridgeway *v.* Toram, 2 Md. Ch. 289.

[2] Ld. Red. 205, n. (*b*).

[3] Dunny *v.* Filmore, 1 Vern. 135; Pitt *v.* Earl of Arglass, *ib.* 441.

[4] Turner *v.* Berry, 3 Gilman, 549; Randon *v.* Cartwright, 3 Texas, 267.

[5] Groce *v.* Field, 13 Geo. 24.

[6] Henderson *v.* Cook, 4 Drew. 306.

[7] Perry *v.* Phelips, 17 Ves. 173, 177.

[8] Story Eq. Pl. § 420; Dexter *v.* Arnold, 5 Mason, 308, 309; Ld. Red. 88–90.

[9] Ld. Red. 90; Story Eq. Pl. § 420; Hodson *v.* Ball, 11 Sim. 256, 443; Singleton *v.* Singleton, 8 B. Mon. 340. A bill of review defective in frame may sometimes be sustained as a cross-bill. Welf. Eq. Pl. 239; Coop. Eq. Pl. 95; Ld. Red. 89, 90.

[1] Lewellin *v.* Mackworth, 2 Atk. 40; Standish *v.* Radley, *ib.* 178; Gartside *v.* Isherwood, 2 Dick. 612; *ante*, p. 1575; Perry *v.* Phelips, 17 Ves. 173, 177; Wortley *v.* Birkhead, 3 Atk. 809; Pendleton *v.* Fay, 3 Paige, 204; Ld. Red. 91; Singleton *v.* Singleton, 8 B. Mon. 340; Dausman *v.* Hooe, 3 Wis. 466.

without a bill of review,[2] a petition for a rehearing must be presented and be brought on with the bill in the nature of a bill of review; and the office of the latter is to remedy the defect which occasioned the decree upon the former bill.[3]

The bill in its frame nearly resembles a bill of review, except that, instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard, with respect to the new matter, at the same time that it is reheard upon the original bill.[4]

A bill in the nature of a bill of review is necessary where, a decree having been made directing the usual accounts against a trustee, it is afterwards sought to charge him with what he might have received but for his wilful default;[5] and on the application for leave to file such a bill, it is only necessary to make out a *primâ facie* case against the trustee;[6] and where a person, who has been served with notice of a decree, considers himself aggrieved thereby, but is unable to raise the question under the pleadings in the cause, he should apply for leave to file a bill in the nature of a bill of review.[7] Where the grantee of an annuity obtained a decree, directing accounts and authorizing a receiver to * keep down the arrears, the costs of the annuitant to *1582 be added to his security, it was held that the grantor could only impeach the grant of the annuity by a bill of review, or in the nature of a bill of review.[1]

No bill of review will be admitted unless the party exhibiting the same has first deposited the sum of 50*l.* with the Registrar, as a pledge to answer such costs and damages as may be awarded to the opposite party, in case the bill is dismissed.[2] And no bill in the nature of a bill of review, grounded upon new matter discovered after the decree, will

[2] *Ante*, p. 1472. If the objection is upon matter of law apparent, or, a mistake in law to be collected from all the pleadings and evidence, and the decree has not been signed and enrolled, it is the subject of a rehearing, and there is no occasion for a bill in the nature of a bill of review. Story Eq. Pl. § 421, and note; Perkins v. Hay, 3 Paige, 204; Wiser v. Blachly, 2 John. Ch. 488; Ld. Red. 160.

[3] Moore *v.* Moore, 1 Dick. 66; 2 Ves. S. Jun. 596; Perry v. Phelips, *ubi sup.*; Bagham v. Dawson, Jac. 243; Purcell v. Macnamara, 3 Jac. N. S. 1070, V. C. S. Head v. Gardner, Johns. Eng. 6 Jur. N. S. 495; *ante*, p. 1474; and see Jopp v. Wood, 2 De G., J. & S. 323, 329. "The distinction between a bill of review and a bill in the nature of a bill of review, though important in England, is not felt in the practice of the Courts of the United States, and perhaps rarely in any of the State Courts of Equity in the Union. I take it to be clear, that in the Courts of the United States all decrees as well as judgments are matters of record, and are deemed to be enrolled as of the term in which they are passed. So that the appropriate remedy is by a bill of review." Story J. in Dexter *v.* Arnold, 5 Mason, 310, 311. In Baker *v.* Whiting, 1 Story, 218, it was held, that where a rehearing is sought on the ground of newly discovered evidence, *after an interlocutory decree*, the Court will grant such a rehearing upon the filing of the supplemental bill, if the evidence is such as to entitle the party to relief upon a bill of review, or a supplemental bill in the nature of a bill of review, after a final decree, but not otherwise. See Barrington *v.* O'Brien, 2 B. & B. 140; Blake *v.* Foster, 2 B. & B. 457; Wiser *v.* Blachly, 2 John. Ch. 488; Livingston *v.* Hubbs, 3 John. Ch. 124.

[4] Ld. Red. 92; Perry *v.* Phelips, *ubi sup.*; Story Eq. Pl. § 425.

[5] Hodson *v.* Ball, 11 Sim. 456, 461; 1 Phil. 177, 179; Partington *v.* Reynolds, 6 W. R. 915, V. C. K.

[6] Partington *v.* Reynolds, *ubi sup.*

[7] Kidd *v.* Cheyne, 18 Jur. 348; S. C. *nom. Ex parte* Kidd, 2 W. R. 316, V. C. W. As to service of notice of the decree, see *ante*, pp. 452-458.

[1] Tynte *v.* Hodge, 2 H. & M. 287.

[2] Ord. XXXI. 12. For the mode of making the deposit, see *ante*, p. 1482.

be admitted, unless the party exhibiting the same has first deposited with the Registrar so much money as, together with the deposit by the rules of the Court to be made on obtaining a rehearing of the cause in which the decree was pronounced,[3] will make up the sum of 50*l.*, as a pledge to answer such costs and damages as may be awarded to the opposite party in case any are awarded at the hearing of the cause on such new bill.[4] Where it was accidentally omitted to make the deposit at the time of filing the bill, it was allowed to be made subsequently.[5]

Filing a bill of review does not stay the execution of the decree which is complained of;[6] and before any bill of review, or other bill to reverse or alter a decree, can be filed, the decree must be first obeyed and performed:[7] except that, if any act is decreed to be done which extinguishes a right at Common Law: as, the making of an assurance or release, acknowledging satisfaction, cancelling of bonds or evidences, and the like: the Court may dispense with the actual performance of that part of the decree until such bill is determined.[8] Thus, if money is directed to be paid, it ought to be paid before the bill of review is filed: though it may afterwards be ordered to be refunded.[9] The rule, however, only requires the aggrieved party to perform so much of the decree as he was bound to perform at the time he files the bill of review, and does not prevent him filing the bill before he has performed the decree as regards those things which, by the decree, he was not bound to perform till a period subsequent to the time when the bill was filed.[10] Under very special circumstances, the performance of the *1583 decree may be dispensed with;[11] and where the plaintiff * was very poor, he was allowed to file a bill of review, without payment of the costs of the former suit.[1]

It has been said, that the constant defence to a bill of review for error apparent upon the decree, is by plea of the decree, and demurrer against opening the enrolment.[2] A demurrer would, however, seem to be the proper defence: for, if the decree is fairly stated in the bill, there can be no necessity to plead it.[3]

[3] See *ante*, pp. 1480, 1481. This deposit is 20*l.* Ord. XXXI. 4.

[4] Ord. XXXI. 13. For the mode of making the deposit, see *ante*, p. 1482.

[5] Loubier *v.* Cross, 1 Dick. 223.

[6] Williams *v.* Mellish, 1 Vern. 117.

[7] Wiser *v.* Blachly, 2 John. Ch. 488; Livingston *v.* Hubbs, 3 John. Ch. 125; Griggs *v.* Gear, 3 Gilman, 2.

[8] Ord. XXXI. 14; Williams *v.* Mellish, *ubi sup.*; Massie *v.* Graham, 3 McLean, 41; Griggs *v.* Gear, 3 Gilman, 2. It would be competent for the Court, if the decree sought to be reversed has been partially executed, to make such decree as to restore the parties to their just rights. Shaw C. J. in Elliott *v.* Balcom, 11 Gray, 296.

[9] Ld. Red. 88; 2 Bro. P. C. ed. Toml. 65, n.; Lubé Eq. Pl. 130.

[10] Partridge *v.* Usborne, 5 Russ. 195, 251.

[11] Williams *v.* Mellish, and Partridge *v.* Usborne, *ubi sup.*; Taylor *v.* Taylor, 12 Beav. 220, 224, 228; and see Wyatt's P. R. 97; Livingston *v.* Hubbs, 3 John. Ch. 124. This may be done where the party is in execution for non-payment of money under the decree, as this is considered equivalent to performance: Livingston *v.* Hubbs, *supra*; so, where the party is insolvent: Stalling *v.* Goodloe, 3 Murph. 159; or has given security for the performance of the decree: Stalling *v.* Goodloe, *supra*; Taylor *v.* Pearson, 2 Hawkes, 298.

[1] Fitton *v.* Earl of Macclesfield, 1 Vern. 264.

[2] Gould *v.* Tancred, 2 Atk. 534; Dancer *v.* Evett, 1 Vern. 392; Smith *v.* Turner, *ib.* 274.

[3] Ld. Red. 203, 291; Slingsby *v.* Hale, 1 Ca. in Cha. 122; Needler *v.* Kendall, Rep. t. Finch, 468; Jones *v.* Kenrick, 5 Bro. P. C. ed. Toml. 244, 248; Green *v.* Jenkins, 1 De G., F. & J. 454; 6 Jur. N. S. 515; see Webb *v.* Pell, 3 Paige, 368.

If any matter beyond the decree is offered as a defence to a bill of review, that matter should be pleaded.[4] It has been stated, that length of time should be pleaded to a bill of review; and that otherwise, the plaintiff would not have the benefit of exceptions: as, infancy, coverture, or the like;[5] but it would seem that, if the plaintiff relies on any such exceptions, he ought to state them in his bill: if he does not do so, this defence can be offered by demurrer.[6] Where a bill of review, or a bill in the nature of a bill of review, is grounded upon new matter, the defendant may, it seems, if he think such new matter not relevant, take the objection by way of demurrer; but as such a bill can only be exhibited by leave of the Court, and the relevancy of the new matter is generally well considered before leave is given, the bill will seldom be liable to a demurrer on this ground.[7]

If a demurrer to a bill of review is allowed, the order allowing it, when enrolled, is an effectual bar to another bill of review on the same grounds; and may be pleaded accordingly.[8]

Where a demurrer to a bill of review, grounded upon error, is overruled, the decree may be reversed without any further hearing.[9]

A bill of review, or a bill in the nature of a bill of review, grounded upon new matter, is liable to any plea which would have * avoided the effect of that matter if stated in the original bill.[1] *1584 It has been stated, that if the defendant can show that the allegation of the discovery of new matter is false, he must do so by plea; and that it is too late to insist upon it by answer;[2] but as the bill must allege the fact of the discovery, and that fact must be the ground of the proceedings, it would seem that it may be traversed by answer and by evidence, like any other fact stated in the bill.[3]

Section VI. — *Bills to impeach decrees for fraud.*

If a decree has been obtained by fraud, it may be impeached by original bill, without the leave of the Court;[4] the fraud used in obtain-

[4] Hartwell v. Lawrence, 2 Bro. P. C. ed. Toml. 107; [Harrington v. Nye, 1 Lea, 66. It would be a good plea to a bill of review, that the decree in the original cause was executed by consent, but such a defence must be pleaded or insisted on in the answer. Lemon v. Berry, 5 Gratt. 541, see Jenkins v. Eldridge, 3 Story, 299.

[5] Gregg v. Mackworth, 2 Ves. S. 109.

[6] Ld. Red. 244, 245, 247; Shortridge v. Smith, 2 Bro. P. C. ed. Toml. 62; Gorman v. M'Cosker, 2 id. 507; Cook v. Arnham, 3 P. Wms. 287; and 68 n. (B).

[7] Ld. Red. 261; Ord. XXXI. 11, *ante*, p. 1577. For form of demurrer to bill of review, see Wills Eq. Pl. 184; 2 Eq. Drafts. (2d ed.) 92.

[8] Dewey v. Filmer, 2 Ca. in Ch. 123; S. C. nom. Dewey v. Fermor, 1 Vern. 135; Pitt v. Earl of Anglesea, *ib.* 441; Wood v. Tucker, 2 Vern. 120; Story Eq. Pl. § 636; Webb v. Pell, 3 Paige, 368.

[9] Cooke v. Bamfield, 3 Swanst. 607. After a defendant has demurred to a bill of review, he cannot object to the right to file it. Griggs v. Gear, 3 Gilman, 2.

[1] Ld. Red. 292.

[2] Lewellin v. Mackworth, 2 Atk. 40.

[3] Ld. Red. 293. The fact that the evidence offered is newly discovered may be controverted by plea or answer. Dexter v. Arnold, 5 Mason, 303; see Hughes v. Millikan, 1 Bland, 596. A trial by jury upon a bill of review is within the discretion of the Judge who hears the cause. Elliott v. Balcom, 11 Gray, 286.

[4] Evans v. Bacon, 99 Mass. 213; Adams Eq. 419; Johnson v. Johnson, 30 Ill. 215; Sanford v. Head, 5 Cal. 267; Patch v. Ward, L. R. 3 Ch. Ap. 203, 206; [Flower v. Lloyd,

ing the decree being the principal point in issue, and necessary to be established by proof, before the propriety of the decree can be investigated.[5] Where a decree has been so obtained, the Court will restore the parties to their former situation, whatever their rights may be.[6]

Besides cases of direct fraud in obtaining a decree, it seems to have been considered that, where a decree has been made against a trustee, the *cestui que trust* not being before the Court, and the trust not discovered, or against a person who has made some conveyance or incumbrance not discovered, or where a decree has been made in favor of or against an heir, when the ancestor has, in fact, disposed by will of the subject-matter of the suit: the concealment of the trust, or subsequent conveyance, or incumbrance, or will, in these several cases, ought to be treated as a fraud.[7] It has been also said, that, where an improper decree has been made against an infant, without actual fraud, it ought to be impeached by original bill.[8] When a decree has been *1585 made by consent, and * the consent has been fraudulently obtained, the party aggrieved can only be relieved by original bill.[1]

A bill to set aside a decree for fraud, must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached.[2]

Section VII. — *Bills to carry decrees into execution.*[3]

A bill to carry a decree into execution is proper where, after a decree has been pronounced, it has happened that, owing to some neglect of the parties to proceed upon the decree, their rights have been so embar-

6 Ch. Div. 297; S. C. 10 Ch. Div. 327]. A bill to impeach a decree for fraud is an original bill in the nature of a bill of review. *Ex parte* Smith, 34 Ala. 455; Person *v.* Nevitt, 32 Miss. 180; Seguin *v.* Maverick, 24 Texas, 526; see Evans *v.* Bacon, *supra;* Elliott *v.* Balcom, 11 Gray, 286; [Randall *v.* Payne, 1 Tenn. Ch. 142. A decree obtained without making the persons parties to the suit whose rights are affected is void as to those parties, and the remedy is an original bill in the nature of a bill of review. Dunklin *v.* Harvey, 56 Ala. 181].

[5] *Ib.* 93; Richmond *v.* Tayleur, 1 P. Wms. 737; Loyd *v.* Mansell, 2 *id.* 73; Wichalse *v.* Short, 3 Bro. P. C. ed. Toml. 558; Kennedy *v.* Daly, 1 Sch. & Lef. 355, 384; Gillard *v.* Hort, *ib.* 386, 407; Mussel *v.* Morgan, 3 Bro. C. C. 74, 78; Brooke *v.* Lord Mostyn, 10 Jur. N. S. 1114; 13 W. R. 115, L. JJ.; 2 De G., J. & S. 373, 417. As to bills to impeach decrees, see Adams on Eq. 415; Coop. Eq. Pl. 96; Harr. by Newl. 91; Story Eq. Pl. § 426; Welford Eq. Pl. 246; and for form of such a bill, see Willis Eq. Pl. 381.

[6] Birne *v.* Hartpole, 5 Bro. P. C. ed. Toml. 197.

[7] Ld. Red. 93; see Style *v.* Martin, 1 Ca. in Cha. 150; Earl of Carlisle *v.* Goble, 3 Cha. Rep. 94.

[8] *Ante*, p. 164; Richmond *v.* Tayleur, *ubi sup.;* Brooke *v.* Lord Mostyn, *ubi sup.;* [Livingston *v.* Noe, 1 Lea, 64.]

[1] *Ante*, p. 973; Bradish *v.* Gee, Ambl. 229. [See Terry *v.* Commercial Bank, 92 U. S. 454; Lester *v.* Mathews, 58 Ga. 403; *ante*, 1575, n. 7.]

[2] The right to maintain such a bill remains only a reasonable time after the discovery of the fraud. In Evans *v.* Bacon, 99 Mass. 213, which was a bill to annul a decree on the ground of fraud, Foster J. said: "It is true there is no statute of limitation fixing a precise period of time after which the right to file a bill like the present is barred. But the limitation of a year for writs of review affords a close and forcible analogy. Plymouth *v.* Russell Mills, 7 Allen, 438." "Without laying down any inflexible rule, the Court are all of opinion that one year after the discovery of the alleged fraud is a period beyond which the right to file such a bill as the present ought not ordinarily to be allowed."

[3] Story Eq. Pl. §§ 429–432; Grew *v.* Breed, 12 Met. 369.

rassed by subsequent events, that no ordinary process of the Court upon the first decree will serve: and it is, therefore, necessary to have another decree of the Court, to ascertain and enforce them.[4]

Sometimes, such a bill is exhibited by a person who was not a party, nor claims under any party, to the original decree, but claims in a similar interest, or is unable to obtain the determination of his own right till the decree has been carried into execution.[5] A bill of the former description was attempted in *Rylands* v. *Latouche*;[6] and another has been since successfully prosecuted in *Oldham* v. *Eboral*.[7]

A bill of this description may also be brought by or against a person claiming as assignee of a party to the decree. This appears to have been the nature of the bill in *Organ* v. *Gardiner*,[8] *Lord Carteret* v. *Paschal*,[9] and *Binks* v. *Binks*.[10]

Such a bill may, also, be brought to carry into execution the judgment of an inferior Court of Equity, if the jurisdiction of that Court is not equal to the purpose: as in the case of a decree by the Court of Great Session in Wales (before the abolition of * that Court), *1586 which the defendant had avoided by fleeing into England.[1]

The question whether, upon a bill to carry a decree into execution, the propriety of the original decree might be examined, or impeached, or the decree varied, was much discussed before the House of Lords, in *Hamilton* v. *Houghton*:[2] in which a decree, which was erroneous, was reversed, upon a bill of this description, notwithstanding that there had been a very long acquiescence.

Although the original decree may be controverted upon a bill to carry it into execution, it is only the defendant, in the new suit, who can call it in question. The plaintiff never can:[3] he must, if dissatisfied with the decree, impeach it, either by bill of review, or by some proceeding of that nature.[4] In *O'Connell* v. *M'Namara*,[5] the Lord Chancellor of Ireland said: "I do not understand the rule to be, that this Court is bound to carry into execution an erroneous decree. On the contrary, I apprehend, that when a party comes into this Court asking for the benefit of a former decree, he must be prepared to show, if the case requires it, that such decree was right." Accordingly, he refused to give the plaintiff the benefit of the former proceedings, unless he consented to take the proper decree.

[4] Ld. Red. 95; *Johnson* v. *Northey*, Prec. in C. 154; 2 Vern. 467. As to bills of this kind, see Adams on Eq. 415; Comp. Eq. Pl. 98; Harr. by Newl. 90; Story Eq. Pl. § 420; Willard Eq. Pl. 240; and for forms of such bills, see 1 Van Hey. 519; Wills Eq. Pl. 301.

[5] Ld. Red. 95.

[6] 2 Bligh, 566.

[7] C. P. Coop. t. Brough. 27

[8] 1 Ch. Ca. 231.

[9] 3 P. Wms. 197; and see S. C. *nom.* Paschall *v.* Tharston, 2 Bro. P. C. ed. Toml. 10.

[10] 2 Bligh, 593.

[1] Ld. Red. 96; Morgan *v.* ——, 1 Atk. 408.

[2] 2 Bligh, 169.

[3] Richardson *v.* Robinson, 2 Ves. S. 225, 232, n.

[4] See Shepherd *v.* Titley, 2 Atk. 348.

[5] 3 Dr. & War. 411.

Section VIII. — *Bills for a Writ of Certiorari.*

When an equitable right is sued for in an inferior Court of Equity, and, by means of the limited jurisdiction of the Court, the defendant cannot have complete justice, or the cause is without the jurisdiction of the inferior Court, the defendant may file a bill in Chancery, stating the proceedings in the inferior Court, and its incompetency, and praying a writ of *certiorari* to remove the cause into the Court of Chancery.[6]

In case the Court of Chancery removes the cause from the inferior Court, the bill exhibited in that Court is considered as an original bill in the Court of Chancery; and is proceeded upon as such.[7]

[6] Ld. Red. 50; Hilton *v.* Lawson, Cary, 48; Portlington *v.* Tarbock, 1 Vern. 178; Sowton *v.* Cutler, 2 Chan. Rep. 108; Wyatt's P. R. 82. As to *certiorari* bills, see Coop. Eq. Pl. 50; Harr. by Newl. 49; 1 Mad. Pr. 3d ed. 249; Story Eq. Pl. §§ 18, 298; 1 Van Hey. 131, nn.; Welford Eq. Pl. 158; and for forms of such bills, see 1 Van Hey. 131; Whitworth Eq. Prec. 22; Willis Eq. Pl. 12, 309.

[7] Ld. Red. 51; and see Stephenson *v.* Houlditch, 2 Vern. 491; and Wyatt's P. R. 82.

*CHAPTER XXXV. *1587

INTERLOCUTORY AND OTHER APPLICATIONS BY MOTION OR PETITION, AND ORDERS THEREON.

SECTION I. — *Generally.*

AN interlocutory application is a request made to the Court, or to a Judge in Chambers, for its interference in a matter arising in the progress of a cause or proceeding; and it may either relate to the process of the Court, or to the protection of the property in litigation *pendente lite*, or to any matter upon which the interference of the Court or Judge is required before, or in consequence of, a decree or order.

Interlocutory applications are extremely various; and the occasions upon which they may be made are too numerous to be discussed in a general Treatise of this nature. They may be made, either to the Judge at Chambers, or to the Court. Applications of this nature in Chambers have been already considered;[1] and it is proposed here to describe the mode in which they are made by motion or petition to the Court.

Interlocutory applications, when made *viva voce* to the Court, are called *motions:* when they are made in writing, they are called *petitions*. There does not appear to be any very distinct line of demarcation between the cases in which they should be made by motion, and those in which they should be made by petition;[2] but, as a general rule, where any long or intricate statement of facts is required, the application should be made by petition; while, in other cases, a motion will be sufficient.[3] Although it is competent to the Court to order money in Court to be paid out, *upon motion, it is generally *1588

[1] *Ante*, p. 1323 *et seq.*

[2] This applies only to applications *in a cause*. Where the application is made on behalf of infants, or under the statutory jurisdiction, it must be by petition, unless otherwise directed by the statute under which the application is made. But where the application is upon some collateral matter which has reference to a suit in Court, a party may be relieved upon petition. Colwell v. Dickerson, 10 Jur. 368. A petition is the proper course to obtain a reversal of an interlocutory decree, wrongfully made, the cause yet pending. It cannot be done on motion, or bill of review. Wilcox v. M'Lean, 2 Hayw. 175. [*Ante*, 1472, 1902.

A petition, in common phrase, is a request in writing; and, in legal language, describes an application to a Court in writing, in contradistinction to a motion, which may be made *ore tenus*. Per Edger J., in Shaft v. Phenix Mut. Life Ins. Co., 67 N. Y. 547, citing this page, and Bergen v. Jones, 4 Met. 371.]

[3] Jones v. Roberts, 12 Sim. 189.

done on petition,[1] where there is no jurisdiction on summons.[2] In like manner, all applications for orders, which partake more of the nature of decrees or of decretal orders than of interlocutory proceedings: such as applications founded upon a separate certificate: or to wind up or compromise suits,[3] should be made by petition; and so, in general, must all applications to the Court, upon matters arising out of decrees or decretal orders:[4] except those relating to the process of the Court, or for enforcing the performance of them, which are usually made upon motion.[5] In *Lord Shipbrooke* v. *Lord Hinchinbrook*,[6] Lord Erskine says: "I do not find that there are any precise or positive boundaries between motions and petitions, as they are to be applied to carry into effect decrees and orders, so as to exclude all discretion in the Court to grant or refuse them, according to circumstances; but, generally speaking, motions, which have for their object the giving effect to decrees and orders, should be confined to cases where the order, which is to be made upon the motion, arises out of recent proceedings, upon which there is no doubt: for, as the adverse party knows nothing but by the notice, containing only the name of the cause and what is prayed of the Court, the proceedings ought to be recent and notorious, so as that the adverse party may be supposed to be perfectly conusant of all the steps and proceedings in the cause, as much as if, at a greater expense, they were recited in the petition."

All motions and petitions in causes (except motions and petitions for orders of course, and for hearing by way of appeal) must be heard before the Judge to whose Court the cause is attached, unless removed therefrom by any special order of the Lord Chancellor or *1589 * Lords Justices;[1] and every notice of motion or petition not in a cause, and every order made thereon, must be marked with the name of the Lord Chancellor and one of the Vice-Chancellors, or with the name of the Master of the Rolls, in the same manner as a bill is marked;[2] and the matter in which such order is made will thenceforth be considered as attached to the Court of the Judge whose name is so

[1] Lord Shipbrooke *v.* Lord Hinchinbrook, 13 Ves. 394; Heathcote *v.* Edwards, Jac. 504; Garratt *v.* Niblock, 5 Beav. 143; and see *post*, Chap. XLI., *Payment out of Court*.

[2] See *ante*, p. 1324.

[3] Winthrop *v.* Winthrop, 1 C. P. Coop. t. Cott. 201, 203; Askew *v.* Millington, 9 Hare, 65; 15 Jur. 532; Richardson *v.* Eyton, 2 De G., M. & G. 79, 90; Harrison *v.* Lane, 2 Sm. & G. 249; Dawson *v.* Newsome, 6 Jur. N. S. 625; 8 W. R. 725, V. C. S.

[4] See Winter *v.* Innes, 4 M. & C. 101, 106.

[5] In Nicholson *v.* Squire, 16 Ves. 260, Lord Eldon said: "I cannot hear parties who are under commitment, except upon petition." Where a person, not a party to the cause, is injuriously affected by an injunction, he may apply by petition to set it aside. Bourbaud *v.* Bourbaud, 12 W. R. 1024, V. C. W.; [Dalglish *v.* Jarvie, 2 Mac. & G. 231; Speak *v.* Ransom, 2 Tenn. Ch. 210]. And maintenance will be allowed to an infant, out of the capital of his estate, upon petition without bill. Matter of Bostwick, 4 John. Ch. 102. A petition is the proper process to affect a fund in Equity, when no other parties are to be brought in to litigate the questions presented by it than such as are or ought to have been parties to the original bill. Hayes *v* Miles, 9 Gill & J. 193. It is not, however, all cases in which a petition is the proper course to reach a fund in Court. *Ibid.*; see Tally *v.* Tally, 2 Dev. & Bat. Eq. 385; *Ex parte* Quackenboss, 3 John. Ch. 408 [Intervention *pro interesse suo* is by petition. Brien *v.* Paul, 3 Tenn. Ch. 361.]

[6] 13 Ves. 393.

[1] Ord. VI. 5, 9; Magan *v.* Magan, 16 Jur. 587, V. C. K.; see *ante*, p. 398. [But see Scully *v.* Lord Dundonald, 8 Ch. Div. 658.]

[2] Ord. VI. 1, 6; *ante*, pp. 389, 397.

marked, subject to being transferred in the same manner as causes are transferred.[3] A petition in the matter of a charity,[4] and petitions for the payment of the dividends,[5] or for the investment of part of the corpus,[6] of a fund standing to the credit of a matter, need not be made to the Court in which former orders relating to the same matter have been made.

Although the Court refuses to entertain an application, on the ground that it ought to have been made in another branch of the Court, it may nevertheless order the applicant to pay the costs of the application.[7] An order made by a branch of the Court which has not properly jurisdiction over the cause must, till discharged, be treated as a valid order; and the party affected by such order is not at liberty to treat it as a nullity, by obtaining another order inconsistent with it, from the proper branch of the Court.[8]

Interlocutory orders are either of course or special. Orders of course are those to which no opposition can be offered; and are drawn up without any direct application to the Judge. Special orders are those which the Court, in the exercise of its discretion, may either grant or refuse.

Orders of course may be made by any Judge of the Court,[9] notwithstanding the cause or matter in which the order is made is not attached to his branch of the Court; and, as a general rule, such order may be made either upon motion or petition; but, in consequence of the great facility with which orders of this kind may be obtained upon petitions to the Master of the Rolls, the practice has become general for orders of course, even in causes attached to the Courts of the Vice-Chancellors, to be made upon petitions at the Rolls.[10]

*No notice need be given of the application for an order of *1590 course, as no opposition can be offered to it.[1] If there is any irregularity in the order, or it has been obtained upon any false suggestion, or by the suppression of any material fact, it will be discharged on special application by motion: although on the merits it would have been proper to make the order.[2] The application to discharge the

[3] Ord. VI. 6. As to transfer of causes, *see ante*, pp. 70, note (*l*); 398, 799.

[4] *Re* Watts, 30 Beav. 401; 8 Jur. N. S. 294.

[5] *Re* B[illegible], 10 W. R. 516, M. R.

[6] *Ex parte* Hunter, 10 W. R. 557, V. C. W.; but see *Re* Browne, 12 Jur. N. S. 153, L. JJ.; 14 W. R. 209, L. JJ.

[7] Cooper v. Kelly, 15 Beav. 102; Yearsley v. Yearsley, 19 Beav. 1.

[8] Beddy v. Kent, 1 Mer. 361; Wilkins v. Stevens, 2 Sim. 617; Leaming v. Humphery, 4 Beav. 1, 7; Blake v. Blake, 7 Beav. 514; Cruse v. Cruse, 2 Phil. 113; 1 C. P. Coop. t. Cott. 338, 342. As to the power of a Judge to make special orders, in matters and causes not attached to his branch of the Court, see Ord. VI. 11; *ante*, p. 785.

[9] Ord. VI. 9; Magan v. Magan, 16 Jur. 587; *Re* Bell, 12 W. R. 1076; 2 H. & M. 601.

[10] See *post*, p. 1605; Ord. XXIII. 17. For a list of orders of course, which may be made on motion and on petition, see *post*, *Appendix*.

[1] Tyler v. Ward, Mos. 255. In some cases, however, where the application would otherwise be special, an order of course can only be obtained on the opposite party subscribing his consent thereto on the petition. The consent should be written opposite the prayer.

[2] Harris v. Start, 4 M. & C. 261; Brooks v. Purton, 4 Beav. 494; St. Victor v. Devereux, 6 Beav. 584, 588, 8 Jur. 26; Marquis of Hertford v. Suisse, 7 Beav. 165; Holcombe v. Aspinall, 8 Beav. 405, 412; Wilson v. Nainby, 16 Beav. 465; De Leuchtere v. Dawes, 11

order must be made to the Judge to whom special applications in the cause or matter ought to be made.[3]

If an order has been irregularly obtained, the party who has obtained it should take the earliest opportunity of discharging it: otherwise, any party affected by it may procure its discharge, at the costs of the person who obtained it;[4] and, moreover, no subsequent order to the same effect can be obtained until it has been discharged.[5]

After an order of course has been obtained, it ought to be served, as soon as possible, upon the party intended to be affected by it, or his solicitor: for, although it does not seem that an order of course is absolutely no order until it is served (as it has been contended), yet, if the other party takes a step before the order is served, that step being in itself regular, the order which had been obtained and not served, cannot afterwards be acted upon, if it will interfere with the step so taken.[6]

After service, an order of course cannot be amended and subsequently reserved, so as to make the amended order, served after the time, regular.[7]

If it is intended to enforce the performance of the order by process of contempt, the order must be personally served upon the party to be affected by it, in the manner before explained;[8] unless a special order has been obtained to authorize substituted service.[9] In other *1591 cases, the service is made in the same manner as other * service not required to be personal:[1] and is effected by delivering to and leaving with the person served, a true copy of the order, and at the same time producing and showing to such person the original order as duly passed and entered; or an office copy thereof, duly sealed with the seal of the Report office, and signed by one of the Clerks of Records and Writs.[2] Where an order was made for the payment of a sum of money by two solicitors, who were in copartnership, service of the order upon one, and leaving a copy at the place where the partnership business was carried on, was held not to be sufficient to ground a proceeding for a contempt.[3]

Interlocutory orders are enforced by attachment, and other process of contempt, in the same manner as other orders.[4]

Beav. 46; Brignall *v.* Whitehead, 30 Beav. 229; 8 Jur. N. S. 183; Wyllie *v.* Ellice, 12 Jur. 711, M. R.; 11 Beav. 99, 105; Cooper *v.* Lewis, 2 Phil. 178.

[3] Ord. VI. 10; Cooper *v.* Knox, 15 Beav. 102; Yearsley *v.* Yearsley, 19 Beav. 1. For form of notice of motion to discharge, see Vol. III.

[4] Tarbuck *v.* Tarbuck, 4 Beav. 149; Lincoln *v.* Wright, *ib.* 166; and see Davis *v.* Franklin, 2 Beav. 369, 375.

[5] Pearce *v.* Gray, 4 Beav. 127, 129.

[6] Church *v.* Marsh, 2 Hare, 652; and see Ballard *v.* Catling, 2 Keen. 606.

[7] Wool *v.* Townsley, 9 Beav. 41, 44.

[8] *Ante*, pp. 1042, 1043.

[9] Hunter *v.* ——, 6 Sim. 429; *Re* Mourilyan, 13 Beav. 84; *Re* Wisewold, 16 Beav. 357; see Lorton *v.* Seaman, 9 Paige, 609. A personal service will be dispensed with where the party cannot be found. And where an order is served upon the solicitor, if knowledge of such service is brought home to the party, he will be in contempt, by not obeying the order, in the same manner as if it had been served upon him personally. People *v.* Brower, 4 Paige, 405; see Stafford *v.* Brown, 4 Paige, 360. As to substituted service, see *ante*, p. 1044.

[1] *Ante*, pp. 453–455; Ord. III. 4, 6, 7; XXXVII. 2.

[2] Braithwaite's Pr. 166, 167; Braithwaite's Manual, 175, n. 73; and *ante*, p. 1018.

[3] Young *v.* Goodson, 2 Russ. 255.

[4] *Ante*, p. 1042 *et seq.*

Section II. — *Motions.*

A motion is an application, either by a party to the proceedings, or his counsel, not founded upon any written statement addressed to the Court.[5]

A motion may be made by or on behalf of any party to the record, provided such party is not in contempt,[6] or an outlaw.[7] A person who is *quasi* a party to the record, such as a claimant coming in under a decree, or a purchaser of an estate sold by order of the Court, may also apply to the Court in this manner: though it was formerly considered that he could only do so by petition.[8]

A motion is either of course,[9] or special.

* A motion of course requires no notice, as no opposition will *1592 be allowed to it.[1] Formerly, although motions of course might be made any day in term,[2] they could not be made out of term, except on a seal day. This rule has, however, been abolished: and now they may be made out of term, as well as in term, on any day, whether a seal day or not.[3]

[5] A motion can only be repeated on new grounds, and not upon mere additional or cumulative papers. Ray *v.* Conners, 3 Edw. Ch. 478; Fenton *v.* Lumberman's Bank, 1 Clarke, 360; Hoffman *v.* Livingston, 1 John. Ch. 211.

[6] Johnson *v.* Pinney, 1 Paige, 646; Rogers *v.* Paterson, 4 Paige, 150; Lane *v.* Lilley, 4 Hen. & M. 504. As to the effect of contempt, see *ante*, pp. 503 *et seq.*; Clark *v.* Cramer, 1 C. P. Coop. t. Cott. 247. An attachment issued against a party, after he has served a notice of motion, but before the motion made, will not prevent his making it. Jeyes *v.* Bateman, 6 Sim. 384. As to applications by a party in contempt, see *ante*, pp. 504 *et seq.*

[7] Knowles *v.* Rhydodendron Colliery Company, 1 Johns. 513; 6 Jur. N. S. 201.

[8] *Ante*, p. 1587; Jones *v.* Roberts, 12 Sim. 184; Lord Portarlington *v.* Danner, 2 Phil. 254.

[9] The term "order of course" is frequently used as if it were confined exclusively to such orders as are drawn up by the subordinate officers of the Court, without any direct application to the Judge. It seems, however, that the term "order of course" is not thus confined in its meaning, but that it includes any order that is granted by the Court as a matter of course, upon the Court being satisfied by affidavit of the truth of some particular facts, specified either by the General Orders or practice of the Court, as the foundation of such an order. As the term "order of course" is used in the General Orders, the precise meaning of it may be important. By the Equity Rules of the Supreme Court of the United States, all motions, rules, orders, and other proceedings, made and directed at Chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed,— which book shall be open at all office hours, to the free inspection of the parties in any suit in Equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order book, touching any and all the matters in the suits, to and in which they are parties and solicitors. Rule 4.

[1] See Tyler *v.* Ward, Mos. 255.

[2] Chalters *v.* Baker, 5 De G., M. & G. 482; 1 Jur. N. S. 32.

[3] Lord Harborough *v.* Wartnaby, 1 Phil. 364, 367; 8 Jur. 326; see, however, Saxby *v.* Saxby, 7 Sim. 140, *post*, p. 1593. By the 5th Equity Rule of the United States Courts, all motions and applications in the clerk's office for the issuing of mesne and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the clerk's office, which do not by special provision require any allowance or order of the Court, or of any Judge thereof, shall be deemed motions and applications grantable of course by the clerk of the Court. But the same may be suspended, or altered, or rescinded, by any Judge of the Court, upon special cause shown. See Chancery Rule of New Jersey, 19.

Motions of course are granted without the Court being called upon to investigate the truth of any allegation or suggestion upon which they are founded, and are not mentioned in Court; but it is the practice for the counsel to sign the brief, and to hand it to the Registrar in Court: who enters it in his book, marks the brief with his initials, and then returns it to the counsel.[4] The brief thus signed is then taken to the order of course seat in the Registrars' office; and the order will be drawn up by one of the Registrars' clerks. It is passed by the Registrar, and entered in the usual manner;[5] but no notice to attend the passing is given to the other side.

A special motion is one which it is not a matter of course to grant, but which the Court, in the exercise of its discretion, may, on the facts established in support of the application, either grant or refuse. Motions of this description may be made either *ex parte*, or upon notice.

Special *ex parte* motions are not limited to the ordinary motion days, but may be made to the Court at any time during its sittings; or, if the Court be not sitting, they may be made to one of the Judges, *1593 at his private house.[6] In such cases, however, care must * be taken to make the motion before the Judge who has properly the cognizance of the cause, unless it is made during vacation.[1] If any material fact is suppressed at the hearing of an *ex parte* motion, the order may be discharged with costs.[2]

It is impossible to lay down any clear rule defining such motions as may be made *ex parte*, and distinguishing them from such as require notice. The general orders usually state whether any applications to be made under their provisions require notice or not; and special applications concerning the proceedings in the cause, not regulated either by the general orders, or by any clearly defined rule of practice, must almost always be made upon notice.[3]

Where an order is made, by which a particular act is to be done, unless the other party shall within a certain time show cause to the contrary (which order is generally termed an order *nisi*), the party obtaining the order must, after the expiration of the time limited by the order *nisi*, if no cause is shown, move for another order to make

[4] Where, however, the counsel or the Registrar feels a difficulty, the matter is mentioned to the Court, before the order is drawn up. For form of motion paper, see Vol III.

[5] *Ante*, p. 1008 *et seq.*

[6] By the 6th Equity Rule of the United States Courts, all motions for rules, orders, and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a Judge of the Court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that in which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any Judge of the Court *ex parte*, and granted, as if not objected to, or refused, in his discretion. See Chancery Rule of New Jersey, 19.

[1] As to orders during the vacation, see Ord. VI. 11; *ante*, p. 985.

[2] Sturgeon *v.* Hooker, 1 De G. & S 434; Dalglish *v.* Jarvie, 2 M'N. & G. 231, 243; see also *Re* Rees, 12 Beav. 256.

[3] Marshall *v.* Mellerish, 5 Beav. 496. Notice of every application to the Court must be given to the opposite party, in case he has appeared, where the motion relates to any matter pending in Court, or where a final order is sought, orders for time, and those of a like nature only excepted; otherwise the applicant will only be entitled to an order *nisi*. Isnard *v.* Cazeaux, 1 Paige, 39; Hart *v.* Small, 4 Paige, 551.

absolute the previous order *nisi*. The motion, in this case, requires no notice; but the application must be supported by an affidavit to prove the due service of the order *nisi*, either upon the party himself, when such service is required to be personal, or upon his solicitor or other person,[4] where personal service is not required or has been dispensed with.[5]

Where an order was made that a case should stand over, with liberty to the plaintiff to amend within a month, and, on his making default, that the bill should be dismissed with costs, and the plaintiff having made default, the defendant obtained an order to dismiss without notice, it was held that the order was regularly obtained; and an application to discharge it was refused.[6]

When the application to be made to the Court is not of course, or does not come within that class of special applications which the Court permits to be made *ex parte*, a statement in writing of the terms of the motion must be served upon the adverse party or his solicitor, before the day on which the motion is intended to be made. This statement is termed a notice of motion.

*Unopposed motions may be made on any day while the *1594 Court is sitting;[1] but the Court appoints special days during term, and the sittings after term, for the hearing of motions; and whenever a motion of importance is required to be made on another day than one of the days appropriated to motions, special leave must be obtained to give notice of the motion for that day. It seems, however, that it is not the course of the Court, to make an order affecting the liberty of the subject, out of term, except on a seal day.[2]

A notice of motion must be properly entitled in the cause or matter in which the application is to be made.[3] It must be correctly addressed to the solicitor of the party or parties intended to be affected by it,[4] or to the party himself where he acts in person, or personal service is intended; and be signed by, or in the name of, the solicitor, or firm of solicitors, of the party moving, or of the party himself where he acts in person. A notice of motion by a party suing or defending *in forma pauperis* (except for the discharge of his solicitor) must be signed by the solicitor of such pauper.[5] A notice of motion must state the day on which the motion is to be made;[6] which must, as we have just seen,

[4] See Ord. III. 4, 6, 7; *ante*, pp. 453-456.

[5] For forms of motion paper and affidavit of service, see Vol. III.

[6] Dobson *v.* Edwards, 11 Sim. 454.

[1] Chaffers *v.* Baker, 5 De G., M. & G. 482, 1 Jur. N. S. 62; see Murray *v.* Blatchford, 2 Wend. 221.

[2] Saxby *v.* Saxby, 7 Sim. 140.

[3] Rawlins *v.* Cattell, 2 Hare, 188; Solomon *v.* Stedman, 4 Beav. 244; Davis *v.* Barrett, 7 Beav. 171; Pollard *v.* Doyle, 2 W. R. 509, V. C. K. The notice, if given in a cause commenced subsequently to 1 Nov., 1852, should have the reference to the second written on it. See Ord. I. 18; *ante*, pp. 1068, 1069. Where the notice was intituled in a cause existing since the motion was not heard, but the notice allowed to be amended. Morrall *v.* Pritchard, 11 Jur. N. S. 969, V. C. S. For form of notice, see Vol. III.

[4] Mosely *v.* Halsted, 11 Jur. 941, V. C. W.; and see Hutchinson *v.* Horner, 9 Jur. 615, V. C. W.; Parker *v.* Francis, *ib.* 616, V. C. L., n.

[5] Ord. III. 4; VII. 11; Perry *v.* Walker, 4 Beav. 452; 5 Jur. 1031; *ante*, p. 42.

[6] Butwell *v.* Wilcox, 2 Calpec, 164, Anon., 1 John. 143; Smith Ch. Pr. (2d Am. ed.), 64, n. (*a*).

be one of the days appointed for motions, unless special leave has been obtained to give the notice of motion for another day. The notice, however, though it expresses the day when the motion is to be made, usually adds "or so soon after as counsel can be heard;"[7] and whenever a motion is to be made "by leave of the Court," the notice ought to mention that it is so made: otherwise, the party against whom it is to be made may disregard it.[8]

A notice of motion must state clearly the terms of the order which will be asked for; and where the object is to discharge an order for irregularity, it is usual, but not necessary, to state the ground of *1595 the application.[9] It may include several objects: such * as, the appointment of a receiver, an injunction, and the payment of money into Court. Where separate motions were made for two objects, which might have been obtained by one motion, the Court made a special order, directing the party making such motions to pay the extra costs occasioned by the irregular proceeding.[1]

No person ought to join in a notice of motion who is not interested in the result of the application; and so strictly was this rule adhered to, that where the name of an uninterested party was inserted in the notice, with the names of others who were entitled to apply, the Court refused the whole motion.[2]

As a general rule, no person can be heard in support of a motion, unless he is one of the parties who gave the notice.[3] If the object of the application is to discharge or vary a Chief Clerk's certificate, it seems that all persons interested in the certificate are entitled to be heard against the application.[4] A notice of motion must also name the Judge before whom it is to be made;[5] and if the motion is not made in a cause, it must be marked with the name of the Lord Chancellor, and one of the Vice-Chancellors, or with the name of the Master of the Rolls, in the same manner as a bill is marked.[6]

A motion cannot be made on behalf of the relators in an information: it must be made on behalf of the Attorney-General.[7] Where the applicant is an infant,[8] or a married woman, without her husband,[9] or other person under disability,[10] the motion is made by the infant, married woman, or other person, by a next friend. Where a person, already

[7] See *Re* Electric Telegraph Company of Ireland, *Ex parte* Budd, 10 W. R. 4, L. JJ.

[5] Hill *v.* Rimell, 8 Sim. 632; 2 Jur. 45; 2 M. & C. 641; Jacklin *v.* Wilkins, 6 Beav. 607; Moggridge *v.* Thomas, 2 C. P. Coop. t. Cott. 166; Chambers *v.* Toynbee, 12 W. R. 1100, V. C. K. As to short notice of motion, see *post*, 1596.

[9] Brown *v.* Robertson, 2 Phil. 173; and see Lambert *v.* Hill, 1 Dr. & War. 74; see Alexander *v.* Easten, 1 Caines, 152; Jackson *v.* Stiles, 1 Cowen, 134, 135, note; 1 Smith Ch. Pr. (2d Am. ed.) 64, n. (*a*).

[1] Hawke *v.* Kemp, 3 Beav. 288.

[2] Folland *v.* Lamotte, 10 Sim. 486.

[8] Stubbs *v.* Sargon, 3 Beav. 408; and see Jaquet *v.* Jaquet, 7 W. R. 543, M. R.

[4] Johnston *v.* Todd, 5 Beav. 394, 396; and see Bonser *v.* Cox, 4 Beav. 379.

[5] Ord. XXXIII. 1.

[6] Ord. VI. 1, 6. As to bills, see *ante*, pp. 389, 397.

[7] Attorney-General *v.* Wright, 3 Beav. 447.

[8] Pidduck *v.* Boultbee, 2 Sim. N. S. 223; see *ante*, p. 77.

[9] Pearse *v.* Cole, 16 Jur. 214, V. C. K.; see *ante*, p. 108 *et seq.* As to suits by husband and wife, or her alone, without a next friend, see *ibid.*

[10] See *ante*, pp. 82–86.

acting as next friend, refuses to join in the motion, a next friend must be named for the purpose of the application;[11] and if no next friend is named in the notice, the solicitor giving the notice of motion may be ordered personally to pay the costs.[12]

A notice of motion for any process of contempt or commitment must be served personally upon the party to be affected by it: unless an order is obtained for substituted service. In other cases, the notice should be served in the manner before explained.[13]

*The application for substituted service of a notice of motion *1596 is made by *ex parte* motion, supported by affidavit.[1]

If any of the persons upon whom the notice of motion is sought to be served are out of the jurisdiction of the Court, leave must be obtained before service upon them can be effected. Such leave is procured on an *ex parte* motion, supported by affidavit showing where the persons are resident.[2] A copy of any order giving leave to serve the notice out of the jurisdiction, or to effect substituted service, must be served with the notice of motion. It is presumed that the power to authorize the service of notices of motion abroad, is co-extensive with that to authorize the service of the copy of the bill.[3]

Where the motion was made against a foreign corporation which had an office in this country, service of the notice of motion on the company at that office was held sufficient.[4]

If the defendant has not entered his appearance to the bill, though duly served, and the time limited for doing so has not expired,[5] leave to serve the notice upon him must first be obtained; and the notice must state that the motion will be made by leave of the Court;[6] otherwise the defendant may safely disregard the notice;[7] but after the expiration of the term limited for appearance, the plaintiff may, without special leave of the Court, serve any notice of motion personally, or at the dwelling-house or office of any defendant who, having been duly served with a copy of the bill, has not caused an appearance to be entered.[8]

Where a person who is not a party appears in any proceeding, either before the Court or in Chambers, service upon the solicitor in London by whom such party appears, whether such solicitor acts as principal or agent, will be deemed good service, except in matters of contempt requiring personal service.[9]

[11] Cox v. Wright, 9 Jur. N. S. 981; 11 W. R. 870; V. C. K.; and see Gay v. Guy, 2 Beav. 607; Eustace v. Eustace, 6 Jur. 227; L. C.; as explained in Cox v. Wright, *ubi sup.*; and see *ante*, p. 77.

[12] Pearce v. Cox, 16 Jur. 214; V. C. K.

[13] *Ante*, pp. 435, 436; Ord. III. 4, 6, 7; XXXVII. 2.

[1] As to substituted service, see *ante*, p. 448 *et seq.* For form of motion paper, see Vol. III.

[2] As to obtaining an order to serve abroad, see *ante*, p. 449 *et seq.* For form of order, see Seton, 1246, No. 11.

[3] *Ante*, p. 449; Green v. Pledger, 3 Hare, 165; 8 Jur. 801; Viscountess Hayarden v. Dunlop, 10 W. R. 685; V. C. K.

[4] Maclaren v. Stanton, 16 Beav. 279.

[5] Ord. III. 8.

[6] Hall v. Russell, 8 Sim. 632; 2 Jur. 45; 2 M. & C. 641; Harris v. Lewis, 8 Jur. 1065; V. C. K. B.; Jacklin v. Wilkins, 6 Beav. 607; *ante*, p. 1504.

[7] Macgregor v. Thomas, 2 C. P. Coop. t. Cott. 166.

[8] Ord. III. 8; *ante*, p. 435.

[9] Ord. III. 7, *ante*, p. 435.

Unless the Court gives special leave to the contrary,[10] there must be at least two clear days[11] between the service of a notice of motion, and the day named in the notice for hearing the motion; and in the computation of such two clear days, Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week, are not *1597 to be reckoned.[12] Leave to serve short * notice of motion will be given, whenever the circumstances of the case require it; but it cannot be implied from the fact that leave has been given to serve notice of motion for a particular day.[1]

Service of a notice of motion is effected by delivering a true copy of the notice to the person on whom the service is made.

The person who serves the notice should, after serving it, make an affidavit of the service: to be used, in case the party served should not appear when the motion is made. In an affidavit of this nature, it is not enough to say that notice was given, or the copy delivered to the party's solicitor, but it must appear, with certainty, when, and to whom, and by whom, notice was given;[2] and it must say "notice in writing," or words to that effect.[3]

The affidavit of service ought, in strictness, to be made and filed before the motion is made. It may, however, be filed afterwards; but no order will be drawn up on an affidavit of service of a notice of motion or petition, unless it is made and filed, at the latest, before the rising of the Court on the day on which the application is made.[4] If this is not done, or the affidavit is not sufficient, a new notice of motion must be given;[5] and an order taken upon an affidavit of service may be discharged for any irregularity.[6]

According to the general rule of the Court, upon motion or seal days, the Judge calls upon each counsel in Court, in turn according to their seniority,[7] to move; and each counsel, when called upon, has a right to make two motions before the next counsel is called upon. If, upon going through the bar, all the motions are not exhausted, the same process is gone through, *toties quoties*, till all the motions are disposed of. In the Court of Appeal, however, motions are set down in the paper, and called on in their order.

If a counsel is unable to make a motion, of which notice is given, on the day named, "or so soon after as counsel can be heard," he may save his notice of motion till the next motion or seal day;[8] but if he

[10] *Ante*, p. 1594.

[11] Where the application is made under Ord. XXXIII. 3, *ante*, p. 475, six clear days' notice is necessary.

[12] Ord. XXXIII. 2; and see Ord. XXXVI. 2; *ante*, p. 455; see Vandenburg *v.* Van Rensselaer, 6 Paige, 147.

[1] Hart *v.* Tulk, 6 Hare, 611, 612; see Newton *v.* Chorlton, 10 Hare Ap. 31, as to motions made by special leave of the Court.

[2] See Ord. XXVIII. 8.

[3] Hinde, 452; Wyatt's P. R. 9; Macauley *v.* Collier, 1 Ves. J. 141. For form of affidavit, see Vol. III.

[4] Lord Milltown *v.* Stuart, 8 Sim. 34.

[5] Barton *v.* Chambers, 4 Beav. 547.

[6] Solomon *v.* Stalman, 4 Beav. 243.

[7] Soltau *v.* De Held, 15 Jur. 1151, V. C. K. On the last day of term the junior bar are first called upon, but their privilege is confined to unopposed motions. *Ibid.*

[8] *Re* Banwen Iron Co., 17 Jur. 127, V. C. S.; see *post*, p. 1601.

omits either to make the motion or to save it, the opposite party may, when all the motions are exhausted, or at the next motion or seal day, apply for his costs of the motion.[9]

*A motion is made by the counsel to whom it is entrusted;[1] *1598 who, in making it, reads the notice of motion, and the evidence entered into on behalf of the party for whom the motion is made. He cannot, however, read any affidavits filed before the date of his notice of motion, unless notice of his intention to read them has been duly served on the opposite party.[2]

The solicitor for the party against whom a motion is to be made should search the affidavit book, at the Record and Writ Clerks' office, up to the morning of the day on which the motion is to be made, to ascertain whether any affidavits have been filed; but this search need not be carried back beyond the day of the date of the notice.[3] The same thing should be done by the solicitor for the party making the motion, in order to ascertain whether affidavits have been filed on the other side. If the motion is not made on the day named in the notice, a party filing a further affidavit ought to give notice of his having done so to the opposite party.

If an affidavit which has been filed upon or in opposition to a motion, requires an answer, but it has been filed so recently that an affidavit in answer cannot be procured, the party affected by it should, if he be the party moving, save his notice of motion till a future day; or, if he be the respondent, he should ask that the motion may stand over, in order that he may file an affidavit in answer.

In a pressing case, the affidavits have been allowed to be sworn in Court;[4] but, except under very special circumstances, the Court will not allow affidavits filed since the motion was opened to be read.[5] It seems, however, that the admission of evidence must depend on the circumstances of each case; and that, on a motion for an injunction, counsel may make use of any affidavit filed before he addresses the Court.[6]

[9] See *post*, p. 1601. Where, however, a motion, of which notice was given for the 29th June, was ordered on that day to stand over to the next motion day, 9th July, but was not then either brought on or saved, it was held that the moving party was entitled to make the motion up to the close of the following motion day, being the 13th July. Widdrington *v.* Llewellyn, 13 W. R. 959, V. C. W.

[1] Counsel's brief will consist of the evidence in support and in opposition to the motion, and such observations as may be deemed necessary. A copy of the notice of motion must be annexed; and, in general, prints of the bill and answers should accompany. For form of endorsement, see Vol. III.

[2] Clement *v.* Griffith, C. P. Coop. 470. In New York, copies of every petition, affidavit, &c., upon which the motion was founded, were required to be served, together with the notice of the motion. Isnard *v.* Cazeaux, 1 Paige, 39; Rule 80, in Chancery; Brown *v.* Ricketts, 2 John. Ch. 425. As to scandal and impertinence in papers prepared for making or opposing a motion, see Powell *v.* Kane, 5 Paige, 256. Where original papers are used in opposition to an application which is denied, the party using such papers must file them, so that the adverse party may obtain copies thereof. Bloodgood *v.* Clark, 4 Paige, 574.

[3] Clement *v.* Griffith, C. P. Coop. 470.

[4] Mercers' Co. *v.* Great Northern Railway Co., 14 Beav. 20.

[5] East Lancashire Railway Co. *v.* Hattersley, 8 Hare, 86; Electric Telegraph Co. *v.* Nott, 11 Jur. 273, V. C. E. This rule extends to documents which it is intended to prove viva voce. Bird *v.* Lake, 1 H. & M. 111.

[6] Munro *v.* Wivenhoe & Brightlingsea Railway Co., 13 W. R. 880, L. JJ.

Where one party gives notice of his intention to read an affidavit, but subsequently declines to do so, the other side may read it.[7]

*1599 *Formerly, the evidence on a motion could only be given by affidavit; but now, oral evidence may be made use of; and witnesses may be cross-examined upon any affidavits they may have made.[1] Unless otherwise directed by the Court, the examination and cross-examination take place before an Examiner, in the manner previously described.[2] In some cases, the Court has allowed the motion to stand over, in order that the cross-examination may take place.[3]

Evidence as to belief only is admissible on interlocutory application;[4] and the Court may also take notice of matters given in evidence on previous proceedings in the cause; and may refer to notes made by the Court on such occasions.[5]

When the counsel who support the motion have concluded, the counsel in opposition to the motion are heard. The senior counsel for the party moving has then the right of reply: after which the Court pronounces its decision.[6]

The Court will not, upon motion, make an order which will decide the principal point of the cause, unless upon the consent of all the parties affected by it: which consent must be expressed by their counsel in Court, and cannot be inferred from their not attending in pursuance of the notice of motion.[7] Nor will the Court, except by consent, extend the order upon a motion, beyond what is expressed in the notice: as, where the notice was, that the Court would be moved that the plaintiff might be put into possession, and a receiver appointed, the Court, though the defendant did not oppose the motion, would not direct that nothing should be received by the defendant in the mean time.[8] It is,

[7] Cauty *v.* Houlditch, 14 Sim. 75. Theoretically, a motion may stand over from time to time until both sides have exhausted themselves in affidavits. Practically, the delay is lessened by conditions imposed by the Court, when the motion is mentioned; as, for instance, that the party opposing the motion shall file his affidavits by a certain day; and that the party moving shall file his affidavits (if any) in reply, by a certain subsequent day; though, even where such directions are given, it is difficult to shut out material evidence, solely on the ground of its not having been adduced in time. 1st Rep. Eng. & Ir. Com. Ap. 69; and see Anderton *v.* Yates, 15 Jur. 833, V. C. K. B.

[1] 15 & 16 Vic. c. 86, § 40; Smith *v.* Swansea Dock Co., 9 Hare Ap. 20, n.

[2] *Ante*, p. 903 *et seq.*

[3] Normanville *v.* Stanning, 10 Hare Ap. 20; Besemeres *v.* Besemeres, Kay Ap. 17; Mayer *v.* Spence, 1 J. & H. 87.

[4] Bird *v.* Lake, 1 H. & M. 111. The grounds for belief should, however, be stated. See Ord. 5 Feb., 1861, r. 23; *ante*, p. 894.

[5] Lister *v.* Leather, 3 Jur. N. S. 433, V. C. W.; 1 De G. & J. 361.

[6] For form of order on motion, see Seton, 36.

[7] Like *v.* Beresford, 3 Bro. C. C. 366; Skinners' Co. *v.* Irish Society, 1 M. & C. 162, 164; Tullett *v.* Armstrong, 1 Keen, 428, 435; but see Bailey *v.* Ford, 13 Sim. 495. An order to break up the soil, for the purposes of inspection, cannot be made on motion. Emor *v.* Barwell, 1 De G., F. & J. 529; 6 Jur. N. S. 1233, 1236.

[The ultimate object of a decree cannot be obtained on motion, or in advance of a hearing on the merits, except by consent: Smith *v.* Earl of Pomfret, 2 Dick. 437; Eldridge *v.* Porter, 14 Ves. 139; McLin *v.* McNamara, 1 D. & B. Eq. 409; Neal *v.* Hagthrop, 3 Bland, 551; Harris *v.* Fly, 7 Paige, 423; Wessells *v.* Wessells, 1 Tenn. Ch. 58; Trimble *v.* Dodd, 2 Tenn. Ch. 500; nor has the Court power on motion to make general references involving rights: Eubank *v.* Wright, 2 Tenn. Ch. 538; and should not make references to the Master without first adjudicating the right of the parties to guide him in his inquiries: Carey *v.* Williams, 1 Lea, 51. And see Brandon *v.* Crouch, 11 Heisk. 605. *Ante*, 857, n. 1; 1004, n 7.]

[8] Wyatt's P. R. 287.

therefore, necessary, that every thing the party wishes to be obtained upon his motion, should be expressed in the notice: otherwise, the Court will not grant it. This rule is strictly followed where the order is taken upon affidavit of service of the notice of motion; but an *order which is less extensive than that asked by the notice may *1600 be granted, if it will not prejudice the person against whom it is made.[1]

A motion for an injunction is often, by consent, turned into a motion for decree;[2] in which case, leave to set the motion down for hearing should be obtained, so as to save the month's delay.[3]

At the hearing of a motion, the Court sometimes orders payment of the costs, and sometimes reserves them until further order;[4] but if no order is made, they become subject to the rules already pointed out with reference to "costs in the cause."[5]

In general, where a motion is unsuccessful it will be refused with costs;[6] and where the party moving asks for something he is entitled to, and also for something he is not entitled to, he may be ordered to pay the costs of it although he succeeds.[7]

No order for payment of costs will be made on an *ex parte* motion.[8]

If the parties appear, the Court may deal with the costs of a motion, although the notice of motion does not state that they will be asked for;[9] but a party against whom the order is taken upon affidavit of service, cannot be directed to pay the costs, if the notice of motion does not ask for them.[10]

If a party who is not interested in the result of a motion is served with the notice of motion, he will be entitled to the costs of appearing;[11] and where a party, who had not been served with the notice, appeared on the hearing of the motion, at the request of the party who

[1] Hatton v. Hepworth, 6 Hare, 315, 317; 12 Jur. 253; and see Powell v. Cockerell, 4 Hare, 572; 10 Jur. 243; Clark v. Jacques, 11 Beav. 623; Pratt v. Walker, 10 Beav. 261.

[2] See *ante*, p. 825, Seton, 871; and *post*, Chap. XXXVI., *Injunctions*.

[3] Green v. Low (No. 1), 22 Beav. 395; and see *ante*, p. 825.

[4] Lewis v. Smith, 1 M'N. & G. 417, 421; Warner v. Mayor, &c., Sheffield, & Lincolnshire Railway Co., 14 Jur. 615, 616, V. C. W.; Jones v. Earlam, 10 Hare Ap. 11; Newton v. Cowtan, 10 Hare Ap. 32; see Kane v. Van Vranker, 5 Paige, 62. Seeber v. Hoe, 5 Paige, 85.

[5] *Ante*, p. 1578; see Rogers v. Rogers, 2 Paige, 389; Wilkinson v. Hoe Law, 4 Paige, 207. If a party succeeds on a motion, and obtains an order for costs, and no direction is given as to them, and he obtains a general decree for costs, he shall be allowed costs of the motion. Stafford v. Bryan, 2 Paige, 45. But this rule does not apply if the motion be granted as a mere matter of favor, or to relieve the applicant from the consequences of his own default. *Ibid.* Costs should not be taxed upon overruling or sustaining a motion to dissolve an injunction. Barnett v. Spencer, 2 Hen. & M. 7.

[6] See Dugdale v. Johnson, 5 Hare, 92.

[7] Lancashire v. Lancashire, 9 Beav. 120, 130; 9 Jur. 956, 958; Moet v. Couston, 33 Beav. 578; 10 Jur. N. S. 1012; and see Starch v. Young, 5 Beav. 557.

[8] Nokes v. Gibbon, 3 Jur. N. S. 282; 5 W. R. 216; Cast v. Poyser, 26 L. J. Ch. 353.

[9] Clark v. Jacques, 11 Beav. 623; Butler v. Gascoyne, 12 Beav. 525; Powell v. Cockerell, 4 Hare, 572; Dawson v. Jay, 2 W. R. 589, L. C.; Tamplin v. Ingle, 1 N. R. 159, see Crippen v. Ingersoll, 10 Wend. 603; Bates v. Loomis, 5 Wend. 78.

[10] Pratt v. Walker, 10 Beav. 261.

[11] Hemenway v. Atkins, I. J. & W. 377; Bamford v. Watts, 2 Beav. 201; Major v. Mason, 14 Jur. 1, 202; see Bruce v. Kinlock, 11 Beav. 432; Tabuteau v. Warburton, 4 Dr. & War. 267; and see *post*, p. 1610.

*1601 gave the notice, he was held to be entitled to his * costs.[1] Where, no proceedings having been taken in the cause for more than seven years, a notice of motion was served on the solicitor for a deceased party, it was held that it was proper for him to appear on the motion.[2]

Where a motion is refused with costs, the costs may be taxed without any special direction for that purpose, unless the Court, upon the application of a party alleging himself to be aggrieved, prohibits such taxation.[3]

Where the right of a party to an order for which he has given a notice of motion is intercepted by a step taken by the other side, he is entitled to his costs; but he should not bring on the motion, if the costs then incurred are tendered.[4]

In some cases, a party who succeeds in his motion may be ordered to pay the costs of it: thus where he applies for an order by which he seeks an indulgence, he will, in general, be ordered to pay all the other parties their costs occasioned by the application.[5] Upon this ground, where a plaintiff, in a foreclosure suit, obtained an order for the cause to be advanced, he was ordered to pay the costs of the motion.[6]

If a party gives a notice of a motion, and does not move accordingly, he is to pay to the other side costs, to be taxed by the Taxing Master, unless the Court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs.[7] In order to obtain the costs of an abandoned motion, the respondent must mention the motion to the Court not later than the motion day next after the day for which the notice was given;[8] and the notice of motion must be produced to the Registrar on bespeaking the order.[9] The order will not be made after the bill has been dismissed for want of prosecution;[10] or at the hearing.[11]

A motion is considered to be abandoned, if not made or saved before the Court has disposed of the motions on the day for which *1602 * the notice is given;[1] or if, when it is before the Appeal Court, it is not made when called on.[2]

[1] Shaw *v.* Forrest, 20 Beav. 249.

[2] Chalie *v.* Gwynne, 9 Beav. 319.

[3] Ord. XL. 38; but see, as to this rule, Seton, 92, and *ante*, p. 1442. For form of order refusing a motion with costs, see Seton, 87, No. 6.

[4] Newton *v.* Ricketts, 11 Beav. 164.

[5] See Cocks *v.* Purday, 12 Beav. 451, 453; Bartlett *v.* Harton, 17 Beav. 479, 482; Douglas *v.* Archbutt, 23 Beav. 293; Dakins *v.* Garratt, 4 Jur. N. S. 579, V. C. K.; Moss *v.* Syers, 9 Jur. N. S. 1219; 11 W. R. 1047, V. C. K.

[6] Browne *v.* Lockhart, 10 Sim. 420; see Ord. XXI. 6, *ante*, p. 972.

[7] Ord. XL. 23. Formerly, if a party gave notice of a motion which he afterwards abandoned, he was not liable to pay to the other party his costs of appearing to oppose the motion, until a notice of the same motion had been given three times, without its being made, and then, upon a fourth notice, the opposite party might object to such motion being heard, until the costs of the three former motions were paid. Shelly *v.* Shelly, 8 Ves. 316; Anderson *v.* Palmer, 14 Ves. 151.

[8] Woodcock *v.* Oxford, Worcester, & Wolverhampton Railway Co., 10 Hare Ap. 54, n.; 17 Jur. 33, V. C. K.; Gorely *v.* Gorely, 25 Beav. 234; Eccles *v.* Liverpool Borough Bank, Johns. 402; but see Wedderburne *v.* Llewellyn, 13 W. R. 939, V. C. W., *ante*, p. 1597, note (9).

[9] Withey *v.* Haigh, 3 Mad. 437; and see Reg. Regul. 15 March, 1860, r. 31, *ante*, p. 1379.

[10] Farquharson *v.* Pitcher, 4 Russ. 510.

[11] Eccles *v.* Liverpool Borough Bank, *ubi sup.*

[1] *Re* Smith, 23 Beav. 284; but see Wedderburne *v.* Llewellyn, 13 W. R. 939, V. C. W.; *ante*, p. 1597, note (9).

[2] Turner *v.* Turner, 15 Jur. 1165, L. JJ.; *ante*, p. 1369.

Where a motion by the plaintiff stood over, in consequence of the defendant undertaking to perform a certain act, and the undertaking was subsequently discharged, on his performing the required act, the motion was not treated as an abandoned motion, but the costs of it were reserved to the hearing.[3]

Where the plaintiff gave a notice of motion, but died before it was heard, and his executors, who subsequently revived the suit, declined to proceed with the motion, it was held that it could not be treated as an abandoned motion;[4] and that the costs of the motion were not costs in the cause.[5]

If the plaintiff amends his bill, after he has given a notice of motion for an injunction,[6] or for a receiver,[7] he thereby waives the notice; and must pay the defendant's costs of the motion.[8] Where after notice of motion for an injunction had been served, a general demurrer to the bill was allowed, leave was given to amend, without prejudice to the notice of motion.[9]

Where an order has been made for the payment of the costs of an abandoned motion, a renewed motion to the same effect cannot be made, until the costs have been paid.[10]

An order made on a motion is drawn up, passed, and entered, in the usual manner.[11] On bespeaking the order, there must be left at the Registrars' office, counsel's brief, with his indorsement of the order made, the notice of motion annexed, and office copies of any affidavits, and any exhibits or other evidence used at the hearing of the motion; and if a fund in Court is to be dealt with, the Accountant-General's certificate of fund must also be left.[12]

An order made upon motion may be discharged or varied upon motion,[13] which may be made, either in the Court where the order was made, or in the Appeal Court,[14] unless the order was made *ex parte*,[1] or the application is made on the ground of irregularity;[2] in both of which cases it must be made in the first instance to the Court by which the order was pronounced. *1603

Where it is not intended to adduce new evidence, the application

[3] Elkins v. Lewis, 11 W. R. 981, V. C. K.; and see Fowler v. Stephens, 12 Jur. 319, L. C.

[4] Warner v. Armstrong, 4 Sim. 149.

[5] Lewis v. Armstrong, 3 M. & K. 69.

[6] Martin v. East, 8 Sim. 199; Goathwaite v. Eyston, 1 Beav. 54; Montgomery v. ——, 1 W. R. 60, V. C. T.

[7] Goathwaite v. Ryston, *ubi sup.*; Smith v. Dixon, 12 W. R. 703, V. C. S.

[8] Montgomery v. ——, *ubi sup.*; London & Blackwall Railway Company v. Lanchester Board of Works, 3 K. & J. 123; Smith v. Dixon, *ubi sup.*

[9] Rawlings v. Lambert, 1 J. & H. 458; and see Harding v. Tingey, 10 Jur. N. S. 872, 12 W. R. 704, V. C. K.

[10] Bellchamber v. Giani, 3 Mad. 550; and see *ante*, p. 1380; Davey v. Durrant, 2 De G. & J. 596; 24 Beav. 411; 4 Jur. N. S. 398; Ray v. Conner, 3 Ldw. Ch. 478.

[11] *Ante*, p. 1098 *et seq.* For form of order on motion, see Seton, 36.

[12] Eng. Regul. 15 March, 1860, rr. 16, 31. For the fee payable on the order, see *ante*, p. 1015, n. (g).

[13] See Fleming v. Dunham, 1 John. Ch. 35. An order or decree by consent cannot be modified or varied in an essential part without the assent of both parties to the same: Leech v. Compston, 4 Paige, 476.

[14] *Ante*, pp. 1472, 1486, [1487, n. 2].

[1] Sturgeon v. Hooker, 2 Phil. 289.

[2] West v. Smith, 3 Beav. 306.

should be made to the Court of Appeal.[8] The Court of Appeal may, however, if it thinks fit, allow new evidence to be used before it,[4] unless the application is to discharge the order as having been made on insufficient evidence: in which case, the Court will only receive the evidence made use of on the former occasion.[5] If the appellant succeeds on the new evidence, he will generally have to pay the costs of the former application.[6]

No deposit or certificate of counsel is required, on an appeal from an interlocutory order made on motion.[7]

The notice of motion is served in the usual manner.[8] The appeal will be set down by the Registrar's clerk, at the order of course seat, on production to him of the order appealed from, or an office copy thereof, and on filing with him a copy of the notice of motion; and it must be set down at least two clear days before the day for which the notice is given.[9]

Section III. — *Petitions.*

A petition is the request of a person in writing, directed to the Lord Chancellor or the Master of the Rolls, and showing some matter or cause on which the petitioner prays his direction or order.

Petitions may be presented, either in a cause or in a matter over which the Court of Chancery, or a Judge thereof, has jurisdiction under some Act of Parliament, or other special authority;[10] but a petition cannot be presented in a cause until the bill is filed.[11]

Petitions are either: for orders of course; or, for special orders. Petitions for orders of course are forthwith granted, without any attendance being ordered. On petitions for special matters, a day *1604 * is appointed for hearing them. Most things which may be moved for of course, may also be obtained, as of course, upon petition.[1]

Petitions for orders of course to set down pleas and demurrers in causes attached to the Courts of the Vice-Chancellors, petitions for a rehearing before either a Vice-Chancellor, the Lord Chancellor, or the Lords Justices, and petitions of appeal, are addressed to the Lord Chan-

[8] Appeal motions are ordinarily heard by the Lords Justices, and not by the Lord Chancellor. If it is desired that the Lord Chancellor should hear the appeal motion, leave must previously be obtained from him.

[4] *Ante*, p. 1488; Const *v.* Barr, 2 Russ. 161, 163; *Re* Joseph & Webster, 1 R. & M. 496; Whitworth *v.* Whyddon, 2 M'N. & G. 56; 14 Jur. 142; Pole *v.* Joel, 2 De G. & J. 285; *Re* Dixon, 3 Jur. N. S. 29.

[5] Tanner *v.* Carter, 1 C. P. Coop. t. Cott. 337.

[6] Williams *v.* Goodchild, 2 Russ. 91.

[7] See *ante*, p. 1481.

[8] *Ante*, pp. 453–455, 1596.

[9] Reg. Regul. 15 March, 1860, rr. 1, 11.

[10] Harr. 417. A guardian may be appointed for an infant and maintenance allowed, on petition, without bill filed. See Matter of Bostwick, 4 John. Ch. 102; *Ex parte* Salter, 3 Bro. C. C. 500; *Ex parte* Mountfort, 15 Ves. 445. [A new trustee appointed under a statute may, by petition, be allowed to take the place of the old trustee in the prosecution of a suit. Murray *v.* Delon, 102 Mass. 11.]

[11] See, however, *ante*, p. 39, n. (11).

[1] For lists of applications which may be made by motion and petition of course, see *post*, *Appendices*.

cellor;[2] but in most other cases, for the reasons before stated,[3] petitions for orders of course are usually presented to the Master of the Rolls, notwithstanding the cause or matter is not attached to his branch of the Court.[4]

A petition must be properly entitled in the cause or matter in which it is presented; and must, if presented in a cause commenced on or after Nov. 2, 1852, have the reference to the record written or stamped on the first page thereof.[5] A petition under the statutory jurisdiction must be entitled in the matter of the Act of Parliament under which the petition is presented, and of the particular trust, or property, or person to which it relates.[6]

A petition in a cause, unless for an order of course, or a rehearing by way of appeal, must be heard before the Judge to whose Court the cause is attached; unless removed therefrom by any special order of the Lord Chancellor or the Lords Justices;[7] and the petition is accordingly marked with his name. If the petition is not in a cause, it must be marked with the name of the Lord Chancellor and one of the Vice-Chancellors, or with the name of the Master of the Rolls, in the same way as a bill is marked, and the matter will thenceforth be considered as attached to the Court of the Judge whose name is so marked, in like manner and for the like purpose as causes are attached to such Court, subject to being transferred.[8]

A petition must state by whom it is presented. If it is presented in a matter, or by a person who is not a party to the cause, the residence and description of the petitioner must be stated, as well as his name.[9]

An infant,[10] a married woman without her husband,[11] or other person under disability,[12] petitions by a next friend; and a next friend may be named for the purposes of the application.[13]

A petition presented on behalf of a pauper (except for the purpose * of the discharge of his solicitor) must be signed by his *1605 solicitor.[1] If the petitioner is resident out of the jurisdiction, he may be ordered to give security for costs, unless the petition is presented in a cause to which he is a party.[2]

The petition must state the material facts upon which the application is founded; but care must be taken to avoid scandal,[3] and impertinence.[4] The statements are divided into paragraphs; which usually,

[2] Ord. XXI. 9; Reg. Regul. 15 March, 1860, rr. 5, 12.

[3] *Ante*, p. 1589.

[4] See *ante*, p. 1556.

[5] Ord. I. 18, 61.

[6] See *post*, Chap. XLV., *Statutory Jurisdiction*, and for forms of titles of petitions, with full directions thereas to, see Vol. III.

[7] Ord. VI. 5, 9; *ante*, p. 598.

[8] Ord. VI. 1–6; *ante*, p. 595.

[9] Glasbrook v. Glasbrook, 9 Beav. 492.

[10] Jones v. Lewis, 1 De G. & S. 245, 252; *ante*, p. 78.

[11] Howard v. Prince, 14 Beav. 28; *ante*, p. 108 *et seq.*

[12] See *ante*, pp. 82, 86.

[13] See *ante*, pp. 78, 1595.

[1] Ord. VII. 11; *ante*, p. 42.

[2] *Re* Parsmore, 1 Beav. 94; *Ex parte*, Sadler, 12 Sim. 106; Anon., *ib.* 262; *Ex parte* Latta, 3 De G. & S. 186; Cochrane v. Beamish, 18 Jur. 568, V. C. K.; Atkins v. Cooke, 3 Drew. 694, 3 Jur. N. S. 283; Partington v. Reynolds, 6 W. R. 207, V. C. K.; and see *ante*, p. 28 *et seq.*

[3] As to scandal, see *ante*, p. 347.

[4] As to impertinence, see *ante*, p. 349; and see *Re* Baltimore Charities, 12 Jur. 965, V. C. T.; *Re* Manchester & Leeds Railway Company, 8 Hare, 31; *Re* Charities, 10 Hare

though not compulsorily, are numbered, in consecutive order, as in a bill.[5] The petition concludes by praying the Court to make the order required.

If the petition is not for an order of course, there must be written at the foot of the petition, and of every copy thereof, a statement of the persons, if any, intended to be served therewith; or, if no person is intended to be served with it, a statement to that effect.[6]

A petition must be fairly written upon paper. Except it is for a rehearing or appeal,[7] or is presented for the opinion of the Court, under Lord St. Leonard's Act,[8] it is not signed by counsel.[9]

Formerly, fees to counsel on settling petitions were not allowed in taxations as between party and party; but now, all just and reasonable expenses, properly incurred in procuring counsel to settle such petitions as may appear to be proper to have been settled by counsel, are allowed.[10]

A petition addressed to the Lord Chancellor must be left with his principal secretary; and if it is not for an order of course,[11] it will be answered by a memorandum, written in the margin of the petition, and signed by such secretary, directing all parties concerned to attend on the next day of petitions:[12] unless, upon previous application, either to his Lordship, or a Vice-Chancellor, permission has been given to *1606 have the petition answered for an * earlier day.[1] A fair copy of the petition must be left at the same time, for the use of the Judge. When the petition is answered, it is taken away, by the person presenting it; and the copy is forwarded from the secretary's office to the Judge by whom the petition is to be heard.[2]

A petition addressed to the Master of the Rolls, must be left with his under secretary, and, if it is not of course, it will be answered in the same manner as a petition addressed to the Lord Chancellor.

Formerly, the practice upon petitions of course, presented to the Master of the Rolls, was for the secretary to obtain the Master of the

Ap. 64; 17 Jur. 852; *Re* Lilley, 17 Sim. 110; and Seton, 89, No. 17.

[5] See *ante*, p. 356.

[6] Ord. XXXIV. 1. If it becomes unnecessary to serve the persons named in the note, the Court will give leave to amend the petition by striking out the note; see *Re* Tweedy, 9 W. R. 398, V. C. S. For forms of petition and foot-note, see Vol. III.

[7] *Ante*, p. 1478.

[8] 22 & 23 Vic. c. 35, § 30; 23 & 24 Vic. c. 38, § 9; see *post*, Chap. XLV., *Statutory Jurisdiction* (*Judicial Opinion Act*).

[9] Petitions must be sworn to. Anon., Hopk. 101; Matter of Christie, 5 Paige, 242.

[10] Ord. XL. 32, *ante*, p. 1439. In Davies v. Marshall (No. 2), 1 Dr. & Sm. 564-566; 7 Jur. N. S. 669, 670, V. C. Kindersley said that, in the long run, much expense would be saved to the suitors, if petitions were generally settled by counsel.

[11] Petitions for orders of course are very seldom presented to the Lord Chancellor; but if they are, upon the *fiat* being obtained they are taken to the Registrar: who draws up the order.

[12] The days for hearing petitions are generally appointed in the sittings paper, issued previously to and after each term.

[1] Anon., 17 Jur. 827, V. C. W.

[2] The following fees are collected, in fee-fund stamps, in the office of the Lord Chancellor's principal secretary: On all attendable petitions, appeals, rehearings, and letters missive, 1*l.* higher scale, 5*s.* lower scale. On all non-attendable petitions, 10*s.* higher scale, 5*s.* lower scale. On a matter-of-course order, on a petition of right, 10*s.* by each scale; and on an order for a commission on a petition of right, 1*l.* by each scale. Regul. to Ord. Sched. 4.

Rolls' *fiat*: upon which the order was drawn up and passed by the Registrar, and entered in the same manner as orders of course, drawn up on petitions presented to the Lord Chancellor; but now, one of the secretaries of the Master of the Rolls will, upon any such petition of course (except upon petitions for setting down causes to be reheard), presented to his Honor, instead of answering such petitions, draw up the order thereon, in such form as the Master of the Rolls may direct; and will sign every such order as passed, with his initials. Every such order is entered in a book kept at the secretary's office, at the Rolls, for that purpose, and is marked and signed with the initials of the secretary as entered; and the suitors of the Court and their solicitors have access to the book, during office hours, without the payment of any fee; and every such order has the same force and effect as orders of course passed by the Registrar have.[2]

All petitions, except those which are of course, require service upon all parties interested; but if there is no other party interested in the matter, as in the case of petitions for the transfer or sale of stock, or the payment out of Court of money, standing to the separate account of the petitioner, no service is necessary.[4]

Unless the Court gives special leave to the contrary, there must be at least two clear days between the service of a petition, and
* the day appointed for hearing it; and in the computation of such *1607
two clear days, Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week, are not reckoned.[1]

A petition for any process of contempt or commitment must be personally served upon the party to be affected by it: unless an order has been obtained for substituted service.[2] In other cases, the petition is served in the manner before explained.[3]

Service is effected by delivering to and leaving with the person served a true copy of the petition, and of the *fiat* or answer thereon, and foot-note thereto, and at the same time showing him the original petition and answer thereto. An application for substituted service is made by *ex parte* motion, supported by affidavit.[4]

Where the persons to be served are resident out of the jurisdiction,

[2] Ord. XXIII. 17; *ante*, pp. 1589, 1694. The Accountant-General will not pay out money on an order of course drawn up and entered by the Master of the Rolls' secretary. For a list of applications which may be made by petition of course at the Rolls, see *post*, *Appendix*. The following fees are collected, in fee-fund stamps, in the office of the secretary at the Rolls: On every petition of course for hearing, to include the fee on hearing, 1*l.* higher scale, 5*s.* lower scale. On the petition of every order of course, 5*s.* higher scale, 1*s.* lower scale; and on the admission of every solicitor, 1*l.* 1*s.* Royal to Ord. Sched. 4.

[3] Under special circumstances, this rule as to service may be wholly or partially dispensed with. Lambert *v.* Newark, 3 De G. & S. 405. *In* Wise, 5 De G. & S. 415; *Ex parte* Pratt, 17 L. J. Ch. 168, V. C. K. B.; *In* Hodges, 6 W. R. 487, V. C. K.

[4] Ord. XXXIV. 2; and see XXXVII. 2, *ante*, pp. 165, 436.

[1] *Ante*, p. 1590, note (p).

[2] *Ante*, pp. 455, 456; Ord. III. 4, 6, 7; XXXVII. 2.

[4] As to substituted service, see *ante*, p. 446 *et seq.* For form of order for substituted service of a petition, see Seton, 1244, No. 5; and for form of motion paper, see Vol. III.

an order may, in a proper case, be obtained, giving leave to serve the petition on them. This order is made on an *ex parte* motion of the petitioner, supported by affidavit, showing where the respondents are resident.[5] A copy of the order giving leave to serve a petition out of the jurisdiction, or on a substitute within, must be served with the petition.

Where a person who is not a party appears in any proceeding, either before the Court or in Chambers, service upon the solicitor in London by whom such party appears, whether such solicitor act as principal or agent, is deemed good service, except in matters of contempt requiring personal service;[6] and the plaintiff may also, without special leave of the Court, serve any petition personally, or at the dwelling-house or office of any defendant, who, having been duly served with a copy of the bill, has not caused an appearance to be entered within the time limited for that purpose.[7]

Where a petition is served upon an infant or a person of unsound mind, a guardian *ad litem* must be appointed, by whom he may appear.[8] The application for such appointment is made by motion of course, or by petition of course at the Rolls; and is supported by an affidavit of the petition having been served, and of the fitness and consent to act of the proposed guardian.[9]

*1608 * Petitions which are not of course are set down by the secretary of the Judge to whom they have been presented; and a list thereof is sent by him to the Registrar, to be put in the paper of petitions appointed for the day.[1] The petitions are called on in their regular order; precedence is, in the first instance, generally given to unopposed petitions; and should any petitions remain undisposed of, at the end of the petition day, they are placed in an adjourned list: preserving their original order; and are taken generally on the next petition day, in priority to the opposed petitions in the new list.[2]

The rules with regard to reading affidavits, and the general practice as to evidence which may be used upon the hearing of petitions, are substantially the same as those with regard to motions.[3] Where, after

[5] As to service abroad, see *ante*, p. 449 *et seq.* For form of order to serve petition abroad, see Seton, 1245, No. 7; and for form of motion paper, see Vol. III; see Shurmen *v.* Hodge, 1 W. N. 304, V. C. K.

[6] Ord. III. 7, *ante*, p. 456.

[7] Ord. III. 8, *ante*, p. 456.

[8] *Ante*, p. 158; *Re* Barrington, 27 Beav. 272; *Re* Ward, 2 Giff. 122; 6 Jur. N. S. 441; *Re* Duke of Cleveland's Harte Estate, 1 Dr. & Sm. 46; *Re* Greaves, W. R. 353, L. C. & L. JJ.

[9] For form of order on motion, see Seton, 1250; and for forms of motion paper, petition, and affidavit, see Vol. III.

[1] Seton, 35.

[2] 1st Rep. Eng. & Ir. Com. Ap. 70. As to the allowance of two counsel, on a petition, see Sturge *v.* Dimsdale, 9 Beav. 170; 10 Jur. 277. Counsel's brief will consist of a brief copy of the petition and of the evidence on each side, together with such observations as may be deemed necessary. For form of indorsement, see Vol. III.

[3] See *ante*, p. 1597 *et seq.*; see also Jones *v.* Turnbull, 17 Jur. 851, V. C. W.; *Re* Pickance, 10 Hare Ap. 35; *Re* Bendyshe, 5 W. R. 816, V. C. K.; 3 Jur. N. S. 727. In New Jersey, when a petition is presented, and an adverse party has a right to be heard in opposition, the usual proceeding is, to grant a rule or order, fixing a day for the hearing of the parties. Copies of the petition and rule are served on the opposite party. The parties are then at liberty to take affidavits, which must be either taken upon two days' notice, or else copies served on the adverse party at least four days before the day of argument.

the affidavits had been sworn, the petition was amended, by altering the title, they were allowed to be used, on being made exhibits, and referred to in a short affidavit intituled in the new matter.[4]

Where two petitions in the same matter are answered for the same day, that which is first presented is entitled to be first heard.[5]

Where there is a petition and a cross-petition, and several respondents in the one join as co-petitioners in the other, the Court will not allow such respondents to be heard by separate counsel, except so far as their cases turn upon questions distinct from each other.[6]

The Court does not usually make any declaration as to the rights of the parties on a petition; but, if necessary, it will preface the order by a statement of its opinion.[7]

Where the evidence is complicated, or the persons entitled *numerous, so that much time would be occupied in investigat- *1609 ing the title in Court, the petition is often adjourned at once into Chambers.[1]

The practice, where a petition is adjourned to Chambers, and the manner in which the petition is brought on for further hearing in Court, where it is not finally disposed of in Chambers, has been already explained.[2]

Where an unopposed petition is directed to stand over, without fixing a day for it to be again put into the paper, the Registrar in attendance in Court, upon the written request of the solicitor, will direct the same to be restored to the paper for the following petition day.[3]

In other cases, where the further consideration of a petition is adjourned, or any portion of a petition is directed to stand over,[4] the Registrar will restore the petition to the paper for hearing, upon being satisfied that the object for which it was adjourned has been accomplished, upon production to him of a written request of the solicitor having the conduct of the proceeding.

Notice that a petition has been restored to the paper for hearing, must be given to the other persons entitled to appear upon it.[5]

If, upon the petition being called on, any of the respondents do not appear, the Court, upon production of an affidavit of service of the petition upon the absent parties, will make an order according to the prayer, or such other order as may be just. If the petitioner does not

The matters presented by the petition are heard upon those affidavits and upon them only. The petition itself is no evidence of the facts stated in it. They must all be proved by affidavit. No answer to the petition is required. Crane v. Drinkwater, 2 Stockt. 34; Case v. Hallett, 1 Green Ch. 311; State Bank v. Bell, 4 Halst. Ch. 376; see Cook v. Woodbury, 13 Iowa 21.

[4] *Re* Varley, Cuyler, 10 Hare Ap. 37; and see *Re* Harris, 3 Jur. N. S. 166, V. C. K. Affidavits filed after agreement in, but before presentation of a petition for payment out of, a fund were received. *Re* Varley, 14 W. R. 98, V. C. K.

[5] *Re* Brockman, 1 M'N. & G. 199.

[6] *Re* Stephen, 2 Phil. 562, 568.

[7] Seton, 56; Shrewsbury v. Gibbs, Kay, 333, 340; 18 Jur. 330; and see *Re* Walker, 16 Jur. 1154, V. C. S.

[1] Seton, 48.

[2] *Ante*, p. 1249 *et seq.*

[3] Rule Regul. 15 March 1860, r. 14. For form of request, see Vol. III.

[4] See *ante*, p. 93; Seton, 658. For form of request, see Vol. III.

[5] For form of notice, see Vol. III.

appear, the petition will, on the application of the respondent, and production of an affidavit of his having been served with the petition, be dismissed with costs.[6] In either case, the affidavit must be filed before the rising of the Court on that day.[7]

An order made upon a special petition is drawn up, passed, and entered in the usual manner.[8] At the time it is bespoken the original petition, and counsel's brief, with his indorsement of the order made, and any decree, order, or the office copy of any certificate on which the petition is founded, and office copies of any affidavits, and any exhibits or other evidence used at the hearing, must be left with the Registrar; and if a fund in Court is to be dealt with, the Accountant-General's certificate of fund must also be left.[9]

Before the order is passed, the original petition must be filed in *1610 * the Report office, and a note thereof made on the order by the Clerk of Reports.[1] Where the original petition had been lost, the Court allowed the copy left for the use of the Judge to be filed instead of the original petition;[2] and where a petitioner, whose petition had been dismissed with costs, refused to deliver up the original petition in order that it might be filed, leave was given to the respondents to file, in its stead, the copy of the petition with which they had been served.[3] The petitioner must pay the costs of such an application.[4]

A petition may, by leave of the Court, be amended. The amended petition does not, in general, require to be reanswered;[5] and the amendments may state facts which have occurred since the presentation of the petition[6] (but not since leave to amend it was given),[7] or introduce the names of new co-petitioners.[8] Leave to amend will be given, on the *ex parte* application of counsel. No formal order is usually drawn up; but the amendments in the original petition are made, or authenticated, by the secretary of the Lord Chancellor, or of the Master of the Rolls as the case may be, on production to him of counsel's brief, with his indorsement of the leave to amend, and containing the draft amendments. If necessary, the Registrar in Court will countersign the indorsement on the brief.[9] Leave to amend is almost of course; it is often given at the hearing;[10] and has even been given

[6] Dunbar *v.* Boldero, 24 Jan., 1818, V. C. Leach, 2 Mad. Pr. 2d ed. 581; 3d ed. 767.

[7] Lord Milltown *v.* Stuart, 8 Sim. 34. For forms of affidavits of service, see Vol. III.

[8] See *ante*, p. 1008 *et seq.* For forms of orders on petition, see Seton, 34, 87.

[9] Reg. Regul. 15 March, 1860, rr. 16, 32.

[1] Ord. XXIII. 23.

[2] Smith *v.* Harwood, 1 Sm. & G. 137; Sanderson *v.* Walker, 1 M. & C. 359.

[3] Andrews *v.* Walton, 1 M. & C. 360; *Re* Devonshire, 32 Beav. 241.

[4] *Ibid.*

[5] Robinson *v.* Harrison, 1 Drew. 307; *Re* Cartwright, 8 W. R. 492; *Re* Medow, 10 Jur. N. S. 536; 12 W. R. 595; and see Maude *v.* Maude, 5 De G. & S. 418.

[6] Robinson *v.* Harrison, *ubi sup.*; but see *Re* Keen, 7 W. R. 577, V. C. K.

[7] Maude *v.* Maude, and *Re* Cartwright, *ubi sup.* [But see *In re* Westbrook's Trusts, L. R. 11 Eq. 252, where the cases cited are shown not to support Mr. Daniell's statement, and the decision is otherwise. Malins V. C. says: "I am surprised that it is otherwise stated in Daniell's Ch. Pr., which is a most carefully written book. Attention ought to be called to any error in it."]

[8] Doubtfire *v.* Elworthy, 15 Sim. 77.

[9] Seton, 36.

[10] Platt *v.* Routh, 3 Beav. 257, 282; Matson *v.* Swift, 8 Beav. 368, 379; 9 Jur. 521.

after the order has been made.[11] The amendments must not, however, state facts which would make the petition and order inconsistent. If the statements, proposed to be introduced by amendment, would have that effect, a new petition must be presented, stating such facts, and praying that the order may be varied.[12]

A party to a cause, who is served with a petition, but has no interest in the order to be made, will not be allowed his costs of appearing at the hearing.[13] The same rule has also been applied * to *1611 petitions presented in matters,[1] but it would seem that, in such a case, a respondent ought to be allowed his costs: as otherwise he would have no opportunity of obtaining the costs which he must incur in taking advice whether he ought to appear on the petition.[2]

A person who unsuccessfully opposes a petition may be allowed his costs;[3] but a person who appears without having been served,[4] or who is served in consequence of an unfounded claim which he has made,[5] is not entitled to his costs.

When a person is about to present a petition, he should consider whether any of the other parties interested can be co-petitioners, instead of respondents; and, if so, he should apply to them to join with him in the petition: otherwise, he may be ordered to pay the costs of such persons, if made respondents.[6]

Where two petitions are *bonâ fide* presented, for the same object, by different parties, the costs of both will be allowed; but where it is known that one petition has been presented, the costs of a second petition, for the same purpose, will not be allowed.[7]

[11] Bishop *v.* Wykeham, 3 W. R. 286; *Re* Bennett, 1 Jur. N. S. 921; *Re* Hawcock (No. 2), 14 W. R. 174; *contra*, *Re* Marrow, C. & P. 142, 146.

[12] *Re* Kean, 7 W. R. 577; but see *Re* Hawcock; 14 W. R. 26, where a supplemental order was made on the petition. But subsequently the petition was amended and a new order made. S. C. (No. 2), 14 W. R. 174.

[13] Carey *v.* Wheeningham, T. & R. 405; Longbotham *v.* Warrington, 1 J. & W. 577, n.; Barton *v.* Latouche, 13 Beav. 526; Day *v.* Croft, 19 Beav. 518; Herman *v.* Dunbar, 23 Beav. 512; Sidney *v.* Wilmot, 31 Beav. 658; *contra*, Bennett *v.* Watts, 2 Beav. 301; Crawshay *v.* Thornton, 2 M. & C. 24; Bruce *v.* Kilmorie, 11 Beav. 432, Rowley *v.* Adams, 16 Beav. 412; Strong *v.* Strong, 4 Jur. N. S. 948, V. C. S.; Hewitson *v.* Cliffe, 11 Jur. N. S. 914, M. R.; and see Eden *v.* Thompson, 2 H. & M. 8; and Morgan & Davey, 43.

[1] *Re* Justices of Oswestry, 19 Beav. 158; *Re* Hertford Charities, 19 Beav. 538, n. (c); *Re* Birch, 2 K. & J. 360; and see Sidney *v.* Wilmot, 32 Beav.

[2] *Re* Third Equitable Benefit Building Society, 16 Sim. 296, 12 Jur. 500; *Ex parte* Queen's College, 4 Jur. N. S. 19, 6 W. R. 9, V. C. S.; *Re* Barnell, 10 Jur. N. S. 224, 12 W. R. 565, V. C. K.; Eden *v.* Thompson, *ubi sup.* As to the costs of applications by petition, see Seton, 91 *et seq.*; Morgan & Davey, 31 *et seq.*

[3] *Ex parte* Stevens, 2 Phil. 772, 774.

[4] Bennett *v.* Biddles, 10 Jur. 534, V. C. E.; *Ex parte* Christ Church, 9 W. R. 474, V. C. S.

[5] *Re* Shrewsbury School, 1 M. N. & G. 85; *Re* Parry, 12 Jur. 615, V. C. E.

[6] Melling *v.* Bird, 17 Jur. 155, V. C. K.; and see Haynes *v.* Barton, 1 Dr. & Sm. 483; 7 Jur. N. S. 699; *Re* Brave, 9 Jur. N. S. 454; 11 W. R. 333, V. C. K.; *Re* Long, 10 Jur. N. S. 417, V. C. K.; *Re* Nicholls, 1 W. N. 93; 14 W. R. 475, 1 V. C. W.

[7] *Re* Chaplin, 34 L. J. Ch. 184, V. C. W.; and see *Re* British & Foreign Gas Co., 11 Jur. N. S. 559; 13 W. R. 649, V. C. S. In Grover *v.* Stilwell, 21 Beav. 182, the M. R. said that it was his inflexible rule, on petitions for transfer of funds standing to a separate account, and in which no person other than the petitioner was interested, to allow 10*l.* to the solicitor for his costs, without taxation. The Registrars have the Master's directions to insert that sum in all such cases. Seton, 94. For a bill of costs, on a petition, see Morgan & Davey, 490. Costs of petition prepared, but not presented, allowed, it having been ascertained that another petition for the same purpose had been presented. *Re* Saville, 14 W. R. 603, V. C. W.

Orders made upon petition may be discharged or varied on motion, where the application is made on the ground of irregularity. Thus, where the objection to the petition, and the order made thereupon, was, that they were intituled in a non-existing cause, the Court discharged the order on motion.[8] If, however, the application is made on the merits, it must, as we have seen, be the subject of a regular rehearing;[9]

but the petition of appeal is considered as an original petition, *1612 and must, therefore, contain all the * statements which were properly inserted in the former petition.[1] No deposit is necessary; but it must be signed and certified as proper by two counsel, as in the case of a petition for the rehearing of a cause.[2]

The petition is presented and served, in the same manner as an original petition; and will be set down on one of the days appointed for the hearing of appealed petitions.

The rules as to the reception of new evidence, in the case of appeals from orders made on petition, are the same as in the case of appeals from orders made on motion.[3]

[8] West *v.* Smith, 3 Beav. 306; and see Binsted *v.* Barefoot, 1 Dick. 112; Bishop *v.* Willis, 2 Ves. S. 113; Clutton *v.* Pardon, T. & R. 301, 303; Ostle *v.* Christian, *ib.* 324; Eastwood *v.* Glenton, 2 M. & K. 280; Lees *v.* Nuttall, *ib.* 284; Barnardiston *v.* Gibbon, cited, *ib.* 287.

[9] *Ante*, p. 1472.

[1] *Ante*, p. 1478; Richards *v.* Platel, C. & P. 79, 84. For forms of notice of appeal motion, and petition of appeal, see Vol. III.

[2] Seton, 1156.

[3] *Ante*, p. 1488.

*CHAPTER XXXVI. *1613

INJUNCTIONS AND RESTRAINING ORDERS.

Section I. — *Generally.*

A writ of injunction is a judicial process, whereby a party is required to refrain from doing a particular thing, according to the exigency of the writ.[1] The process is, therefore, rather preventive than restorative: though it is not confined to the former object.[2]

Injunctions are either provisional or perpetual. Provisional injunctions are such as are to continue until a certain specified *period: such as, the coming in of the defendant's answer; or *1614 the hearing of the cause.[1] Perpetual injunctions are such as

[1] As to mandatory injunctions, see [*infra*, 1662:] Knapp *v.* Douglas Axe Co., 13 Allen, 1; Beadel *v.* Perry, L. R. 3 Eq. 465; Senior *v.* Pawson, L. R. 3 Eq. 330; Attorney General *v.* Mid-Kent Railway Co. & South Eastern Railway Co., L. R. 3 Ch. Ap. 100.

[Under the English Judicature Act, the jurisdiction of granting injunctions is vested in the High Court of Justice, and is practically unlimited. Beddow *v.* Beddow, 9 Ch. Div. 89.]

[2] As to injunctions in Equity, see 2 L. C. Eq. 564-657; Scrim. 867-961; Story Eq. Jur. §§ 861-959; Winnipiseogee Lake Co. *v.* Worster, 29 N. H. 449; Washington University *v.* Green, 1 Md. Ch. 97. The most common sort of injunctions is that, which operates as a restraint upon a party in the exercise of his real or supposed rights: and this is sometimes called the remedial writ of injunction. The other sort, commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same: as, for instance, it may contain a direction to the party defendant to yield up, or to quiet, or to continue, the possession of the land, or other property, which constitutes the subject-matter of the decree in favor of the other party. 2 Story Eq. Jur. § 861; see Knapp *v.* Douglas Axe Co., 13 Allen, 1; [and Gaines *v.* Hale, 26 Ark. 168]. An injunction is a secondary process (except in a few cases) for the prevention of torts, or is auxiliary to some primary equity, which must be disclosed in the same bill that prays for the injunction. Washington *v.* Emery, 4 Jones Eq. 29; Patterson *v.* Miller, 4 Jones Eq. 451. Where there is no equity in the bill there can be no injunction. Smith *v.* Lard, 28 Geo. 425. [An injunction will not be granted where an action of ejectment will restore the party to all his rights. Morris Canal Co. *v.* Fagin, 7 C. E. Green, 430.] The interdicts of the Roman law, which much resembled the injunctions of our own law, were, 1.) Prohibitory, which prohibited something being done. (2.) Restoratory, which commanded something to be restored. (3.) Exhibitory, which commanded some person or thing to be exhibited. Lord Mackenzie, Roman Law (ed. 1862), 310 *et seq.*; 1 Kaufmann's Mackeldey, 211 *et seq.* The powers of the Court [in Mass.] are very much enlarged under the General Statutes, and applications to restrain proceedings at Law in proper cases would now be entertained, the authority being clear and indisputable. See Atlas Bank *v.* Nahant Bank, 23 Pick. 480, 482. Deshon *v.* Foster, 4 Allen, 545, 550; [Stone *v.* Hobart, 8 Pick. 464]. In New Hampshire, writs of injunction may be granted whenever the same shall be necessary to prevent injustice. Wason *v.* Sanborn, 45 N. H. 571. [A preliminary injunction is a prohibitory writ, whose office is to restrain, not to compel performance. McMinnville, &c. R. Co. *v.* Huggins, 7 Coldw. 217. It will not be granted against the enforcement of a judgment at Law for the recovery of realty, if between the filing of the bill and the application the judgment has been executed. Kamm *v.* Stark, 1 Sawyer, 547.]

[3] Formerly, provisional injunctions were divided into common and special injunctions; but this distinction has now been abolished.

form part of the decree made at the hearing, upon the merits, whereby the defendant is perpetually enjoined from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience.

As a general rule, an injunction or restraining order will not be granted before decree, unless prayed for by the bill.[2] At the hearing, however, the Court will, where it is necessary for the purposes of complete justice, direct an injunction to issue: although it has not been prayed by the bill;[3] and where the Court, having full cognizance of the matter, has, by its decree, taken it into its own hands, it will, on the application of the defendant,[4] as well as the plaintiff, interfere, by its injunction or restraining order, to prevent its decision from being questioned in another Court;[5] or to restrain the bringing of actions inconsistent with the spirit of the decree: although no injunction has been prayed by the bill.[6] The Court will also, under similar circumstances, interfere, to prevent injury to the property, either by the parties litigant or others. Thus, if, after a decree to account in a foreclosure suit, the mortgagor attempts to cut timber, the Court will enjoin him, although there is no injunction prayed by the bill.[7]

Upon the same principle, if there has been a decree for the administration of assets, the Court will restrain a creditor, who is not a party

15 & 16 Vic. c. 86, § 58; Ord. XXV.; see Senior *v.* Pritchard, 16 Beav. 473; Lovell *v.* Galloway, 17 Beav. 1; Magnay *v.* Mines Royal Co., 3 Dr. 130; [1625 n. 2.

For the distinction between the common and special injunctions, see Bradford *v.* Peckham, 9 R. I. 250; Chadwell *v.* Jordan, 2 Tenn. Ch. 635. In the last of these cases it is noted that injunctions in Tenn. are always special, though often *ex parte*.] Injunctions cannot be granted in the Courts of the United States without notice, and hence all of them in those Courts are special. Penny *v.* Parker, 1 Wood. & M. 280; see 1 Hoff. Ch. Pr. 78; Elmslie *v.* Delaware & Schuylkill Canal Co., 4 Whart. 424; Poor *v.* Carlton, 3 Sumner, 73, 74; Hall *v.* M'Pherson, 3 Bland, 529.

By the 55th Equity Rule of the United States Courts, whenever an injunction is asked for by the bill to stay proceedings at Law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the Court in term, or by a Judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case, where an injunction, either the common injunction, or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the Judge granting the same, continue until the next term of the Court, or until it is dissolved by some other order of the Court. See Penny *v.* Parker, in note above. [Gray *v.* Chicago R. Co., 1 Woolw. 63; Mowrey *v.* Ind. & Cinn. R. Co., 4 Biss. 78. But now the U. S. Courts may grant a preliminary injunction in a patent case without notice: Yuengling *v.* Johnson, 1 Hughes, 607; and may, it seems, make an order on the defendant, upon the filing of the bill, to do nothing prejudicial to the rights of the complainants until the application for an injunction can be heard: Fanshawe *v.* Tracy, 4 Biss. 490. And see, as to the general principles which govern in granting and dissolving preliminary injunctions, United States *v.* Duluth, 1 Dill. 469; Shoemaker *v.* National Bank, 2 Abb. U. S. 416.]

[2] Ld. Red. 46 n. (*z*); Savory *v.* Dyer, Amb. 70; Wright *v.* Atkyns, 1 V. & B. 313, 314; Wood *v.* Beadell, 3 Sim. 273. For forms of prayer, see Vol. III.

[3] Blomfield *v.* Eyre, 8 Beav. 250, 259; 9 Jur. 717; Reynell *v.* Sprye, 1 De G., M. & G. 660, 690; [Walker *v.* Devereaux, 4 Paige, 248; African Church *v.* Conover, 12 C. E. Green, 157. *Ante*, 388, n. 8.]

[4] Wedderburn *v.* Wedderburn, 2 Beav 208, 213; 4 Jur. 66; 4 M. & C. 585, 593, 596; Booth *v.* Leycester, 1 Keen, 579.

[5] Walker *v.* Micklethwait, 1 Dr. & Sm. 49.

[6] Grand Junction Canal Company *v.* Dimes, 17 Sim. 38; 13 Jur. 779; see Matter of Hemiup, 2 Paige, 319.

[7] Wright *v.* Atkyns, 1 V. & B. 313, 314; Goodman *v.* Kine, 8 Beav. 379; Casamajor *v.* Strode, 1 S. & S. 381; and see Walton *v.* Johnson, 15 Sim. 352; 12 Jur. 299; King *v.* Smith, 2 Hare, 239, 242; 7 Jur. 694.

to the suit, from proceeding at Law against the testator's *or intestate's estate, for his debt.[1] This it does, because it *1615 considers that the decree which it has made is in the nature of a judgment for all the creditors; and having taken the fund into its own hands, it will administer it equitably, and not permit the executor to be pursued at Law.[2] This practice of restraining a creditor, although no injunction has been prayed in terms against him, may be followed, where the creditor is suing in a foreign Court,[3] if he has adopted the proceedings here, or a very strong case can be made out, showing the inexpediency of permitting him to continue the proceedings in the foreign Court.[4]

The action will be restrained on the application of the heir;[5] of another creditor;[6] of a common legatee; or even, as it seems, of a residuary legatee,[7] as well as the legal personal representative.

There is no instance, however, in which a creditor at Law has ever been stopped, unless there was a decree giving him an absolute and unconditional right to come in and prove his debt at once: for, until there is such a decree, the creditor ought not to be deprived of the benefit of a prior judgment.[8] But when the decree has been made, it must be preferred, if it precedes the judgment in point of time:[9] although a creditor, who has obtained his judgment previously to the decree, will not be restrained from issuing execution;[10] nor from obtaining the benefit of his judgment, *by means of a garnishee order, *1616 under the 17 & 18 Vic. c. 125, § 61.[1]

[1] Thompson *v.* Brown, 4 John. Ch. 642; see Benson *v.* Lowry, 4 John. Ch. 651; Updike *v.* Doyle, 7 R. I. 460, 461. For a collection of cases as to staying proceedings at Law by a creditor, after decree, with forms of orders, see Seton, 882–887; and as to staying concurrent suits after decree, see *ib.* 887–890; and *ante*, p. 797 *et seq.* [And see, as to injunctions by the County Courts, *infra*, 1519, n. 5.]

[2] Martin *v.* Martin, 1 Ves. S. 211, 214; Morrice *v.* Bank of England, Ca. t. Talb. 217, 226; 3 P. Wms. 400, n. (F); 3 Swanst. 555, n. (c); Bank of England *v.* Morrice, 2 Bro. P. C. (ed. Toml.) 463; Paxton *v.* Douglas, 8 Ves. 520; Perry *v.* Phelips, 10 Ves. 34, 40 41; Clarke *v.* Earl of Ormonde, Jac. 122; Jackson *v.* Leaf, 1 J. & W. 220, 231, 232, n. (*b*); Drewry *v.* Thacker, 3 Swanst. 541, 542, n.; Lee *v.* Park, 1 Keen, 714, 719; Macrae *v.* Smith, 2 K. & J. 411, 412; Hearn *v.* Dudley, 1 Green Ch. 158; Lupton *v.* Doyle, 7 R. I. 446, 460, 461.

[3] The same rule applies in other cases where the Court has possession of funds for the common benefit of a class, and has made a decree. Smith *v.* St. Louis Mut. Life Ins. Co., 5 Lans. Ch. 502; Mason *v.* Chittenden, 2 Tenn. Ch. 26.]

[4] Graham *v.* Maxwell, 1 M'N. & G. 71; 13 Jur. 217; and see Pennell *v.* Key, 5 De G., M. & G. 120; 17 Jur. 247; Dobson *v.* Pearce, 4 Allen, 340; S. C. 7 Allen, 87; Mackintosh *v.* Ogilvie, 3 Swanst. 593, note; Massie *v.* Watts, 6 Cranch, 158; Briggs *v.* French, 1 Sumner, 504; Dobson *v.* Pearce, 4 Duer, 142; S. C., 2 Kernan, 156.

[4] Carron Company *v.* Maclaren, 5 H. L. Ca. 416, reversing S. C. *nom.* Maclaren *v.* Stainton, 16 Beav. 279; and see S. C., 2 Jur. N. S. 49, L. C. & L. JJ.; and 21 Beav. 152; *In* Brett, Reynolds *v.* Lewis, 8 W. R. 272, V. C. S.; Dobson *v.* Foster, *ubi supra*.

[5] Martin *v.* Martin, *ubi sup.*; Rouse *v.* Jones, 1 Phil. 462.

[6] Dyer *v.* Kearsley, 2 Mer. 482; Earl of Portarlington *v.* Damer, 2 Phil. 262, 265.

[7] Brooks *v.* Reynolds, 1 Bro. C. C. 183; and see Clarke *v.* Earl of Ormonde, Jac. 122.

[8] Rich *v.* Higgs, 4 Ves. 638, 643; and see Perry *v.* Phelips, 10 Ves. 34; Rankin *v.* Harwood, 2 Phil. 22; S. C. *nom.* Ranken *v.* Harwood, 5 Hare, 215; 10 Jur. 794.

[9] Lupton *v.* Bowen, 1 Sch. & Lef. 296, 299; Lee *v.* Park, 1 Keen, 714, 724; and see Green *v.* Pledger, 3 Hare, 165; Whitaker *v.* Wright, 2 Hare, 310; Parker *v.* Ringham, 33 Beav. 535.

[10] Lee *v.* Park, *ubi sup.*; Vincent *v.* Godson, 3 De G. & S. 717, 726; Ranken *v.* Harwood, *ubi sup.*; Marriage *v.* Skaggs, *In re* Skaggs, 4 De G. & J. 4, 5 Jur. N. S. 520; and see Horn *v.* Kilkenny Railway Company, 1 K. & J. 399.

[1] *In* Roberts, Fowler *v.* Roberts, 2 Giff. 226; 6 Jur. N. S. 1189. As to attachment of debts and garnishee orders, see Chitty's Arch. 639 *et seq.*

The action will be restrained, although the executor, or heir, may have pleaded *plene administravit*,[2] or *riens per descent*;[3] but the Court only interferes to give effect to its own decree, by restraining proceedings against the assets,[4] and protecting the persons who have acted in accordance therewith;[5] it will not interfere to protect an executor from any liability to which he may have, personally, subjected himself: therefore, if he has put in such a plea at Law as will entitle the creditor to a judgment *de bonis propriis*, or to a judgment *de bonis testatoris, et, si non, de bonis propriis*, the execution of it will not be restrained.[6] What will amount to such a plea is not easily to be gathered from the cases; but it appears that all pleas, except a general issue, or *plene administravit*, would be considered to have that effect.[7]

Where an heir pleaded a false plea, execution was restrained against the assets, but not against him personally.[8]

In one case, where the executors had suffered judgment to go by default, Lord Eldon granted an injunction: considering that an executor's suffering judgment to go by default was no more than saying that he was ready to do whatever a Court of Law or Equity might think proper.[9] But on another occasion, his Lordship intimated, that it is the duty of executors to apply at once for an injunction: for he took it to be clear, that if, after a decree to account, the executors should let judgment go by default, or should permit the creditor to proceed at Law, they would be responsible: they might indeed be allowed to stand in the place of those creditors against the estate, but they could not do more.[10]

The power of restraining a creditor will also be exercised, where an administration order has been made, in a suit commenced by summons;[11] or where an order has been made, directing an account to be taken of the debts and liabilities of a deceased person;[12] but not after an order directing preliminary accounts and inquiries.[13]

*1617 * As the practice of granting restraining orders of this description might be liable to much abuse, by a friendly creditor filing a bill and obtaining a decree, it has been laid down as a rule, that an order to restrain a creditor from proceeding at Law, after a decree, will not be

[2] Vernon *v.* Thellusson, 1 Phil. 466; Kirby *v.* Barton, 8 Beav. 45, 48.

[3] Rouse *v.* Jones, 1 Phil. 462, 464.

[4] Kent *v.* Pickering, 5 Sim. 569; Burles *v.* Popplewell, 10 Sim. 383.

[5] As to the protection afforded to executors, see *ante*, p. 1207.

[6] Terrewest *v.* Featherby, 2 Mer. 480; Clarke *v.* Earl of Ormonde, *ubi sup.*; Lord *v.* Wormleighton, Jac. 148; Price *v.* Evans, 4 Sim. 514; Kent *v.* Pickering, *ubi sup.*; but see Ratcliffe *v.* Winch, 16 Beav. 576; 17 Jur. 586.

[7] Lee *v.* Park, *ubi sup.* For circumstances under which action was allowed to proceed but execution stayed, see Hobson *v.* Bagnall, 1 W. N. 47, M. R.

[8] Price *v.* Evans, 4 Sim. 514. As to proceedings at Law against executors and administrators, see Chitty's Arch. 1216 *et seq.*; Trower, 285 *et seq.*

[9] Dyer *v.* Kearsley, 2 Mer. 482.

[10] Clarke *v.* Earl of Ormonde, Jac. 108, 122.

[11] Ratcliffe *v.* Winch, 16 Beav. 576; 17 Jur. 586; Gardner *v.* Garrett, 20 Beav. 469; *Re* Brooker, Brooker *v.* Brooker, 3 Sm. & G. 475; 3 Jur. N. S. 381.

[12] 13 & 14 Vic. c. 35, § 24; see 23 & 24 Vic. c. 38, § 14.

[13] Teague *v.* Richards, 11 Sim. 46; *ante*, p. 992.

granted without an admission of assets from the executor, or an affidavit from him as to what assets he has in his hands.[1] This rule however, does not apply, where the balance in the executor's hands has been stated in his answer;[2] nor where the suit has been instituted by a legatee.[3]

The creditor is, unless his claim is unfounded,[4] entitled to his costs in the action, up to the time when he first had notice of the decree; but not to his costs subsequently incurred.[5] He will also be allowed his costs of the application, unless his conduct has disentitled him thereto.[6] If assets are admitted, the creditor's costs are directed to be paid to him at once. If assets are not admitted, leave is given to add his costs to his claim; and to prove for the same in the suit.[7] If assets are admitted, but the debt is disputed, the creditor's costs will be directed to be paid immediately on his establishing his claim.[8]

If the application is made after the account of debts has been taken, an inquiry as to the amount of the creditor's claim will, if necessary, be directed.[9]

An application to restrain a creditor from proceeding at Law is made by motion, of which notice must be given to him.[10] Separate notices must be served on each creditor, suing separately.[11]

Under the present practice, the creditor's further proceedings in the matter are restrained by the order itself; and it is not usual to direct an injunction to issue for that purpose.[12]

An injunction may also be granted, without a bill being filed for * that express purpose, where a plaintiff is proceeding against *1618 the defendant both in the Court of Chancery and in another Court, at the same time and for the same matter. In such cases, as we have seen,[1] the defendant has a right to call upon the plaintiff to elect in which Court he will proceed; and then, if the plaintiff elects to proceed in Chancery, the Court will interfere, by injunction, to restrain him from further proceeding in the other Court.[2] This remedy applies

[1] Paxton v. Douglas, 8 Ves. 520; Cleverly v. Cleverly, cited *ib.* 521; Colpin v. Lady Southampton, 18 Ves. 151; Drewry v. Thackeray, 3 Swanst. 546; Clarke v. Earl of Ormonde, *ubi sup.*; Vernon v. Thellusson, 1 Phil. 466; Bardins v. Commander, C. P. Coop. 124; Ledbrooke v. Sleane, 3 De G. & S. 201, 202; Lawton v. Lawton, 8 W. R. 458, M. R.; Seton, 887.

[2] Colpin v. Lady Southampton, *ubi sup.*

[3] Ray v. Wreck, *ubi sup.*

[4] King v. King, 12 W. R. 1095, M. R.; 34 Beav. 10.

[5] Paxton v. Douglas, 8 Ves. 520; Jackson v. Leaf, 1 J. & W. 222, 241, 245; Curre v. Bowyer, 3 Mad. 456; Jones v. Bruce, 2 Y. & C. C. C. 170; Sharrod v. Winfield, 1 Jur. N. S. 1164, V. C. K.; see Seton, 884.

[6] Jones v. Jones, 5 Sim. 628; Graham v. Maxwell, 1 M'N. & G. 71, 78; Cole v. Bingham, Kay App. 1; Seton, 885; and see Gardiner v. Garrett, 29 Beav. 469; Lawton v. Lawton, 8 W. R. 458, M. R.

[7] West v. Swinburne, 14 Jur. 360, V. C. K. B.; Cole v. Burgess, *ubi sup.*; Davey v. Plestow, 14 Jur. 388, V. C. W.; Canham v. Neale, 26 Beav. 266. See form of order, in Seton, 882.

[8] King v. King, 10 Jur. N. S. 762; 12 W. R. 1095, M. R.; 34 Beav. 10; and see Davey v. Plestow, *ubi sup.*; see also Morgan & Davey, 129 *et seq.*

[9] Sutton v. Mashiter, 2 Sim. 513.

[10] Where the proceeding is under 13 & 14 Vict. c. 35, and 23 & 24 Vict. c. 38, § 14, the application, pending the account, may also be made by summons. For forms of notice of motion and summons, see Vol. III.

[11] Moseley v. Moseley, 9 W. R. 531, V. C. S.

[12] Seton, 883; and see form of order, *ib.* 882; Braithwaite's Pr. 229; see also 15 & 16 Vict. c. 76, § 226.

[1] *Ante*, p. 815 *et seq.*; Seton, 947.

[2] Rogers v. Vosburgh, 4 John. Ch. 84.

only where the plaintiff has not proceeded to a decree. After decree, the benefit of the order to elect is lost: because the plaintiff has already made his election, and the decree has decided the question between the parties. Under special circumstances, however, the plaintiff will be permitted to sue the defendant, both under the decree, and in the other Court; but the plaintiff ought, before taking such steps, to apply for leave to the Court; and if he proceeds without such leave, the Court will restrain him, upon the application of the defendant.[3] It is not now usual to issue the injunction: service of the order to elect being sufficient;[4] but, if required, the injunction will be issued, on production of an office copy of the election.[5]

Except in the cases above pointed out, an injunction will be granted on the application of a defendant, before decree, only under very special circumstances.[6]

Another class of cases in which an injunction may be obtained, without a bill being filed for that purpose, has been already pointed out as proceeding from jealousy entertained by the Court of any interference with its process by another tribunal: for which reason, the Court will protect persons who have acted under its decree from actions brought against them for so doing; and will even issue its injunction to restrain a person from proceeding in an action at Law, to recover damages for false imprisonment under process of contempt improperly issued.[7]

With the exceptions above enumerated, the rule is, that, before the Court will issue an injunction, a bill must be filed:[8] of which bill a prayer for an injunction must form a part;[9] and the injunc-
*1619 tion * must be founded on the case alleged by the bill.[1] We have already seen, that where the bill prays a writ of injunction, a

[3] Wedderburn *v.* Wedderburn, 2 Beav. 208, 213; 4 Jur. 66; *ante*, p. 815; Phelps *v.* Prothero, 7 De G., M. & G. 722, 734; 2 Jur. N. S. 173; [Lord Tredegar *v.* Windus, L. R. 19 Eq. 607].

[4] Braithwaite's Pr. 229.

[5] See Seton, 950.

[6] Russell *v.* London, Chatham, and Dover Railway Company, 4 Giff. 403; S. C. *nom.* Norman Scott Russell *v.* London, Chatham, and Dover Railway Company, 9 Jur. N. S. 1007; Edgcumbe *v.* Carpenter, 1 Beav. 171. [After the Court has acquired jurisdiction of the subject-matter, one defendant, or the plaintiff may obtain an injunction against the suit of a co-defendant. Kingman *v.* Maisey, 2 Sim. 41; Laing *v.* Zeeden, 19 W. R. 273; 40 L. J. Ch. 155. See *infra*, 1734, n. 9.]

[7] *Ante*, p. 511; Frowd *v.* Lawrence, 1 J. & W. 655.

[8] By Genl. Stat. Vt. c. 29, § 55, it is enacted that "no injunction shall be issued in any case until the bill shall have been filed." See Howe *v.* Willard, 40 Vt. 654; see also Peck *v.* Crane, 25 Vt. 146. [Under the general practice of the Courts of this country, the writ of injunction will not issue until after bill filed. Vliet *v.* Sherwood, 37 Wis. 165. An injunction granted before summons issued is irregular under the N. C. Code, and will be vacated on motion. Hirsch *v.* Whitehead, 65 N. C. 516; Patrick *v.* Joyner, 63 N. C. 573.]

[9] *Ante*, p. 388; Del. & Rar. Canal, &c., and A. R. & T. Co. *v.* Rar. & Del. Bay R. Co., 1 C. E. Green, 379, 380; Walker *v.* Devereaux, 4 Paige, 229. The bill or petition asking for an injunction must be sworn to. Where the facts on which the injunction is asked are not within the personal knowledge of the plaintiff, he should state the facts on his own information and belief, and annex the affidavits of the person from whom he obtained the information, or some other person who can swear to the truth of the material allegations in the bill. Campbell *v.* Morrison, 7 Paige, 157 Bogert *v.* Haight, 9 Paige, 305; Bank of Orleans *v.* Skinner, 9 Paige, 305; Perkins *v.* Collins, 2 Green Ch. 482; see Hamersley *v.* Wyckoff, 8 Paige, 72; Youngblood *v.* Schamp, 2 McCarter, 42; *ante*, 394, note; Holdredge *v.* Gwynne, 3 C. E. Green, 26.

[1] Cresy *v.* Beavan, 13 Sim. 99; Hertz *v.* Union Bank of London, 1 Jur. N. S. 127, V. C. S.; Bardett *v.* Hay, 9 Jur. N. S. 1260; 12 W. R. 61, L. C. [It is irregular, upon the defendant's motion, to dissolve an injunction,

written bill may be filed, and a written copy served, on an undertaking to file a printed copy.[2]

The various cases in which this Court will interfere, by injunction, are almost as numerous as the matters which fall within its equitable jurisdiction: for, whenever a plaintiff is entitled to equitable relief,[3] if that relief consists in restraining the commission or continuance of some act of the defendant, the Court will enjoin him, by means of this prohibitory writ,[4] or by an order in the nature of it.[5]

In investigating the subject, it will be most convenient to consider, in the first place, the cases in which an injunction will not be granted.[6]

*The Court will not grant an injunction, or order in the nature *1620
of an injunction, to restrain persons from applying to the legislature of this or a foreign country:[1] except where the application

to grant a new injunction, and especially so if the new injunction be not granted in the terms of the bill. Bartlett *v.* Hay, 4 De G., J. & S. 41.] It is a general rule that an injunction will not be granted against persons who are not parties to the suit. Fellows *v.* Fellows, 4 John. Ch. 25; Waller *v.* Harris, 7 Paige, 167; Dawson *v.* Principe, 2 Anst. 521; Gadd *v.* Worrall, 2 Anst. 555; Iveson *v.* Harris, 7 Ves. 256, 257; Schalk *v.* Schmidt, 1 McCarter, 268; Inchiquin *v.* French, Amb. 34.

The exceptions to this general rule consist either of cases where the party enjoined is the mere solicitor, or agent, or tenant of a party to the suit, having no rights involved in the controversy, or where the right has been already determined. Schalk *v.* Schmidt, *supra;* Cholmondeley *v.* Clinton, 19 Ves. 261; Attorney-General *v.* Ancaster, 1 Dick. 68; Mogg *v.* Mogg, 1 Dick. 670; Casamajor *v.* Strode, 1 S. & S. 381.

[Ante, pp. 399, 442; 15 & 16 Vic. c. 86, § 6; Ord. IX. 4; XL. 18. [See Carr *v.* Morice, L. R. 16 Eq. 125.]

[2] Except to stay waste or prevent irreparable injury, an injunction can issue only as ancillary to some primary equity. Stockton *v.* Briggs, 5 Jones Eq. 330; Scantlin *v.* Bobbitt, 5 Jones Eq. 342; Washington *v.* Bundy, 4 Jones Eq. 25; Patterson *v.* Miller, 4 Jones Eq. 464; Mallett *v.* Atlantic & N. C. R. Co., 5 Jones Eq. 353; Smith *v.* Lane, 28 Geo. 570. And it is provided by statute in New York, that an injunction shall be granted only when it shall appear by the complaint that the party is entitled to the relief demanded; therefore, contrary to the usual practice, there must be an inquiry into the right of the Court to grant relief, upon a motion for a preliminary injunction. Hartt *v.* Harvey, 32 Barb. 55.

[In the absence of statutory direction, all that the Judge should, as a general rule, require, upon a preliminary application for an injunction to restrain probable rights and probable danger to that right, and the question should be regulated by the balance of inconvenience or injury to the one party or the other. Flippin *v.* Knaffle, 2 Tenn. Ch. 238, citing Glascot *v.* Lang, 3 M. & C. 455; Great Western R. Co. *v.* Birmingham, &c. R. Co., 2 Ph. 602; Georgia *v.* Brailsford, 2 Dall. 402; Ballard *v.* Fuller, 32 Barb. 68. See also Spicer *v.* Hoop, 51 Ind. 365; Pullan *v.* Cinn. R. Co., 4 Biss. 35.]

[4] Equity will restrain by injunction a trustee from submitting to arbitration a question in which the *cestui que trusts* alone are interested without their consent. Crum *v.* Moore, 1 McCarter, 436.

[5] The Court may now award damages, either in addition to, or in substitution for, an injunction. 21 & 22 Vic. c. 27, § 2; *ante*, pp. 1081 *et seq.*; 1140 *et seq.*; Pentney *v.* Lynn Paving Commissioners, 13 W. R. 983; Senior *v.* Pawson, 1 W. N. 364. By the 28 & 29 Vic. c. 99, § 1, the County Courts have and may exercise all the power and authority of the High Court of Chancery in all proceedings for orders in the nature of injunctions, where the same are requisite for granting relief in any matter in which jurisdiction is given by that Act to the County Court. 11 Jur. N. S. Pt. II. 369; Pollock & Nicol, Sup. 22.

[6] An injunction will not be granted on application *ex parte*, or, if granted, will be dissolved, when it appears that the refusal to grant, or the dissolution, cannot lead to any injury, or cause any loss to the plaintiff, which cannot be repaired in damages, or affect the merits of the controversy on a trial in due course. Wing *v.* Fairhaven, 8 Cush. 363.

[1] Bill *v.* Sierra Nevada Company, 1 De G., J. & J. 177; 6 Jur. N. S. 184; Ware *v.* Grand Junction Waterworks Company, 2 D. & M. 470, 484; Stockton and Hartlepool Railway Company *v.* Leeds and Thirsk Railway Company, 2 Phil. 666, 670; Heathcote *v.* North Staffordshire Railway Company, 2 M. N. & G. 100, 108; Lancaster and Carlisle Railway Company *v.* North Western Railway Company, 2 K. & J. 293; [Steele *v.* North Met. R. Co., L. R. 2 Ch. App. 237; *Ex parte* Hartridge, L. R. 5 Ch. App. 671]. In New Jersey, the Court of Chancery has no power, by injunction, to restrain any citizen from

is made in breach of an express or implied agreement entered into by the parties, and relates to matters which are not of public interest. An injunction may, however, be granted to restrain a person from opposing such an application;[2] or to prevent an improper appropriation of public funds, in promoting or opposing the application.[3]

The Court will also refuse an injunction to stay proceedings in any criminal matter.[4] The Court has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*, an indictment, an information, or a writ of prohibition;[5] but this restriction applies only to cases where the parties, seeking redress by such proceedings, are not the plaintiffs in Equity: for, if they are, then they are subject to control by an order personally affecting them. If, for instance, a suit were to be instituted to establish a right to land, and to quiet the possession, and after filing the bill the plaintiff should prefer an indictment for a forcible entry, which is of a double nature, as it partakes of a breach of the peace and is also a civil right, "the Court," said Lord Hardwicke, "would certainly stop the proceedings upon such an indictment."[6] Upon this principle his Lordship acted, in *The Mayor of York* v. *Pilkington*,[7] where a bill had been filed to establish a right of fishing, and the plaintiffs in the first cause indicted the agents of the defendants for a breach of the peace in fishing: there, an injunction was granted, with reference to what was civilly in question between the parties, though it was also the subject of a criminal prosecution: for, while the ques-
*1621 tion of right was depending in * Equity, it was but reasonable that the plaintiff should not proceed by action or indictment until it was determined there.

A Court of Equity has no jurisdiction to stay the process of a Court

petitioning either branch of the legislature upon any subject of legislation in which he is interested. Such restraint would be an unauthorized abridgment of the political rights of the party enjoined. Story *v.* The Jersey City and Bergen Point Plank Road Company, 1 C. E. Green, 13. [Nor will the Court grant an injunction on a doubtful point of constitutional law, nor to restrain the execution of laws because the authority delegated by them may be used unwisely, or injuriously to the public. Inhabitants, &c. *v.* Seymour, 7 C. E. Green, 458. Nor, even at the instance of the State, where a corporation has been permitted to spend a large sum of money upon its construction of a public grant, there being a doubt as to the authority to do the act. Attorney-General *v.* Delaware, &c. R. Co., 12 C. E. Green, 1.]

[2] Stockton and Hartlepool Railway Company *v.* Leeds and Thirsk Railway Company, *ubi supra*.

[3] Attorney-General *v.* Corporation of Norwich, 16 Sim. 225, 229; Attorney-General *v.* Guardians of Southampton, 17 Sim. 6, 13; Attorney-General *v.* Eastlake, 11 Hare, 205; 17 Jur. 801; Attorney-General *v.* Mayor of Wigan, Kay, 268; 5 De G., M. & G. 52; 18 Jur. 299; Munt *v.* The Shrewsbury and Chester Railway Co., 13 Beav. 1; Stevens *v.* South Devon Railway Co. 13 Beav. 48; The Great Western Railway Co. *v.* Rushout, 5 De G. & Sm. 290; Simpson *v.* Dennison, 10 Hare, 51; [Attorney-General *v.* West Hartlepool Imp. Com., L. R. 10 Eq. 152].

[4] Holderstaffe *v.* Saunders, 6 Mod. 16; [Saull *v.* Browne, L. R. 10 Ch. App. 64; Kerr *v.* Corp. of Preston, 6 Ch. Div. 463;] see Burnett *v.* Craig, 30 Ala. 135; [Moses *v.* Mayor, &c., 52 Ala. 198; Schwab *v.* City of Madison, 49 Ind. 327; Gault *v.* Wallis, 53 Ga. 675; Sheridan *v.* Colvin, 78 Ill. 237; Chicago *v.* Wright, 69 Ill. 318. And see, as to unauthorized municipal regulations and ordinances, Brown *v.* Trustees, 11 Bush, 435. See also, Wallack *v.* Society, &c., 67 N. Y. 23; Wolfe *v.* Burke, 56 N. Y. 118; West *v.* Mayor of New York, 10 Paige, 539].

[5] Lord Montague *v.* Dudman, 2 Ves. S. 396. [See, as to mandamus, Columbia County *v.* Bryson, 13 Fla. 281.]

[6] 2 Atk. 303.

[7] 2 Atk. 302; see Lord Montague *v.* Dudman, 2 Ves. S. 396; Attorney-General *v.* Cleaver, 18 Ves. 220.

of Law, upon an award which has been made a rule of Court under the stat. 9 & 10 Will. III. c. 15: the Court in which the submission is to be made a rule, alone having the power of reviewing the award.[1]

An injunction will not lie to relieve the plaintiff against a judgment at Law, where the case in Equity proceeds upon a ground which was equally available at Law, unless the plaintiff can establish some special equitable ground for the relief which he asks.[2] Accordingly, it has been held, that a plaintiff in Equity, who had pleaded a set-off in an action at Law and failed, could not sustain a bill for an account, relating to the same transaction as to which he had pleaded the set-off.[3] But if a defence could not have been made available in the Court of Law, at the same time, or under the circumstances, and there is no *laches* in the party applying, then relief will be granted, and the Court of Chancery will interfere by its injunction.[4] So also, if a fact, material to the merits, which would render the proceedings upon the judgment inequitable, should be discovered after a trial, which could not, by ordinary diligence, have been ascertained before, relief will be granted.[5] These, however, are mere exceptions to the general rule, that Equity will not relieve after a verdict where the defendant at Law might properly have defended himself there;[6] or where there has * been a mistake in *1622

[1] Gwinett *v.* Bannister, 14 Ves. 530; Dawson *v.* Sadler, 1 S. & S. 537; Nichols *v.* Roe, 3 M. & K. 431, 438; overruling S. C., 5 Sim. 156; see also Heming *v.* Swinnerton, 2 Phil. 79; Davies *v.* Getty, 1 S. & S. 411; Pope *v.* Duncannon, 9 Sim. 177.

[2] See Stone *v.* Hobart, 8 Pick. 466; S. C., 10 Pick. 215; Hibbard *v.* Eastman, 47 N. H. 507. A Court of Equity does not issue an injunction to stay proceedings at Law where the rights of a party can be fully established in a Court of Law. Fuller *v.* Cadwell, 6 Allen, 504, 505; Derbyshire, &c. Railway Co. *v.* Serrell, 2 De G. & S. 353; Anderson *v.* Dowling, 11 Irish Eq. 590; New York Dry Dock Co. *v.* American Life Ins. & Trust Co., 11 Paige, 384; Morris Canal and Banking Co. *v.* Dennis, 1 Beasley, 249. [An injunction will not lie to a suit at law upon a foreign judgment on the ground of fraud, fraud being a good defence at law. Christmas *v.* Eppler, L. R. 8 Ch. App. 666. And a bill which shows upon its face that there is a good defence at law is demurrable. Kemp *v.* Tucker, L. R. 8 Ch. App. 369; Wood *v.* Fenwick, 31 Ala. 5; Screw Mower *v.* Mayhew, 11 C. E. Green, 116.]

[3] Harrison *v.* Southcote, 2 M. & K. 424, 428, and see Sampson *v.* Lord Howden, 3 M. & C. 97; Mellor *v.* Lee, cited, 26 Beav. 466; [Moore *v.* McGaha, 3 Tenn. Ch. 415.]

[4] Farquharson *v.* Pilfrey, 2 Russ. 84, 89.

[5] Ingle *v.* Chandler, 1 S. & L. 319.

[6] Peatherey *v.* Freeman, 2 Stewart, 227; and see Countess of Cambridge *v.* Gerard, 2 P. Wms. 424; Ld. Red. 132; Taylor *v.* Sheppard, 1 Y. & C. Ex. 271, 279; Hankey *v.* Vernon, 2 Cox, 12; Isaac *v.* Humpage, 1 Ves. J. 427; 3 Bro. C. C. 463; Bateman *v.* Willoe, 1 Sch. & Lef. 205; Hibbard *v.* Morrison, 47 N. H. 507; Fuller *v.* Cadwell, 6 Allen, 505; Borland *v.* Thornton, 12 Cal. 440; Ponder *v.* Cox, 26 Geo. 485; Jordan *v.* Thomas, 34 Miss. 72; Todd *v.* Fisk, 14 La. An. 13; Gibson *v.* Moore, 22 Texas, 611; Kreichbaum *v.* Bridges, 1 Clarke (Iowa), 14; Farmers' Bank *v.* Vanmeter, 4 Hen. & M. 553; Dodge *v.* Strong, 2 John. Ch. 230; Marine Ins. Co. *v.* Hodgson, 7 Cranch, 332; Woodworth *v.* Van Buskirk, 1 John. Ch. 432; Vaughn *v.* Fuller, 23 Geo. 366; Forsythe *v.* McCreight, 10 Rich. Eq. (S. C.) 308; [Robinson *v.* Wheeler, 51 N. H. 384]. An injunction will not be granted, if the person seeking it could, by proper vigilance, have protected himself from injury by the ordinary means at Law. Albritton *v.* Bird, R. M. Charlt. 93; Dodge *v.* Strong, *supra*; Fuller *v.* Cadwell, 6 Allen, 505; Derbyshire, &c. Railway Co. *v.* Serrell, 2 De G. & S. 353; Anderson *v.* Dowling, 11 Irish Eq. 590; N. Y. Dry Dock Co. *v.* Amer. Life Ins. & Trust Co., 11 Paige, 384; Morris Canal & Banking Co. *v.* Dennis, 1 Beasley, 249; Taliaferro *v.* Branch Bank Mont., 23 Ala. 755; Chambless *v.* Taber, 26 Geo. 167; Smith *v.* Ryan, 29 Texas, 65; Farmers', &c. Bank *v.* Ruse, 27 Geo. 391; Stubbs *v.* Leavitt, 30 Ala. 352; Watt *v.* Cobb, 32 Ala. 530; Methodist P. Church *v.* Mayor and Common Council of Baltimore, 6 Gill, 391; Briesch *v.* McCauley, 7 Gill, 189; Bruner *v.* Planters' Bank, 23 Miss. 406; Yongue *v.* Billups, 25 Miss. 407; Indax *v.* Carpenter, 14 Cal. 173; Emery *v.* Van Sickle, 2 McCarter, 144; [Miller *v.* Palmer, 55 Miss. 324]

the pleadings, or in the conduct of the cause;[1] or merely to let in new corroborative evidence.[2]

An important distinction has frequently been attempted to be drawn between an error or mistake in fact, and an error or mistake in law. With respect to the former, it has been clearly settled, that where a deed has been executed, or money paid, from ignorance of a fact, or under an erroneous impression respecting it, a Court of Equity will relieve; but there seems to have been some difference upon the question whether it would do so, when an act has been done under a mistake of law.[3] With regard to the cases on this head, in which relief has been given, some of them are attended with circumstances of fraud or circumvention, and others of them lie so much on the borders of the two kinds of errors, that they are to be classed amongst instances of errors of fact, rather than errors of law;[4] but, in *Pullen* v. *Ready*,[5] Lord Hardwicke intimated, that, if parties are entering into an agreement, and have the facts before them, and their counsel choose to construe it, taking upon themselves the knowledge of the law, he would then hold them bound. Lord Eldon has quoted this passage with evident approbation; and, whatever may be the rule generally as to other parties, yet, in family arrangements, it seems to be settled that they will not be disturbed, after a long acquiescence, on the ground that they are founded on a mistake of the parties, or because, in the result, they may turn out to be more advantageous to one party than the other.[6] We may, therefore, infer, from these cases, that an injunction will not be granted to stay any legal proceedings on the ground that the deed or instrument upon which an action was brought was made under a mistake in point of law:[7] for *ignorantia juris non excusat*.[8]

*1623 * Having now considered the several cases in which the Court will not interfere by injunction, the principal instances in which injunctions may be obtained will be mentioned.[1]

[1] Stephenson *v.* Wilson, 2 Vern. 325; Blackhall *v.* Combs, 2 P. Wms. 70; Kemp *v.* Mackrell, 2 Ves. S. 579; Holworthy *v.* Mortlock, 1 Cox, 141; Great Western Railway Company *v.* Cripps, 5 Hare, 91; Farmers' Bank *v.* Vanmeter, 4 Rand. 553; Jamison *v.* May, 13 Ark. 600. A suit at Law will not be enjoined because of the refusal of the Court to postpone the trial. Hamilton *v.* Dobbs, 4 C. E. Green, 227.

[2] Ware *v.* Horwood, 14 Ves. 31; Bullock *v.* Chapman, 2 De G. & S. 211; see Smith *v.* Lowry, 1 John. Ch. 320; Slack *v.* Wood, 9 Grattan, 40; Hibbard *v.* Eastman, 47 N. H. 507. An injunction was granted against a judgment at Law, grounded on a bill of sale, which was fraudulently obtained. Crawford *v.* Crawford, 4 Des. 176.

[3] Pusey *v.* Desbouvrie, 3 P. Wms. 315; Broderick *v.* Broderick, 1 P. Wms. 239; Cocking *v.* Pratt, 1 Ves. S. 400; Bingham *v.* Bingham, *ib.* 126; Ramsden *v.* Hylton, 2 Ves. S. 304.

[4] See 3 M. & K. 99.

[5] 2 Atk. 591; cited 1 V. & B. 30.

[6] See Tweddell *v.* Tweddell, T. & R. 1, 11; Bellamy *v.* Sabine, 2 Phil. 425; Jenner *v.* Jenner, 2 Giff. 232; 2 De G., F. & J. 359; Talbot *v.* Staniforth, 1 J. & H. 484.

[7] Stockley *v.* Stockley, 1 V. & B. 23; Clifton *v.* Cockburn, 3 M. & K. 76; Neale *v.* Neale, 1 Keen, 672, 682. [But where a judgment creditor paid over money collected by execution to the assignee in bankruptcy of the debtor under a mistake of law, the Court ordered the assignee, as its officer, to repay the money, James, L. J., remarking that "the Court of Bankruptcy ought to be as honest as other people." *Ex parte* James, L. R. 9 Ch. App. 609.]

[8] Broom's Maxims, 249 *et seq.*

[1] An injunction will generally be granted to secure the enjoyment of a statute privilege, of which the party is in actual possession, unless the right is doubtful. Boston & Lowell R. R. Co. *v.* S. & L. R. R. Co., 2 Gray, 27;

It is a general rule, that wherever a party,[2] by fraud, accident, mistake, or otherwise, has obtained an advantage in proceeding in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong, by restraining the party whose conscience is thus bound, from using the advantage he has there gained.[3] Thus, if by fraud, accident, or mistake, a deed is framed contrary to, or beyond the intention of the parties in their contract on the subject, and the forms of the Courts of Common Law will not admit of such an investigation as will enable them to do justice, the Court of Chancery will restrain the party from asserting his legal rights under the instrument in those points in which it is so framed, until the question has been investigated: when if the complaint be well founded, it will either rectify the instrument in the points complained of, or permanently restrict the party from making use of it.[4] There are also many other cases in which the legal defence to a claim set up at Law rests, either exclusively or in a great degree, within the knowledge of the party advancing the claim; and as it is against conscience that the party should proceed in the assertion of his claim without communicating the information he possesses, it has become one of the modes of equitable interposition to afford relief, by injunction, until the discovery is obtained. Fraud, accident, mistake, and discovery, are, therefore, four of the principal grounds upon which injunctions may be applied for, to stay proceedings at Law. And it is to be observed, * that an injunction to restrain proceedings at Law, *1624 when awarded, does not deny, but admit, the jurisdiction of the

Newburgh, &c. Turnp. v. Miller, 5 John. Ch. 101; Livingston v. Van Ingen, 9 John. 507; Craig v. Ryker, 1 John. Ch. 641; Del. & Rar. Canal & C. A. R. & T. Co. v. Rar. & Del. Bay R. Co., 1 C. E. Green, 321, 378.

[2] No person can enjoin a judgment at Law in which he was not a party; but if he is aggrieved, he could pray an injunction to the execution. Jordan v. Williams, 3 Ran. 501; Murry v. Westhall, 35 Penn. 487.]

[3] Hibbard v. Eastman, 47 N. H. 507; Baldwin v. Sears, 44 N. H. 294; Read v. Read-Inger, 44 N. H. 72; Miller v. McCoy, 6 Penn. 441; Briggs v. Law, 4 John. Ch. 22; Ellis v. Harper, 20 Miss. 470; see Mason v. Hawkins, 4 Hen. & M. 427; Morris Ins. Co. v. Hodges, 7 Gill, 332; Gourley v. Lemmon, 8 Gill & J. 340; Emerson v. Udall, 14 Vt. 477; Briggs v. Shaw, 15 Vt. 78; Wingate v. Haywood, 40 N. H. 441, 443; Mason v. Crosby, 1 Sneed, 240; Wright v. Paine, 7 Wis. 201; Bradley v. Richardson, 2 Blatch. C. C. 343; S. C. 23 Vt. 720; Dennis v. Forest, 13 La. An. 209. Equity will not by injunction enable a party to try in Equity a case that the defendant has begun to try and which can and should most properly be tried in a Court of Law. Evans v. Cooper, 1 Hughes, C. C. 344; S. C. 3 Am. Law Reg. N. S. 488; Fuller v. Caldwell, 6 Ala. 208; Wayman v. Bates, L. R. 2 Eq. 534; Mills v. Gabler, 7 Paige, 68; Cross v. Bussell, 10 Paige, 373; M'Lin v. Robinson, 1 Heisk. 678; Chadwell v. Jordan, 2 Tenn. Ch. 635. But if both parties must be heard in order to do complete justice, Equity will interfere. Radcliff v. Varnor, 56 Ga. 222. A purely legal defence, such as payment, will not entitle coming into Equity. Williams v. Stewart, 56 Ga. 663. And in no case ought the right of the defendant to proceed to judgment at Law on a legal demand to be interfered with by injunction. Chadwell v. Jordan, 2 Tenn. Ch. 635; Hill v. Billingsley, 53 Miss. 111; Henwood v. Jarvis, 12 C. E. Green, 247. And when a stay of proceedings at Law is asked, the Chancellor may require a confession of judgment in the action at Law. Great Falls Man. Co. v. Henry, 25 Gratt. 575. *Infra*, 1624, n. 2 & 3. When judgment was given, "to be dealt with as the Court of Chancery shall direct," execution may, on good cause shown, be allowed before hearing on the merits, the proceeds to be brought into Court. Hodges v. Fincham, 1 Ch. Div. 9]. An injunction is never granted to stay a suit before judgment merely because the plaintiff has no cause of action. Craddin v. Mayes, 29 Texas, 470. Proceedings in one suit in Equity may be restrained by an injunction obtained in another suit. Prudential Ins. Co. v. Thomas, L. R. 3 Ch. Ap. 74. [See *ante*, 1607, n. 2.]

[4] 1 Lil. Reg. 127. Edes, on Inj. 4-14.

Courts of Common Law; and the ground upon which it issues is, that they are making use of their jurisdiction, contrary to equity and good conscience.[1]

In these cases, the interference of a Court of Equity is founded upon strict equitable principles. Sometimes, however, the question between the parties depends partly upon a legal title and partly on an equity which will arise only in the event of that title being decided in one way. In such a case, the practice of the Court is, to require that the party applying to the Court for its interposition should admit the legal right of the other party, as in the case of giving judgment in ejectment;[2] or, if circumstances are not such as to enable him to do that, then to allow the action to go on, but to restrain execution on the judgment, in order that the legal rights of the parties may be first ascertained, and that the plaintiff may then come to the Court to apply those legal rights.[3]

In cases resting upon purely equitable grounds, the injunction is not confined to any one point of the proceedings at Law;[4] but, upon a proper case being presented to the Court, it may be granted at any stage of the action.[5] Thus, an injunction is sometimes granted to stay trial:[6] sometimes, when the parties are in a condition to enter up judgment, to restrain their so doing;[7] and sometimes it is issued after a judgment, to stay execution, or proceedings under an execution.[8] The

[1] Hill *v.* Turner, 1 Atk. 515; and see Sheffield *v.* Duchess of Buckinghamshire, *ib.* 628.

[2] It is a rule of practice in the Circuit Courts of the United States not to stay an ejectment suit until it can be investigated in Equity, unless judgment be entered therein. Turner *v.* Amer. Bapt. Miss. Union, 5 McLean, 344; see Henry *v.* Tupper, 27 Vt. 518; [Ham *v.* Schuyler, 2 Johns. Ch. 140; Carroll *v.* Sand, 10 Paige, 298; Johnston *v.* McArthur, 64 N. C. 675. Where ejectment is pending, the plaintiff cannot enjoin the defendant from selling the crops raised on the land, because of the defendant's insolvency. He has no lien, and stands in no better attitude than any other general creditor. Walker *v.* Zorn, 50 Ga. 370].

[3] Barnard *v.* Wallis, C. & P. 85, 90; Hudson *v.* Temple, 9 W. R. 243; not reported on this point, 29 Beav. 536; and see Seton, 875. [If the bill be first filed to get rid of a legal demand, such as a policy of insurance, on the ground of fraud, a suit at Law, subsequently commenced on the demand, will not be enjoined: Hoare *v.* Bremridge, L. R. 8 Ch. App. 22; except upon the terms of consenting to give judgment at Law: *Id.*; Chadwell *v.* Jordan, 2 Tenn. Ch. 635. And see *ante*, 1623, note 3; Staples *v.* Turner, 29 Gratt. 575.]

[4] A judgment may be enjoined for part, and be allowed to proceed for the residue. Dunlap *v.* Stetson, 4 Mason, 349; Lyles *v.* Hatton, 6 Gill & J. 122; Bell *v.* Cunningham, 1 Sumner, 89.

[5] Albritton *v.* Bird, R. M. Charlt. 93; Spurr *v.* Benedict, 99 Mass. 463, 467.

[6] Codd *v.* Wooden, 3 Bro. C. C. 73; Lady Arundell *v.* Phipps, 10 Ves. 139, 144; Rowe *v.* Wood, 2 Swanst. 234, n. (*a*); Holme *v.* Brown, 9 Hare Ap. 29; and see Lloyd *v.* Adams, 4 K. & J. 467.

[7] Turner *v.* Wright, 1 J. & W. 290; Williams *v.* Roberts, 8 Hare, 315.

[8] Protheroe *v.* Forman, 2 Swanst. 227, 234, n.; Brooks *v.* Purton, 1 Y. & C. C. C. 271, 274; Williams *v.* Davies, 2 Sim. 461; Grant *v.* Lathrop, 23 N. H. 67; Kenyon *v.* Clarke, 2 R. I. 67; Shaw *v.* Dwight, 16 Barb. 536. In reference to the damages allowed in some States upon a dissolution of an injunction of this character, see Taylor *v.* Morton, 5 J. J. Marsh. 67; Wilson *v.* McCullough, *ib.* 363; Griffin *v.* Pickett, 6 J. J. Marsh. 389; Brown *v.* Commonwealth, *ib.* 653; Washington *v.* Parks, 6 Leigh, 581; Howard *v.* Warfield, 4 Harr. & M'H. 21; Thomas *v.* Brashear, 4 Monroe, 67; Clayton *v.* Anthony, 15 Grattan, 518; Williams *v.* Close, 14 La. An. 737. [An action will lie to prevent a cloud being cast on title to real estate by execution sale, as well as to remove a cloud. Mann *v.* Utica, 44 How. Pr. 334. It will lie to enjoin the sheriff from selling under an illegal assessment. McPike *v.* Pen, 51 Mo. 63. And the Court will, in a proper case, enjoin the sale of complainant's realty under an execution against a third person: Pettit *v.* Shepherd, 5 Paige, 502; Oakley *v.* Trustees, 6 Paige, 265; Merriman *v.* Polk, 5 Heisk. 717; Moore *v.* Cord, 13 Wis. 213; Gamble *v.* Loof, 14 Wis. 465; Lockwood *v.* Kitteringham, 42 Iowa, 257; although no title would in fact pass: Vogler *v.* Montgomery, 54 Mo. 578. But the injunction

Court is, however, very cautious in interfering, when the application is made on the eve of the trial at Law;[9] and it is to be remembered, that, after a judgment, an injunction will not be granted, except in those cases * where there has been fraud or collusion in obtain- *1625 ing a verdict; or where the party has been unable to defend himself effectually at Law, without any fault or negligence of his own; or where the plaintiff has possessed himself of something by means of which he has obtained an unconscientious advantage.[1] In short, the

should not be granted where it might prejudice the creditor's right against his debtor: for the right of the complainant, as a third party, may be protected as well after as before execution sale. Freeman *v.* Elmendorf, 3 Halst. Ch. 479, 655; Goldstein *v.* Kelly, 51 Cal. 301; Moore *v.* Hallum, 1 Lea, 511; Sanders *v.* Everett, 3 Tenn. Ch. 520. And see Groves *v.* Webber, 72 Ill. 606; Rea *v.* Longstreet, 54 Ala. 291; Goodell *v.* Bonner, 41 Wis. 436; Wilson *v.* Hyatt, 4 S. C. 369. An injunction will lie to protect the homestead from sale by execution: Irwin *v.* Lewis, 55 Miss. 654; and against dispossession by process in a suit to which the complainant is no party: Banks *v.* Parker, 80 N. C. 157. A person in possession of land, however defective his title may be, is entitled to maintain an action to quiet his title and possession against an adverse claimant whose title is weaker than his. Giltenau *v.* Lamert, 13 Kans. 476; Brenner *v.* Bigelow, 8 Kans. 496; *Aliter* of a person out of possession: Orton *v.* Smith, 18 How. 263; Burton *v.* Gleason, 56 Ill. 25; Clark *v.* Covenant, &c. Ins. Co., 52 Mo. 272; Daniel *v.* Stewart, 55 Ala. 278; unless he shows some special equity, that is some obstacle which would embarrass the remedy at Law. Plant *v.* Barclay, 56 Ala. 561. *Aliter* also if a person having possession except that he has warranted title: Bissell *v.* Kellogg, 60 Barb. 617; Huntington *v.* Allen, 44 Miss. 654; but see Ely *v.* Wilcox, 26 Wis. 91; or a mere right to sell for the purposes of administration or distribution: Robinson *v.* Joplin, 54 Ala. 70; nor where the bill states only a pretended title in defendant: Lawson *v.* Breeding Co., 22 Mich. 464. If the land be vacant, Equity will act. O'Brien *v.* Craig, 16 Kans. 242. If neither party has title, bill will be dismissed: San Diego *v.* Allison, 45 Cal. 590. In Tennessee, the bill will lie by a person out of possession. Allaway *v.* Hogan, 4 Heisk. 39; Thompson *v.* Mercer, 4 Heisk. 370. As to what constitutes a cloud on the title, see Landis *v.* Saye, 48 N. Y. 178; Newell *v.* Wheeler, 48 N. Y. 486; King *v.* Hughes, 3 Oreg. 496.

An injunction based on a cloud upon the title has been granted where the wrongful acts complained of do not directly operate as a cloud. O'Conner *v.* Wilson, 57 Ill. 226. Where there was a sale under a void decree of foreclosure. Hodgen *v.* Gregory, 58 Ill. 441. Where an administrator was about to sell property disposed of by the decedent in his lifetime. Gerry *v.* Stimson, 60 Me. 186. Where the title against which relief is sought is such as would bar the other party to produce his title in defence. Lick *v.* Ray, 43 Cal. 85. Where the claim arises from a collector's deed on a sale for taxes, and the taxes have been in fact paid. Gage *v.* Rohrback, 56 Ill. 262; Gage *v.* Billings, 56 Ill. 268; Gage *v.* Chapman, 56 Ill. 311. Great caution should be exercised in such cases. Glazier *v.* Bailey, 47 Miss. 395. Equity will relieve if the cloud is an illegal tax deed: Lee *v.* Ruggles, 62 Ill. 427; upon payment of the purchase-money at the tax sale, other taxes, and interest: Phelps *v.* Harding, 87 Ill. 442; Barnett *v.* Clive, 60 Ill. 205; together with all costs: Bank of Kentucky *v.* Gay, 1 Memph. L. J. 311; Bloomstein *v.* Brien, 3 Tenn. Ch. 55. See Carlisle *v.* Tindall, 49 Miss. 229. Or where the cloud is an invalid patent. Danforth *v.* Morrical, 84 Ill. 456.

Equity will not interfere, even in favor of an infant, to cancel a deed as a cloud upon the title, when the deed is void on its face. Cohen *v.* Sharp, 44 Cal. 29; Guest *v.* Brooklyn, 69 N. Y. 507. *Aliter*, where the deed is good on its face, and the defect can only be made to appear by extrinsic evidence. Sanxay *v.* Hunger, 42 Ind. 44; Daniel *v.* Stewart, 55 Ala. 278; Alden *v.* Trabue, 44 Conn. 455; Carroll *v.* Brown, 28 Gratt. 791. And see, as to the right of complainant to come into equity for the cancellation of notes, although there is a good defence at Law: Smith *v.* Smith, 3 S. W. Rep. 564.]

[9] Seton, 877, citing Larmuth *v.* Simmons, 11 Feb., 1854; and see Holme *v.* Brown, 9 Hare Ap. 29; Lloyd *v.* Adams, 4 K. & J. 467.

[1] See Lorentzen *v.* Wilson, 1 Duer, N. Y., 624; Kent *v.* Ricards, 3 Md. Ch. Dec. 392; [Walker *v.* Shreve, 87 Ill. 474; Finch *v.* Hollinger, 17 Iowa, 173; Crim *v.* Handley, 94 U. S. 652; Grubb *v.* Kolb, 55 Ga. 630; Hendrickson *v.* Hinckley, 17 How. 443; Kearney *v.* Smith, 3 Yerg. 127; Richmond Enquirer *v.* Robinson, 24 Gratt. 548; Railroad Co. *v.* Neal, 1 Woods, 353; Shields *v.* McClung, 6 W. Va. 79; Smith *v.* Allen, 63 Ill. 474; Craft *v.* Thompson, 51 N. H. 536. If the defence at Law fail because the party could not be a witness, the bill will be held bad on demurrer. Robinson *v.* Wheeler, 51 N. H. 384. And Equity will not impeach a judgment upon a bill attacking the truth of an officer's return on parol testimony. Wardsboro *v.* Whittingham, 45 Vt. 316. And see Driver *v.* Cobb, 1 Lea, Ch. 490. See also Leftwick *v.* Hamilton, 9 Heisk. 310.] An injunction will be granted to prevent a party making use of a legal writ of execution for the purpose of vexation and injustice. Colt *v.* Cornwell, 2 Root, 109. Where an attorney brings a suit without any

Courts are unwilling to interfere, where it appears that the plaintiff has lain by until after a trial has taken place.[2]

authority from the plaintiffs, and the defendant obtains a judgment for costs, a Court of Equity will restrain the enforcing of such judgment by a perpetual injunction, if it be shown that the attorney is poor and unable to respond. Smyth *v.* Balch, 40 N. H. 363.

Where a claim, in which an action had been brought, was settled, before the term of the Court was begun, and the plaintiff wrongfully entered the action, took judgment and execution, and long afterwards assigned the execution, an injunction was granted to relieve the debtor in the execution against its enforcement. Devall *v.* Scales, 49 Maine, 320.

[A Court of Equity is not a Court of review to correct the errors and irregularities in the proceedings of a Court of Law. Tilton *v.* Cofield, 93 U. S. 163; Maxwell *v.* Stewart, 22 Wall. 79; Greenlaw *v.* Kernahan, 4 Sneed, 380; Holmes *v.* Steele, 28 N. J. Eq. 173; Glenn *v.* Maguire, 3 Tenn. Ch. 695; New York, &c. R. Co. *v.* Haws, 56 N. Y. 175; Gibbons *v.* Bressler, 61 Ill. 110. But Equity will relieve against a judgment obtained in violation of a written stipulation for notice: Foote *v.* Despain, 87 Ill. 28; or by inducing defendants to withdraw an equitable plea by a promise to do the equity: Markham *v.* Augier, 57 Ga. 43; or not to make a legal defence: Baker *v.* Redd, 44 Iowa, 179. And where a party sued out an injunction to restrain the collection of a void and unjust judgment, which was dissolved, whereupon he immediately filed a second bill, which was held sufficient to entitle him to relief; it was held that complainant was entitled to perpetually enjoin a judgment recovered in the mean time on the injunction bond, as well as the original void judgment. Weaver *v.* Poyer, 79 Ill. 417. But see Blythe *v.* Peters, 3 Yerg. 378. Where the equity on which an injunction is based goes only to a part of a judgment, the injunction should provide that the judgment creditor may proceed by execution to collect the undisputed balance. Levy *v.* Steinbach, 43 Md. 212. A legatee, against whom the administrator has recovered a judgment for a debt due the estate, may enjoin execution on the ground that the executors were indebted to him in a larger amount in right of his legacy, were insolvent, and the estate out of debt. Dobbs *v.* Protho, 57 Ga. 14; Parker *v.* Britt, 4 Heisk. 243. See also Ewing *v.* Nickle, 45 Md. 413; Gaines *v.* Kennedy, 53 Miss. 103. Equity will enjoin a judgment where it appears that the defendant was not served with process, and has a valid defence. Martin *v.* Parsons, 49 Cal. 95; Robinson *v.* Reid, 50 Ala. 69. And, it seems, Equity will not inquire whether he has a valid defence. Blakeslee *v.* Murphy, 44 Conn. 188; Ridgway *v.* Bank of Tennessee, 11 Hum. 523. But see Estis *v.* Patton, 3 Yerg. 382; Creed *v.* Scruggs, 1 Heisk. 592.

A bill of injunction by a surety has been sustained after judgment upon proof of payment of the debt having been discovered after recovery, and that due diligence was used to discover it before. McGahee *v.* Gold, 68 Ill. 215. So by the debtor himself upon new evidence and diligence. Cox *v.* Mobile, &c. R. Co., 44 Ala. 611. But see Levan *v.* Patton, 2 Heisk. 108, and Greenfield *v.* Frierson, 7 Heisk. 633, as to the essential allegations of such a bill. An injunction will be granted to restrain a sheriff from selling property previously sold by the execution debtor, until other property of the defendant subject to execution be exhausted, but not on the ground that the sheriff has wrongfully permitted the execution debtor to remove from the State, and sell other property subject to the executive lien. Sidener *v.* White, 46 Ind. 588.

Equity will not relieve for the negligence of the party or his counsel: Crim *v.* Handley, 94 U. S. 652; Kern *v.* Strausberger, 71 Ill. 413; Rogers *v.* Parker, 1 Hughes, 148; Brown *v.* Wilson, 56 Ga. 534; Nicholson *v.* Patterson, 6 Humph. 394; not even in the case of a married woman: Newman *v.* Morris, 52 Miss. 402; nor where the remedy by appeal has been lost by adopting a defective mode. Long *v.* Smith, 39 Texas, 160. In North Carolina, the remedy against a judgment is, now, not by injunction, but by application to the Court in which the judgment was rendered. Chambers *v.* Penland, 78 N. C. 53.

A suit to annul a judgment is not maintainable upon averments in general terms that the adverse party and his witnesses conspired to obtain the judgment by fraud and perjury. What other averments such a bill must contain. Ross *v.* Woods, 70 N. Y. 8. Where a decree is rendered affecting the interest of one not made a party, the decree may be opened upon bill filed by him so far as to let him in to defend as if he had been made a party defendant. Gaytes *v.* Franklin Sav. Bank, 85 Ill. 256.

Where the bill is for a new trial, it must allege not only discovery of new evidence, but state what that evidence is, so that the Court may see that it is material, and not merely cumulative, corroborative or collateral, and such as ought to produce an opposite result; and it must also show that the evidence could not by reasonable diligence have been secured at the former trial. Smith *v.* McLain, 11 W. Va. 654, 668. And see Leay *v.* Hughes, 5 Sneed, 155.]

[2] Meredith *v.* Johns, 1 Hen. & M. 583. Formerly, a distinction existed between injunctions to restrain proceedings at Law, and other injunctions; but this has been abolished. 15 & 16 Vic. c. 86, § 58; Ord. XXV.; and see Holme *v.* Brown, 9 Hare, Ap. 29; Fitzgerald *v.* Bult, *ib.* Ap. 65; Sergison *v.* Beavan, 16 Jur. 1111; 9 Hare, Ap. 29, n.; Senior *v.* Pritchard, 16 Beav. 473; Lovell *v.* Galloway, 17 Beav. 1; Mollett *v.* Enequist, 25 Beav. 609; 26 Beav. 466; Harris *v.* Collett, 26 Beav. 222; Magnay *v.* Mines Royal, 3 Drew. 130; Lloyd *v.* Adams, 4 K. & J. 467; Fox *v.* Hill, 2 De G. & J. 353; Peninsular Bank *v.* Darther, 14 W. R. 454.

The Courts of Common Law have now the power of compelling discovery, and adjudicating upon equitable defences;[3] but the concurrent jurisdiction of the Court of Chancery is not thereby abrogated.[4] A party, however, who raises an equitable defence at Law, may be held to have elected to abide by the proceedings there, and to have abandoned his right to proceed in the Court of Chancery.[5]

An injunction until answer, or further order, may be granted to restrain proceedings in the Court of Probate, on the ground that a complete discovery cannot be obtained there;[6] and although that Court is the proper jurisdiction to determine the validity of a will of personal estate, yet, if the will comes into Chancery on an incident in the cause, and that incident or the will itself *is admitted by the *1626 parties, it has been decided that the Court will hold the parties to be bound by such admission; and, if any of them should afterwards bring a new suit to contest that determination, it will grant an injunction to restrain them.[1]

An injunction to stay proceedings in the Admiralty Court, in a suit for the condemnation of a ship, has been refused, when it appeared that the Court of Admiralty, by its own rules, had as large an authority as the Court of Chancery, to put the subject into a method of inquiry, and to act upon that inquiry by giving the same relief;[2] but if the proceedings in the Admiralty Court are in that stage in which no new evidence can be received: as, if a sentence has been obtained, and an important fact has since been discovered: the Court of Chancery will restrain proceedings to enforce that sentence: considering it in the same light as if there had been a trial at Law, and a verdict obtained, which may be affected in Equity by subsequent discovery.[8]

Although the Court of Chancery does not, in general, interfere with proceedings in the Court of Bankruptcy, which is a Court of Equity as well as of Law, and therefore capable of doing justice between the par-

[3] As to compelling discovery at Law, see Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, §§ 50-57); and, as to equitable defences at Law, see same Act, §§ 83-86; as to writs of injunction at Law, see *post*, p. 1635.

[4] Murray *v.* Mines Royal, 3 Drew. 130; 1 Jur. N. S. 153; Lanchester *v.* Welchman, 3 Drew. 122; Gompertz *v.* Pixley, 4 Drew. 448; Evans *v.* Bicknell, 2 K. & J. 174; 8 De G., M. & G. 100; British Empire Shipping Company *v.* Somes, 3 K. & J. 433; Cockell *v.* European & American Company, 1 J. & H. 108; Barry *v.* Croskey, 2 J. & H. 1, 21; Walker *v.* Micklethwaite, 1 De. & Sm. 49; Thornton *v.* M'Keever, 1 H. & M. 525, 529; Stewart *v.* Great Western Railway Company, 2 De. & Sm. 458, 484, 2 De G., J. & S. 319.

[5] Terrell *v.* Hall, 1 De G. & J. 388; 4 Jur. N. S. 41; Walker *v.* Micklethwaite, *ubi sup.*; and see Evans *v.* Bicknell, and Stewart *v.* Great Western Railway Company, *ubi sup.* [And, as to election, it has been also held that a party who has filed a bill in Equity and has a trial on the merits, a subsequent suit at Law will be enjoined. Phelps *v.* Prothero, 7 De G., M. & G. 722; Lord Tredegar *v.* Wyndus, 19 Lp. 607.]

[6] Fuller *v.* Ingram, 5 Jur. N. S. 510; 7 W. R. 502, V. C. W. As to the power of the Court of Probate to compel discovery, see 20 & 21 Vict. c. 77, §§ 24, 25; Deane & Brooke, 260 *et seq.*

[1] Sheffield *v.* Duchess of Buckinghamshire, 1 Atk. 628, 630; Gascoyne *v.* Chudleigh, 3 Swanst. 418, note; [Wilcox *v.* Carter, L. R. 19 Eq. 327; S. C. 10 Ch. 440. As to restraining proceedings in the Court of Divorce, see Hunt *v.* Hunt, 4 De G., F. & J. 221; Brown *v.* Brown, L. R. 7 Eq. 185.]

[2] Anon., 3 Atk. 390.

[8] Jarvis *v.* Chandler, T. & R. 319; and see Glascott *v.* Lang, 3 M. & C. 451, 454; Duncan *v.* M'Calmont, 3 Beav. 409, 417; 5 Jur. 243; Lascelles *v.* Layton, 3 K. & J. 446. As to proceedings in the Court of Admiralty, see 3 & 4 Vict. c. 65; 17 & 18 Vict. c. 78; 24 & 25 Vict. c. 10.

ties in matters of equity, yet, it seems, that it will interfere to restrain proceedings, the effect of which may be to afford a foundation for an adjudication in bankruptcy, in a case where such a proceeding would be contrary to equity.[4]

With regard to foreign Courts, there has been much doubt and difference of opinion. Soon after the Restoration, when the Court of Chancery was in its infancy, Lord Clarendon refused an injunction to restrain proceedings at Leghorn, after advising with the other Judges; but the reporter adds, "*sed quære*, for all the bar was of another opinion."[5] This case has not been recognized or followed in later times; and several authorities may be found where decrees and orders have been made to restrain defendants from carrying on proceedings *1627 under such actions, in Ireland,[6] Scotland,[7] * Demerara, and other countries.[1] In granting such an injunction, however, the Court does not presume to direct or control the foreign Courts; but, without respect to the subject-matter of dispute, it considers the equities between the parties, and decrees *in personam*, according to those equities.[2] The jurisdiction is not grounded upon any pretension to the exercise of judicial and administrative rights abroad; but on the circumstance of the party, upon whom the order is made, being within the power of the

[4] Attwood *v.* Banks, 2 Beav. 192, 200; Perry *v.* Walker, 1 Y. & C. C. C. 672; Pim *v.* Wilson, 2 Phil. 653, 656; and see Thompson *v.* Derham, 1 Hare, 358, 371, 380; Mather *v.* Lay, 2 J. & H. 374. An injunction will be granted to stay proceedings under the Insolvent Law. Beaty *v.* Beaty, 2 John. Ch. 430; Lancaster *v.* Choate, 5 Allen, 530. On a motion for an injunction to restrain a bishop from passing sentence against a priest, the Court held, that the only ground on which the Court can exercise any jurisdiction in such a case is that the threatened action of the bishop may affect the civil rights of the priest. Walker *v.* Wainwright, 16 Barb. 486.

[5] Love *v.* Baker, 1 Ch. Ca. 67; S. C. *nom.* Lowe *v.* Baker, Freem. 125.

[6] Clarke *v.* Ormonde, Jac. 546; Booth *v.* Leycester, 1 Keen, 579; Harrison *v.* Gurney, 2 J. & W. 563.

[7] Kennedy *v.* Cassillis, 2 Swanst. 313, 323; see Wharton *v.* May, 5 Ves. 27, 71; Bushby *v.* Munday, 5 Mad. 297, 306; Marquess of Breadalbane *v.* Marquess of Chandos, 2 M. & C. 711, 728; Jones *v.* Geddes, 1 Phil. 724; Venning *v.* Loyd, 1 De G., F. & J. 193; Marquis of Bute *v.* Stuart, 2 Giff. 582; S. C. *nom.* Stuart *v.* Moore, *ib.* 1129; 4 Mac. H. L. 1; [Baillie *v.* Baillie, L. R. 5 Eq. 175].

[1] Bunbury *v.* Bunbury, 1 Beav. 318, 331; Beckford *v.* Kemble, 1 S. & S. 7, 15; Hope *v.* Carnegie, L. R. 1 Ch. Ap. 320; 12 Jur. N. S. 284, L. JJ.; Marco *v.* Low, 55 Maine, 549; Baillie *v.* Baillie, L. R. 5 Eq. 175; Dehon *v.* Foster, 4 Allen, 550; Carron Iron Co. *v.* Maclaren, 5 H. L. Ca. 416, 445; Maclaren *v.* Stainton, 16 Beav. 286; Massie *v.* Watts, 6 Cranch, 158; Briggs *v.* French, 1 Sumner, 504; Dobson *v.* Pearce, 4 Duer, 142; S. C., 2 Kernan, 156; Price *v.* Dewhurst, 4 M. & C. 76, 79; 8 Sim. 279; Cood *v.* Cood, 33 Beav. 314; 9 Jur. N. S. 1335.

[2] [Wharton *v.* May, 5 Ves. 71. The jurisdiction may be sustained whenever the parties, or the subject, or such a portion of the subject that an effectual decree can be made and enforced, are within the jurisdiction. Ward *v.* Arredondo, 1 Hopk. 213; Lord Cranstoun *v.* Johnston, 3 Ves. 170; Wilson *v.* Robertson, 1 Tenn. 266; Winchester *v.* Evans, Cooke, 420; Winchester *v.* Jackson, 3 Hayw. 305; Engel *v.* Scheuerman, 40 Ga. 206; Dehon *v.* Foster, 4 Allen, 550; Mitchell *v.* Burch, 2 Paige, 606.

By Act of Congress, the United States Courts are prohibited, except in cases where the cognizance of those Courts is exclusive or primary, from enjoining proceedings in the State Courts. Diggs *v.* Wolcott, 4 Cranch, 179; McKim *v.* Voorhes, 7 Cranch, 279; Rogers *v.* Cincinnati, 5 M'Lean, 337; Haines *v.* Carpenter, 91 U. S. 254; Dial *v.* Reynolds, 96 U. S. 340; Chaffin *v.* City of St. Louis, 4 Dill. 19. Nor, conversely, will a State Court ordinarily enjoin proceedings in a United States Court. But where the State Court has obtained possession of a controversy, it will enjoin a party from prosecuting a suit subsequently commenced in the Federal Court in another State. Home Ins. Co. *v.* Howell, 9 C. E. Green, 238.

In New York, it has been held that an action cannot be maintained to enjoin the prosecution of an action pending in a Court of a sister State. Mead *v.* Merritt, 2 Paige, 402; Bicknell *v.* Field, 8 Page, 440; Williams *v.* Avrault, 31 Barb. 364.]

Court: for, if the Court can decree the performance of an agreement touching the boundary of a province in North America,[3] or can foreclose a mortgage in the Channel Islands,[4] in like manner it can restrain the party, being within the limits of its jurisdiction, from doing any thing abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or prosecuting of an action in a foreign Court.[5] And if a defendant, who is thus * ordered to discontinue *1628 a proceeding which he has commenced against the plaintiff in a foreign Court, should think fit to disobey the order, and continue the prosecution of such proceedings, the Court of Chancery, although it does not pretend to control or intermeddle with the independent jurisdiction which the other Court undoubtedly possesses, will act upon the person of the defendant, by punishing him for his contempt; and if he should continue contumacious, and ultimately obtain a judgment in the other Court, it will protect the plaintiff here against the consequences of that judgment.[1] In this view of the case, as the doctrine is now established, the only question is, whether the ends of justice require that the Court of Chancery should interfere. This must depend upon special circumstances: such as that the Court of Chancery has better means of determining both the law and facts of the case;[2] or that two suits have been instituted for the same matter, in all respects, and there has been a decree and adjudication in this country; or that there are questions in the cause, which must be decided according to the principles of equity, before it can appear whether the parties have

[3] Penn *v.* Lord Baltimore, 1 Ves. S. 444.

[4] Toller *v.* Carteret, 2 Vern. 494. [The decree of the Circuit Court of the United States in one State, foreclosing a mortgage upon a railroad, where the Court has jurisdiction of the mortgagor and the trustees, is good, although part of the property ordered to be sold is situated in another State. Miller *v.* Dows, 94 U. S. 444; M'Lrath *v.* Pittsburgh, &c. R. Co., 55 Pa. St. 189.]

[5] Lord Portarlington *v.* Soulby, 3 M. & K. 104, 108; Graham *v.* Maxwell, 1 Mac. & Gor. 71. In restraining proceedings at Law, Courts of Equity do not proceed upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent their adjudicating on the rights of parties, when drawn in controversy and duly presented for their determination. But the jurisdiction is said to be founded on the authority vested in Courts of Equity over persons within the limits of their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others, and are, therefore, contrary to equity and good conscience. And the decree of the Court in such cases is intended to operate wholly upon the party and not upon the tribunal where the suit or proceeding is pending, it is immaterial that the party is prosecuting his action in the Courts of a foreign State or country. Dehon *v.* Foster, 4 Allen, 539; Massie *v.* Low, 55 Maine, 549; see Marsh *v.* Eastern R. R. Co., 40 N. H. 574, 575; Great Falls Co. *v.* Worster, 23 N. H. 462; Bank of Bellows Falls *v.* Rut. & Bur. R. R. Co., 28 Vt. 470; Hood *v.* N. Y. & N. H. R. R. Co., 23 Conn. 609; Baillie *v.* Baillie, L. R. 5 Eq. 175. A Court cannot interfere in proceedings before another concurrent jurisdiction. Anthony *v.* Dunlop, 8 Cal. 26; Rickett *v.* Johnson, 8 Cal. 34; Revolk *v.* Kraemer, 8 Cal. 66; Gorham *v.* Toomey, 9 Cal. 77; Uhlfelder *v.* Levy, 9 Cal. 607. Equity will not interfere where the relief sought can be obtained in the Court in which the action or proceeding is pending. Uhfelder *v.* Levy, 7 Cal. 607.

The Supreme Court of Massachusetts has jurisdiction in Equity, upon a proper case being made, to enjoin a citizen of Massachusetts from availing himself of an attachment of personal property in another State, in an action against a debtor who is insolvent under the laws of Massachusetts, and thus preventing the same from coming to the hands of the assignee; and it is no objection that the action was commenced before the institution of proceedings in insolvency, if this was done with knowledge that such proceedings were about to be instituted, and with a view to obtain a preference. Dehon *v.* Foster, 4 Allen, 545; S. C., 7 Allen, 57.

[1] Barkley *v.* Marjoy, 5 Mad. 297, 307.

[2] *Ibid.*; Jones *v.* Geddes, 1 Phill. 724.

a clear equitable, as well as legal title, to the rights which they claim abroad.[3]

An injunction will also be granted to prevent waste, or any thing in the nature of waste.[4] The inadequacy of the remedy at Com-
*1629 mon * Law, for waste, is so unquestionable, that a resort to the Courts of Law, for this purpose, has in a great measure fallen into disuse.[1] The remedy by a bill in Equity is much more easy, expeditious, and complete: for relief will be given in Equity, where the remedies provided in the Courts of Common Law could not be made to apply;[2] as where the titles of the parties are of a purely equitable nature; or where the parties have both legal titles and legal remedies, but irreparable mischief would be done, unless they were entitled to more complete relief than that which they could obtain at Law; or where the parties committing the waste, with nothing but temporary and limited interests in the subject-matter, are maliciously and wantonly abusing those legal rights to the injury of those in remainder.[3]

[3] Booth *v.* Leycester, 1 Keen, 579; 3 M. & C. 459; see also Lord Portarlington *v.* Soulby, 3 M. & K. 104; Wedderburn *v.* Wedderburn, 4 M. & C. 585, 594; Jones *v.* Geddes, *ubi sup.*; Henderson *v.* Henderson, 3 Hare, 100, 110; Pennell *v.* Roy, 3 De G., M. & G. 126; 17 Jur. 247; Coode *v.* Coode, 33 Beav. 314; 9 Jur. N. S. 1335. [In Fletcher *v.* Rodgers, 27 W. R. 97, the Court of Chancery Appeals refused to enjoin an attachment suit in the State of California. And in Moor *v.* Anglo-Italian Bank, 10 Ch. Div. 681, an injunction was refused against a foreign suit of foreclosure.]

[4] Taylor Land & Ten. § 691 *et seq.*; see Downing *v.* Palmateer, 1 Monroe, 65; Ballou *v.* Wood, 8 Cush. 48; Shubrick *v.* Guerrard, 2 Desaus. 616. [As of course, Markham *v.* Howell, 33 Ga. 508.] An injunction to restrain the executors from committing waste or selling the estate of the testator was granted. Wightman *v.* Brown, 1 Desaus. 166. Where the land of an insolvent debtor has been attached in a suit at Law, he may be enjoined against waste during the pendency of such suit. Camp *v.* Bates, 11 Conn. 51; Powers *v.* Heery, R. M. Charlt. 523. It is competent for a Court of Equity to restrain by injunction the removal of what has been obtained by past waste. United States *v.* Parrott, 1 McAll. C. C. (Cal.) 271. What constitutes waste is properly a question of law, and the facts which constitute it ought to be passed upon by a jury. A Court of Equity will not interfere with nor restrain a suit for that object. Syckel *v.* Emery, 3 C. E. Green, 387.

[1] An injunction to stay waste was refused where there appeared to be no impediment to the action of waste at Law. Cutting *v.* Carter, 4 Hen. & M. 424; but see Scott *v.* Wharton, 2 Hen. & M. 25, where it was held, that no person is entitled to an injunction to stay waste, unless he can maintain an action at Law for it. Both these positions are incorrect. See Kane *v.* Vanderburgh, 1 John. Ch. 11; Harris *v.* Thomas, 1 Hen. & M. 18.

[2] As to effect of laches, in cases of waste, see Attorney-General *v.* Eastlake, 11 Hare, 205; 17 Jur. 801.

[3] As to waste, see 2 Spence Eq. Jur. 570; Story Eq. Jur. § 515; and for a collection of cases as to waste, with forms of orders for injunctions, see Seton, 890-897. An injunction to stay waste or trespass may be granted in Maryland in any case in which it would be granted according to the English authorities. Duvall *v.* Waters, 1 Bland, 576. An injunction may be granted in that State to stay waste pending an action at Law, or a suit in Equity to try the right. *Ibid.*; Attorney-General *v.* Norwood, 1 Bland, 581; Coale *v.* Garrison, 1 Bland, 581; Flannagan *v.* Kips, 1 Bland, 528; Gittings *v.* Dew, 1 Bland, 583; see Ingraham *v.* Dunnell, 5 Met. 118; Dana *v.* Valentine, 5 Met. 8; Smith *v.* Collyer, 8 Sumner's Ves. 89, n. (*a*); Storm *v.* Mann, 4 John. Ch. 21. But an injunction will not be issued to stay waste or nuisance before a hearing on the merits, except in cases of urgent necessity, or where the subject-matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. Charles River Bridge *v.* Warren Bridge, 9 Pick. 376. In all cases where the right is doubtful, the Court will direct a trial; and in the mean time, if there be danger of irreparable mischief, or if there is any other good cause of granting a temporary injunction, it will be ordered, so as to restrain all injurious proceedings; and when the plaintiff's right is fully established, a perpetual injunction will be decreed. Ingraham *v.* Dunnell, 5 Met. 126; 2 Story Eq. Jur. §§ 925, 926; Perry *v.* Parker, 1 Wood. & M. 280; *post*, 1637, 1638, notes. If the thing sought to be prohibited is in itself a nuisance, the Court will interfere to stay irreparable mischief, without waiting for the result of a trial. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may according to circumstances prove so, then the Court will refuse to interfere,

The most ordinary instance of the interposition of a Court of Equity, is by injunction to restrain the commission of waste by a tenant for life or years, upon the application of the reversioner or remainder-man: for an estate for life is always impeachable for waste, unless the contrary is expressly provided.[1] Injunctions [*] also will be granted *1630 to protect the interests of a child *in ventre sa mere*:[1] of a remainder-man, whether vested,[2] or contingent,[3] or of an executory devisee;[4] or of a tenant in common, if the co-tenant in possession is doing that which is destructive of the property.[5] And not only will the Court of Chancery grant the injunction upon the application of the remainder-man in fee, but it will also grant it upon the application of the mesne remainder-man for life:[6] for though he has no right to the timber, which belongs to the owner of the inheritance,[7] yet, if the first tenant for life should die, he would have an interest in the mast and shade.[8] Upon the like principle, also, an injunction will be granted at the suit of a ground landlord to stay waste by an under lessee;[9] and an injunction has also been obtained against a tenant from year to year, after a notice to quit, to restrain him from taking away the crops, or sowing the land with a pernicious seed, in a manner which was contrary to the usual course of husbandry.[10]

A Court of Equity will also restrain waste where the titles of the parties are equitable: thus, in the case of mortgages, if the mortgagor in possession should attempt to cut down timber, and the land without the timber is an insufficient or scanty security, a Court of Equity will restrain him:[11] for, as the whole estate is a security for the money advanced, the mortgagor, under such circumstances, ought not to be

until the matter has been tried at Law. Per Brougham, Lord Chancellor, Bacon *v.* Hobart, 1 Cox, Eq. Ca. 333; S. C., 3 My. & K. 161; Lochhead *v.* Barrington, L. R. 4 Ch. App. 588; Mayo *v.* Sanborn, 45 N. H. 169, 171, and cases cited. The Universities of Oxf. and Camb. *v.* Richardson, 3 Swanst. Ch. 686, note (a); see Hart *v.* Mayor, &c. of Albany, 3 Paige, 213. [As to enjoining a mortgagee when the right of redemption is clear: Caldwell *v.* Knott, 10 Yerg. 209, where doubtful: Kirkman *v.* Hardy, 11 How. 411.] An injunction to stay waste pending a suit to try the right, will not prevent the occupying tenant from making the ordinary use of the land. Davall *v.* Waters, 1 Bligh, N. S. 1.

[1] Cole *v.* Peyton, 1 Ch. Rep. 196. An injunction may be granted, although the tenant holds under a lease terminable forever. Coppage *v.* Goldson, 4 J. J. Marsh. 507.

[2] Robinson *v.* Litton, 3 Atk. 211; Lutterel's Case, cited Free. in Ch. 86.

[3] Russell's Case, 1 Eden, Ch. 571; Tracy *v.* Tracy, 4 Vern. 240; Abraham *v.* Bubb, Freem. 54; Garth *v.* Cotton, 1 Dick. 183, 208; Legg *v.* Bagot, 32 Beav. 509; [Wells *v.* Bass, L. R. 7 Eq. 182.

[4] Williams *v.* Duke of Bolton, 3 P. Wms. 268, note (1).

[5] Hayward *v.* Stillingfleet, 1 Atk. 422, 425; Robinson *v.* Litton, *ubi sup.*; and see Stansfield *v.* Habergham, 10 Ves. 273; Brasier *v.* Macey, 3 J. J. Marsh. 93.

[6] Arthur *v.* Lamb, 2 Dr. & Sm. 428; [Bailey *v.* Hobson, L. R. 5 Ch. App. 180.]

[7] Mayo *v.* Foster, 2 McCord Ch. 143; Kane *v.* Vandenburgh, 1 John. Ch. 11. Whether the estate of a reversioner is vested in such manner as to entitle him to sue for waste, and what shall be the rule of damages, are questions proper to be determined in the Courts of Law. Sykes *v.* Emery, 3 C. E. Green, 387.

[8] Lushington *v.* Boldero, 15 Beav. 1; and see Bagot *v.* Bagot, *ubi sup.*

[9] Daverell *v.* Champness, 1 Eq. Ca. Ab. 400, pl. 4; Mallinson *v.* Powell, 3 P. Wms. 265, n. (F); Perrot *v.* Perrot, 3 Atk. 94; Davis *v.* Dan, 6 Ves. 787.

[10] Farrant *v.* Lovel, 3 Atk. 723; S. C. *nom.* Farrant *v.* Lee, Amb. 105.

[11] Ormsby *v.* ——, 16 Ves. 174; Pratt *v.* Berry, 2 Mad. 423 and see Duke of St. Albans *v.* Shipwith, 8 Beav. 354.

[11] See Scott *v.* Wharton, 2 Hen. & M. 25; Deaming *v.* Pennington, 1 Munns. 65; Brady *v.* Waldron, 2 John. Ch. 148; Murdock's Case, 2 Bland, 461; Robinson *v.* Fenwick, 3 Edw. Ch. 246.

suffered to lessen or diminish it.[12] And so it is the duty of trustees to protect the entire inheritance for the benefit of all the *cestui que trusts* in remainder, whether vested or contingent; and as, in many instances, the value of that inheritance consists as much of the mines and *1631 timber as it * does of the land, they may, by force of their trust, have their remedy by injunction, to prevent the destruction of the one or the exhaustion of the other.[1] Under this head, we may also class those cases where persons are contracting for leases and other interests in the property, which they are only in possession of by virtue of the contract: in such cases, if the plaintiff has no legal title, he has no redress at law; but if he has such a contract as will authorize him to call upon the Court to clothe his possession with the legal title, the injunction will be granted.[2]

An injunction will also be granted, in some cases, where the parties have both legal titles and legal remedies, but irreparable mischief would be done unless they were entitled to more complete relief than that which they would obtain at Law. It has accordingly been granted, where the injunction amounted in fact to an injunction to stop a trespass: for, if the Court would not interfere against a trespasser, he might go on by repeated acts of damage, which would be absolutely irremediable.[3] The original distinction was, that if a person still living

[12] Usborne *v.* Usborne, 1 Dick. 75; Wright *v.* Atkyns, 1 V. & B. 313, 314; Hippesley *v.* Spencer, 5 Mad. 422; Humphreys *v.* Harrison, 1 J. & W. 581; Goodman *v.* Kine, 8 Beav. 379; and see King *v.* Smith, 2 Hare, 239; 7 Jur. 694. [And without any charge that the mortgagor is insolvent. Fairbank *v.* Cudworth, 33 Wis. 358.]

[1] Garth *v.* Cotton, 1 Dick. 183; Stansfield *v.* Habergham, 10 Ves. 273, 279; Pugh *v.* Vaughan, 12 Beav. 517.

[2] Norway *v.* Rowe, 19 Ves. 154, 155.

[3] Deere *v.* Guest, 1 M. & C. 516; Greenhalgh *v.* Manchester & Birmingham Railway Company, 3 M. & C. 784; Fooks *v.* Wilts Railway Company, 5 Hare, 199; East Lancashire Railway Company *v.* Hattersley, 8 Hare, 72, 87; Webster *v.* South Eastern Railway Company, 1 Sim. N. S. 272; [London, &c. R. Co. *v.* Lancashire, &c. R. Co., L. R. 4 Eq. 174; Turner *v.* Highway Board, L. R. 9 Eq. 418]; Winnipiseogee Lake Co. *v.* Worster, 29 N. H. 433, 447; Davis *v.* Reed, 14 Md. 152; Scheetz's Case, 35 Penn. (State) 88; Thomas *v.* James, 32 Ala. 723; Powers *v.* Heery, R. M. Charlt. 523, 524; New York Printing Co. *v.* Fitch, 1 Paige, 97; Livingston *v.* Livingston, 6 John. Ch. 497; Jerome *v.* Ross, 7 John. Ch. 315; Attaquin *v.* Fish, 5 Met. 148; Robinson *v.* Lord Byron, 1 Bro. C. C. 588, 589, notes (*a*) and (*b*), and cases cited; Putnam *v.* Valentine, 5 Ohio, 187. The practice of issuing injunctions in cases of trespass, on the principle of irreparable mischief, has now become extremely common. Hanson *v.* Gardiner, 7 Ves. 305 b, note (*c*). But an injunction will not be granted to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. Jerome *v.* Ross, 7 John. Ch. 315; Stevens *v.* Beekman, 1 John. Ch. 318; Amelung *v.* Seekamp, 9 Gill & J. 468; Smith *v.* Pettingill, 15 Vt. 82; Hart *v.* Mayor, &c. of Albany, 3 Paige, 213; Ross *v.* Page, 6 Ohio, 166; Herr *v.* Bierbower, 3 Md. Ch. 456; Carlisle *v.* Stevenson, 3 Md. Ch. 499; Chesapeake & Ohio Co. *v.* Young, 3 Md. 480; Brooks *v.* Dias, 35 Ala. 599; Bassett *v.* Company, 47 N. H. 426; Morris Canal & Banking Co. *v.* Fagan, 3 C. E. Green, 215; Morris Canal & Banking Co. *v.* Central Railroad Co., 1 C. E. Green, 419, 442; McGee *v.* Smith, 1 C. E. Green, 462; Fort *v.* Groves, 29 Md. 188; Laughlin *v.* President, &c., 6 Ind. 223; Hodgman *v.* Richards, 45 N. H. 28; Wason *v.* Sanborn, 45 N. H. 169; Dana *v.* Valentine, 5 Met. 8; Eastman *v.* Company, 47 N. H. 78; [De Veney *v.* Gallagher, 5 C. E. Green, 33; Lanahan *v.* Gahan, 37 Md. 105, 107]. The mere allegation of danger of a great and irreparable injury is not enough: facts must be stated to satisfy the Court of the existence of a danger of that kind. Branch Turnp. Co. *v.* Yuba, 13 Cal. 190; Fort *v.* Groves, 29 Md. 188; Davis *v.* Reed, 14 Md. 152; see Bolster *v.* Catterlin, 10 Ind. 117; De Witt *v.* Hayes, 2 Cal. 463; Cornelius *v.* Post, 1 Stockt. 196. [Equity will enjoin a trespass which is continuous and invades proprietary rights. Morris & Essex R. Co. *v.* Hudson Tunnel R. Co., 10 C. E. Green, 384; Goodson *v.* Richardson, L. R. 9 Ch. App. 221; Holmes *v.* Upton, L. R.

committed a trespass, by cutting timber, or taking lead-ore, or digging for coal, the Court would not interfere, except so far as to give a discovery, and then an action might be brought for the value discovered: but if the person * died, then, since the trespass died *1632
with him, the Court has said it would decree an account, though the law provided no remedy. Throughout Lord Hardwicke's time, and down to that of Lord Thurlow, the distinction between waste and trespass was thus acknowledged.[1] Lord Thurlow himself acted upon the same principle: saying, that the person to be enjoined was a mere stranger; and he ought to be turned out of possession immediately.[2] In *Flamang's case*,[3] a landlord of two adjoining closes let one of them to a tenant who took coal out of one close, and also out of the other which was not demised to him: and it was held, at first, that the taking the coal out of the former as waste, would be restrained, but as to the close which was not demised to him, it was a mere trespass, and the Court could not interfere: but Lord Thurlow afterwards changed his opinion, on the ground that irreparable mischief would follow his refusal: holding, in effect, that if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not the only remedy to which in Equity he was entitled.

The same principle has been acted on, and applied, in various other cases;[4] and the grounds on which the Court acts, in cases of this nature, appear to be as follows: Where the defendant is in possession, and the plaintiff, claiming possession, seeks to restrain him from committing acts of trespass or waste, the Court will not interfere,[5] unless the acts are such flagrant acts of spoliation as to justify it in departing from the

9 Ch. App. 214, note. And this, notwithstanding the completion of the act. *Id.* And see, as to damages even where a mandatory injunction may not lie, City of London Brewery Co. v. Tennant, L. R. 9 Ch. App. 212.

A trespass that goes to the destruction of the inheritance will be restrained until the trespasser shall have established his right at law: Southwood v. M'Laughlin, 9 C. E. Green, 181; Johnston v. Hyde, 10 C. E. Green, 444; Schlatter v. Schrader, 45 Mo. 500; or where the injury is continuous and irreparable: Mooney v. Cooledge, 30 Ark. 640; Sumner v. Morris Canal, &c. Co., 12 C. E. Green, 344; Wilson v. City of Mineral Point, 29 Wis. 169; Carr v. Jeffersonville R. Co., 44 Ind. 218; Creely v. Bay State Brick Co., 103 Mass. 514; Gilbert v. Arnold, 10 Md. 247; Wright v. Wade, 43 Mo. 229; Gould v. Arnold, 38 How. Pr. 94; or for the protection of a lessee against Vanderbilt v. Schreyer, 18 N. Y. Sup. Ct. 59, 466, where the trespass is temporary, as the cutting down of a division fence: Minnig's Appeal, 82 Pa. St. 474; or where there is a failure to state facts from which the Court can see that the injury is irreparable: Leitham v. Cusick, 1 Utah, 242; Horn v. Sweeney, 12 Nev. 284; nor unless the legal title is clear, and there is no adequate legal remedy: Boulo v. New Orleans, &c. R. Co., 55 Ala. 480.]

[1] Thomas v. Oakley, 18 Ves. 186.

[2] Mortimer v. Cottrell, 2 Cox, 205; Smith v. Pettigill, 15 Vt. 82. For injunction to stay defendants destroying family graves, and removing or defacing tombstones, or obliterating inscriptions thereon in burial-grounds attached to a chapel, see Maitland v. Richards, n. 24 Beav. 33, note; [Burke v. Wall, 29 La. Ann. 38].

[3] Cited or referred to in 6 Ves. 147; 7 Ves. 308; 15 Ves. 138; 18 Ves. 186. [An injunction will lie to restrain the working of a placer gold-mine located by the complainants under the United States mining acts, while in the possession of persons not qualified to take and hold such lands. Chapman v. Toy Long, 4 Sawy. 28.]

[4] See Judgment of V. C. Kindersley, in Lowndes v. Keith, 12 W. R. 399. As to an injunction in such cases, see Whaley v. Bianchet, 12 W. R. 570, 595.

[5] Hamilton v. Worsfold, cited 10 Ves. 290, n. (*c*); Pillsworth v. Hopton, 6 Ves. 51; Crockford v. Alexander, 15 Ves. 138; Jones v. Jones, 3 Mer. 161; Haigh v. Jaggar, 2 Coll. 231; Davenport v. Davenport, 7 Hare, 217.

general principle;[6] where the plaintiff is in possession, and the person committing the acts complained of is an utter stranger, not claiming under the color of right, then the tendency of the Court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at Law: though, where the acts tend to the destruction of the estate, the Court will grant it.[7] But where the person in possession seeks to restrain one who claims by adverse title, then the tendency will be to grant the injunction: at least where the acts alone either do or might tend to the destruction of the estate.[8]

*1633 *The Court will likewise interfere by injunction, where the parties committing the waste, with nothing but temporary and limited interests in the subject-matter, are maliciously and wantonly abusing their legal rights to the injury of those in remainder. This is commonly called equitable waste, which may be defined to be: the commission of such acts as at Law would not be esteemed, under the circumstances of the case, to be waste, but which are so esteemed in the view of a Court of Equity, from their manifest injury to the inheritance, though not inconsistent with the legal rights of the party committing them.[1] Thus, for example, it was held, in *Lewis Bowle's case*,[2] that if there was a tenant for life without impeachment of waste, he had as great a power to do waste, and to convert it at his own pleasure, as a tenant in fee or a tenant in tail had: so that, if any trees were severed from the inheritance, either by the act of the party or by the act of law, and became chattels, the whole property in them was in the tenant for life, by force of the clause. The necessary consequence of this doctrine was, that a tenant for life without impeachment of waste, could not in any case be restrained, in Equity, from cutting timber upon the estate: for that would have been to determine that he should not enjoy the property which the law gave him.[3] It was, however, soon found, that this extensive power might be wantonly and capriciously abused, to the prejudice of the inheritance; and, accordingly, where a tenant for life, unimpeachable of waste, was making an unconscientious use of that power, the Court of Chancery assumed the jurisdiction of restraining and modelling it.[4] Thus, it has interfered by injunction, where the tenant for life was pulling down a castle;[5] or the family mansion, or farm-houses.[6] It will also interfere, where he is cutting down timber of too young growth;[7] or where he is cutting down trees which were planted or growing, or designedly left, for orna-

[6] Earl Talbot *v.* Hope Scott, 4 K. & J. 96; Neale *v.* Cripps, 4 K. & J. 472.

[7] Mogg *v.* Mogg, 2 Dick. 670; Mortimer *v.* Cottrell, 2 Cox, 205; Mitchell *v.* Dors, 6 Ves. 147; Earl Cowper *v.* Baker, 17 Ves. 128; Courthope *v.* Mapplesden, 10 Ves. 290; Best *v.* Drake, 11 Hare, 369.

[8] Anon., cited in Mogg *v.* Mogg, *ubi sup.*; Robinson *v.* Lord Byron, 1 Bro. C. C. 588; Grey *v.* Duke of Northumberland, 13 Ves. 236; Kinder *v.* Jones, 17 Ves. 110; Thomas *v.* Oakley, 18 Ves. 184; Lowndes *v.* Bettle, *ubi sup.*; *contra*, Smith *v.* Collyer, 8 Ves. 89.

[1] As to equitable waste, see *ante*, p. 1629, note (3).

[2] 11 Rep. 80.

[3] Aston *v.* Aston, 1 Ves. S. 264, 266.

[4] See Kane *v.* Vanderburgh, 1 John. Ch. 11.

[5] Vane *v.* Lord Barnard, 2 Vern. 738; S. C. *nom.* Lord Bernard's Case, Prec. in Ch. 454.

[6] Aston *v.* Aston, *ubi sup.*; Smyth *v.* Carter, 18 Beav. 78.

[7] Obrien *v.* Obrien, Amb. 107; Chamber-

ment or shelter.[5] This principle has even been extended to plantations, vistas, avenues, and rides;[6] *and to trees which are *1634 either planted to shut out an object,[1] or merely for the benefit of a view.[2] In some of these cases, the kind of waste has been called, by the Judges, extravagant, humorsome waste: in others, voluntary, malicious, intended waste: in others again, wanton and wilful waste. In all of them, in short, it was the improper and abusive exercise of a legal power, to the detriment of those in remainder, which the Court interfered to restrain;[3] it will not interfere in any case of permissive waste.[4]

Tenants in tail after the possibility of issue extinct, have the same powers, and are subject to the same restrictions, as tenants for life without impeachment of waste; and it makes no difference that they are unimpeachable of waste, not by the provision of the grantor, but as a legal incident of their estate.[5]

It is to be remarked, that the object of the Court's interference in granting an injunction to stay this kind of waste is not by way of satisfying a damage, but in order to prevent a wrong; and, therefore, a person cannot come into Equity merely for an account, unless where the waste is of that nature that the plaintiff has no remedy at Law. The account depends entirely upon the injunction: it is incidental to, and consequential upon it; and, if a person is entitled to the one, he is entitled to the other also, on the principle of preventing a multiplicity of suits: for, otherwise, he would be obliged to bring his action at Law as well as his bill in Equity: his action by way of satisfaction: his bill by way of prevention.[6] After the determination of the tenant's estate, a bill will lie for an account of equitable waste, although no injunction is prayed by the bill;[7] and if the person who has committed the waste is dead, he must, through his representatives, refund in respect of the

lyne v. Dummer, 1 Bro. C. C. 166; and see Order in S. C., Seton, 850; Strathmore v. Bowes, 2 Bro. C. C. 88; Turner v. Wright, 2 Dow, 74; 6 Jur. N. S. 647; 2 De G., F. & J. 234; 8 Jur. N. S. 840.

[5] Packington's Case, 3 Atk. 215; Williams v. M'Namara, 5 Ves. 741; Stansfield v. Habergham, 10 Ves. 278; Williams v. Wellesley, 2 Sim. 477; Morris v. Morris, 15 Sim. 505; Kekewich v. Manner, 3 M. N. & G. 311, 322; Mosley v. Mosley, 9 Hare, 11; Campbell v. Allgood, 17 Beav. 623; Vernon v. Spicer, 22 Beav. 497; 2 Jur. N. S. 634; Macclesfield v. Macclesfield, 1 De G. & J. 391; 3 Jur. N. S. 2; Hallowell v. Phillips, 4 Jur. N. S. 6; W. R. 108; V. C. W.; Turner v. Wright, ante, Earl v. Tassie, 10 Jur. N. S. 429, 4 Jur. 2 De G., J. & S. 127. For forms of order, see Seton, 850-854.

[6] Lord Tamworth v. Lord Ferrers, 6 Ves. 419.

[1] Day v. Merry, 16 Ves. 375.

[2] Marquis of Downshire v. Lady Sandys, 6 Ves. 107.

[3] A decision for 50s was restrained from cutting down the trees from the woodland of the estate and from planting the new grounds. Smith v. Pyne, 2 Dick. 780. S. P. restraining the timber for any other purpose than for fuel, fencing, &c., 1564.

[4] Penny v. Blagrave, 4 De G., M. & G. 448, 458; Kay, 495; 18 Jur. 462.

[5] Abraham v. Bible, Freem. 53; Attorney-General v. Duke of Marlborough, 3 Mad. 498, 537; Williams v. Williams, 15 Ves. 419, 423; and see 2 Swanst. 145, n.

[6] Jesus College v. Bloom, 3 Atk. 262; Amb. 54; Duke of Leeds v. Lord Amherst, 14 Sim. 357, 364; 20 Beav. 239; 2 Phil. 117, 122; Lushington v. Bibbins, 14 Beav. 1. Wimbush v. Pitts, 4 Price, 259; Duncall v. Warren, 1 Russ. 556. [Downing v. Collins, 2 Del. Ch. 230]. The Court of Equity will not interfere unless they can stay a multiplicity of suits at Law. They must have an indefinite jurisdiction over the whole litigation, and the power to adjust the whole dispute. Lawrence v. Company, 47 N. H. 71. [And a plaintiff who comes into Equity submits his legal rights to the control of the Court. Phelps v. Prothero, 7 De G., M. & G. 722; Lord Tredegar v. Winslow, L. R. 19 L. 642; see Black v. Carrothers, 6 Hom. 87.]

[7] Coppin v. Coppin, 1 Dick. 184; Smith v. Cooke, 3 Atk. 381; Pelletreau v. Warren, 6 Ves. 89; Greenlaw v. Lyte, 2 Ves. 346.

wrong he has done, and not retain the produce of his injury: which is recoverable in no other Court. "It would," says Lord Cowper,[8] "be a reproach to Equity to say, when a man has taken my ore or timber, and disposed of it in his lifetime, and dies, that, in this case, I must be without remedy."

*1635 *The Court will interfere, by injunction, to suppress the commission or continuance of a nuisance.[1] Nuisances are of two

[8] Bishop of Winchester *v.* Knight, 1 P. Wms. 406, 407; and see Hambly *v.* Trott, Cowp. 371, 376; Marquis of Lansdowne *v.* Marchioness Dowager of Lansdowne, 1 Mad. 116, 136.

[1] Boston & Lowell R. R. Corp. *v.* S. & L. R. R. Co., 2 Gray, 1, 27, 28; Charles River Bridge *v.* Warren Bridge, 6 Pick. 376; S. C., 7 Pick. 344; Sprague *v.* Rhodes, 4 R. I. 301; Attorney-General *v.* Colney Hatch Lunatic Asylum, L. R. 4 Ch. Ap. 146. The Court enjoins what will clearly end in nuisance; if this is uncertain, the motion will be refused with costs. Haine *v.* Taylor, 2 Ph. 209; 10 Beav. 75, 80. What is nuisance is chiefly a subject for a jury, and to be ascertained by an action before granting relief. See Attorney-General *v.* U. K. Elec. Tel. Co., 5 L. T. N. S. 328; Cleeve *v.* Mahany, 9 W. R. 882; Wason *v.* Sanborn, 45 N. H. 171; Eastman *v.* Company, 47 N. H. 71. [See Carlisle *v.* Cooper, 6 C. E. Green, 376, where the jurisdiction of Chancery over nuisances is largely considered.]

The real question in all the cases is the question of fact, viz., whether the annoyance or inconvenience is such as materially to interfere with the ordinary comfort of human existence; or, in reference to property, whether the injury arising from matters complained of is such as visibly to diminish the value of the property, and the comfort and enjoyment of it. St. Helen's Smelting Company *v.* Tipping, 11 H. L. Cas. 642; S. C., 4 B. & S. 608, 616, 1093; Walter *v.* Selfe, 4 De G. & Sm. 322; Soltau *v.* De Held, 2 Sim. N. S. 133; Crump *v.* Lambert, L. R. 3 Eq. 409, 412, 413; Fish *v.* Dodge, 4 Denio, 311; Peck *v.* Elder, 3 Sandf. 126; Catlin *v.* Valentine, 9 Paige, 575; Wesson *v.* Washburn Iron Co., 13 Allen, 95; Barnes *v.* Hathorn, 7 Am. Law Reg. (N. S.) 81; Rhodes *v.* Dunbar, 7 Am. Law Reg. 412; Davidson *v.* Isham, 1 Stockt. 189; Walcott *v.* Melick, 3 Stockt. 207; Holsman *v.* Boiling Spring Bleaching Co., 1 McCarter, 243; Beardmore *v.* Leadwell, 3 Giff. 683; Cooke *v.* Forbes, L. R. 5 Eq. 173; Inchbald *v.* Barrington, L. R. 4 Ch. Ap. 388, 396; Walker *v.* Brewster, L. R. 5 Eq. 25; *ante*, p. 1629, note. But if the evidence is satisfactory, the Court will grant an injunction against a nuisance without having the question, whether there is a nuisance, tried before a jury. Inchbald *v.* Robinson, L. R. 4 Ch. Ap. 388; Inchbold *v.* Barrington, *ibid.*; *ante*, 1629, note.

Having one's rest disturbed is a nuisance, though compensable by damages; depreciation of property is not a nuisance. White *v.* Cohen, 2 Drew. 312. Burning bricks on one's own ground was stayed as a nuisance. Walter *v.* Selfe, 4 D. & S. 315, 320, 325; Grafton *v.* Hilliard, 4 D. & S. 326; Pollock *v.* Lester, 11 Hare, 266, 275; [Campbell *v.* Seaman, 63 N. Y. 568]. Holding a regatta on a reservoir, on which rights of fishing and sporting were reserved, was held a nuisance. Bostock *v.* N. Staff. Ry., 5 D. & S. 584; 3 S. & G. 283. And a cattle fair on a recreation ground was enjoined. Attorney-General *v.* Mayor, Southampton, 1 Giff. 363, 365, 366. Leaving open or opening sewers into a main-road sewer, while running into a canal, was enjoined. Manchester Ry. *v.* Workshop Bd., 23 Beav. 198, 206, 208, 211; see Case *v.* M. R. Co., 27 Beav. 247, 252; Oldaker *v.* Hunt, 6 De G., M. & G. 376, 388; 19 Beav. 485; Attorney-General *v.* Colney Hatch Lunatic Asylum, L. R. 4 Ch. Ap. 146. A dense smoke, laden with cinders, continued for twelve hours twice in each month, falling upon and penetrating the houses and premises of the plaintiff, at distances varying from forty to two hundred feet, was held, by Chancellor Zabriskie, in Ross *v.* Butler, 4 C. E. Green, 294, to constitute a legal nuisance.

In Crump *v.* Lambert, L. R. 3 Eq. 409, an injunction was granted to restrain the issuing of smoke and effluvia from a factory chimney, and the making of noise in the factory, although it was situated in a manufacturing town; it being proved that such smoke, effluvia, and noise were a material addition to previously existing nuisances. See Crossley *v.* Lightowler, L. R. 3 Eq. 279; S. C., L. R. 2 Ch. Ap. 478; [Adams *v.* Michael, 38 Md. 123; see Broadbent *v.* Imperial Gas Co., 7 De G., M. & G. 436, and, on appeal, 7 H. L. Cas. 600]. Smoke, unaccompanied with noise or with noxious vapor, and offensive odors alone, although not injurious to health, may severally constitute a nuisance. Crump *v.* Lambert, *supra*; [Duncan *v.* Hayes, 7 C. E. Green, 25. Offensive odors which render life uncomfortable, although not unwholesome, will authorize an injunction. Meigs *v.* Lister, 8 C. E. Green, 199. As a slaughter-house, the injunction being against its being conducted so as to be offensive. Minke *v.* Hopeman, 87 Ill. 450. So, annoyance from the unusual use of a house as a stable, although occasioned by a change in the house, not in its use, will sustain an injunction. Ball *v.* Ray, 8 Ch. App. 467. So, the vibratory motion occasioned by a printing-press. Robertson *v.* Campbell, 13 F. C. 61. So of the ringing of a chime of bells. Harrison *v.* St. Mark's Church, 3 W. N. 384; Soltau *v.* De Held, 9 L. & E. 104. And see, as to the smoke nuisance necessary to stop a large commercial work, Salvin *v.* North Brancepeth Coal Co., L. R. 9 Ch. App. 705. So of a

kinds: those which are injurious to the public at large; and those which are injurious to the rights and interests of private persons.

* With regard to nuisances, the jurisdiction seems to be of very *1636 ancient date, and to be founded on the irreparable damage to individuals, or the great public injury which is likely to ensue. The jurisdiction is applicable, not only to nuisances strictly so called, but also to *purprestures*. By *purpresture* is meant, in its present acceptation, an encroachment upon the Crown, either upon part of the demesne lands, or upon the high roads, rivers, forts, or streets; and the difference between *purprestures* and nuisances consists in this: that where the *jus privatum* of the Crown is invaded, it is a *purpresture*; but where the ***jus publicum*** **is violated, it is a nuisance.**[1]

In cases of *purpresture*, the remedy is either by information for an intrusion at the Common Law, or by information in Equity at the suit of the Attorney-General: the consequence of a judgment at Common Law being the abatement of the erection or grievance complained of, whether it is or is not a nuisance; whilst, upon an information in Equity, where the trespass does not produce any public injury, the Court may direct an inquiry whether it is most beneficial to the Crown to abate the *purpresture*, or to suffer the erection to remain, and be assessed as a part of the legal revenue.[2]

In cases of public nuisance, properly so called, an indictment lies to abate them, and to prosecute the offender; but an information will also lie in Equity to stop the mischief, and to restrain the continuance of it.[3] It is necessary, however, that the nuisance should be actual and existing, and not merely prospective: however strongly the apprehension of injury may be supported by scientific evidence.[4]

circus, causing an intolerable amount of noise. Imbald v. Robinson, L. R. 4 Ch. App. 388. See of a rôle, drawing together crowds of idle and improper persons. Walker v. Brewster, L. R. 5 Eq. 25. As to erecting inflammable material. Hudson v. Leslau, 2 H. & M. 345. Is a question of restraining a lawful business, equity will consider the customs of the people, the characteristics of their business, the common uses of property, and the peculiar circumstances of the place; and an injunction against a brick kiln, as injuring a vineyard and residence, was refused. Hackettstown's Appeal, 70 Pa. St. 102. See, to the same effect, where the injunction was sought against the establishment of a steam flouring mill in case of a block of stores. Gilbert v. Showerman, 23 Mich. 448.

If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful, or at least it cannot be a nuisance. Metropolitan Fireproof Co. v. Gilbert, L. R. 1 H. L. 93, 112; Attorney-General v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. App. 146, 164; Hinchman v. Paterson Horse R. Co., 2 C. E. Green, 75; Northern Transportation Co. v. Chicago, 99 U. S. 635. As to cases to which these do not apply, see Hervey v. Smith, 1 K. & J. 389.

As to the effect of a prescription in a nuisance preventing the interference of the Court for or against a party, see Bankhart v. Houghton, 27 Beav. 425, 428; Attorney-General v. Sheffield, &c. Co., 3 De G., M. & G. 304, 314, 322, 331; Senior v. Pawson, L. R. 3 Eq. 330; Mayor v. Lister, 8 C. E. Green, 199].

[1] 2 Inst. 38, 272; Harg. Law Tracts, 84, 87.

[2] Attorney-General v. Richards, 2 Anst. 603, 616; Attorney-General v. Johnson, 2 J. Wil. 87; Rex v. Earl Grosvenor, 2 Starkie's N. P. 511.

[3] Mayor of London v. Bolt, 5 Ves. 129; Attorney-General v. Nichol, 16 Ves. 338; Attorney-General v. Forbes, 2 M. & C. 123, 129; Tomer v. Blandin, 4 Drew. 402; Attorney-General v. Cambridge Consumers' Gas Co., L. R. 5 Eq. 282, 292; [but see S. C., L. R. 4 Ch. App., where the ruling of the Vice-Chancellor was reversed; Attorney-General v. Leeds, L. R. 5 Ch. App. 583;] Attorney-General v. Bradford Canal, L. R. 2 Eq. 71; Attorney-General v. Staffordshire Copper Co., 1 W. N. 228. [But the case must be plain. Bunnell's Appeal, 69 Pa. St. 50; see Craig v. People, 47 Ill. 487. The establishment of a National School is not a nuisance. Harrison v. Good, L. R. 11 Eq. 338.]

[4] Attorney-General v. Mayor, &c. of

As a general rule, a suit of this kind should be instituted by the Attorney-General, or, at all events, he should be a party to it, as representing the public; but persons who conceive themselves aggrieved may also come forward, and ask the assistance of the Court to prevent a public nuisance from which they have individually sustained dam-
*1637 age;[5] and in the event of an individual *suffering peculiar and special damage by a public nuisance, a suit may be sustained by him, without making the Attorney-General a party.[1]

With regard to private nuisances, the Court will interfere by way of injunction where the mischief is irreparable.[2] The general ground of its

Kingston-on-Thames, 13 W. R. 888; Haine *v.* Taylor, 2 Ph. 209; 10 Beav. 75, 77, 79, 80; Ross *v.* Butler, 4 C. E. Green, 294; [Lytton *v.* Steward, 2 Tenn. Ch. 586; Cleveland *v.* Citizens' Gas Light Co., 5 C. E. Green, 201. See, as to an injunction against anticipated injury by the erection of a factory, Adams *v.* Michael, 38 Md. 123; of a powder-magazine: Wier's Appeal, 7 Pa. St. 230; of a threatened increase of the use of water: Fairham, &c. Co. *v.* Adams, 46 Vt. 496; of theoretical injury: Bassett *v.* Company, 47 N. H. 425; Lytton *v.* Stewart, 2 Tenn. Ch. 586; Mason *v.* Rollins, 2 Biss. 99].

[5] Baines *v.* Baker, Amb. 158; Attorney-General *v.* Cleaver, 18 Ves. 211; Spencer *v.* London and Birmingham Railway Company, 8 Sim. 193; Sampson *v.* Smith, *ib.* 272; Attorney-General *v.* Forbes, 2 M. & C. 123; Lee *v.* Milner, 2 Y. & C. Ex. 611; Elmhirst *v.* Spencer, 2 M'N. & G. 45; Mayor, &c. of Liverpool *v.* Chorley Waterworks Company, 2 De G., M. & G. 852; Attorney-General *v.* Corporation of Birmingham, 4 K. & J. 528; Attorney-General *v.* United Kingdom Electric Telegraph Company, 30 Beav. 287; Fort *v.* Groves, 29 Md. 188; Allen *v.* Board of Chosen Freeholders, 2 Beasley, 68, 74; King *v.* The Morris and Essex R. R. Co., 3 C. E. Green, 397; Cook *v.* Mayor and Corp. of Bath, L. R. 6 Eq. 177; Rowe *v.* Granite Bridge, 21 Pick. 344; Corning *v.* Lowerre, 6 John. Ch. 439; Hamilton *v.* Whitridge, 11 Md. 128; Zabriskie *v.* Jersey City & Bergen R. R. Co., 2 Beasley, 314; Dover *v.* Portsmouth Bridge, 17 N. H. 200; Walker *v.* Brewster, L. R. 5 Eq. 25. But a bill for an injunction against a public nuisance will not be sustained, unless it shows a particular injury to the plaintiff, distinct from that which he suffers in common with the rest of the public. Bigelow *v.* The Hartford Bridge Co., 14 Conn. 565.

[See Attorney-General *v.* Brown, 9 C. E. Green, 89, where the Court refused to interfere with the erection of a building in a disused, but not abandoned highway: Herrell *v.* Hannum, 56 Ga. 508, where the object was to restrain the defendants from burning woodland over which, in common with the people generally, complainant was allowed a right to pasture cattle; and Jones *v.* Little Rock, 25 Ark. 301, where the Court refused to restrain a municipal corporation from the illegal issuance of bonds to circulate as money, at the instance of a complainant who failed to show that any injury to his private interests would result from the issuance. But see, as to the issuance of township-bonds with the consent of a majority of tax-payers and land-owners, Lane *v.* Schomp, 5 C. E. Green, 82. And the issuance of county-bonds in a manner different from that prescribed by law. English *v.* Smock, 34 Ind. 115. As to the construction of a railroad through a village. Improvement Commissioners *v.* New Jersey Midland R. Co., 7 C. E. Green, 94.

A State may, through its officers, maintain proceedings by injunction to restrain public corporations from doing acts in violation of the law and constitution of the State; as where a county wrongfully issues its bonds in favor of a railroad: State *v.* County Court, 51 Mo. 395; and to restrain persons, who have combined together, from interfering with the State's agents in the execution of the legislative will: State *v.* Fagan, 22 La. Ann. 545.

See, as to interference with a ferry franchise, Midland, &c. Ferry Co. *v.* Wilson, 1 Stew. Eq. 537, and the Reporter's learned and exhaustive note; and, as to interference with a turnpike franchise, White's Creek Turnpike Co. *v.* County of Davidson, 3 Tenn. Ch. 396.

An injunction will not be granted to restrain the officers of government from executing a law, on the application of a party who fears he may be injured in a business he proposes to undertake: Mason *v.* Rollins, 2 Biss. 99; nor to restrain a railroad company from using land until proper stop-gaps were erected, the right resting in parol, and not being included in the grant: Cook *v.* North, &c. R. Co., 46 Ga. 618.]

An owner of lots upon a street, upon which a railway is about to be constructed which will be specially injurious to him, may maintain a suit to enjoin such construction. Milhan *v.* Sharp, 28 Barb. 228; [Coast Line R. Co. *v.* Cohen, 50 Ga. 451]. In Hamilton *v.* Whitridge, 11 Md. 128, it was held, that parties suffering special damage in the value and use of their property, may have an injunction to restrain the owner of an adjoining house from its contemplated use as a house of prostitution.

[1] Soltau *v.* De Held, 2 Sim. N. S. 133, 142; Wood *v.* Sutcliffe, 2 Sim. N. S. 163.

[2] Winnipiseogee Lake Co. *v.* Worster, 29 N. H. 433; Ingraham *v.* Dunnell, 5 Met. 118; Davis *v.* Reed, 14 Md. 152; Webber *v.* Gage, 39 N. H. 182; Middleton *v.* Franklin, 3 Cal.

interference is that sort of material injury to property or health requiring the application to prevent, as well as remedy, an evil, for which damages more or less would be given in an action at Law.[3] It is not every case that would furnish a right of action against a party which would justify the interposition of the Court of Equity, to redress the mischief or remove the annoyance.[4] But there must be such an injury, or the apprehension of it, as from its nature is not susceptible of being adequately compensated for by damages; or such as, from its long continuance, occasions a constantly recurring grievance which cannot be otherwise prevented but by an injunction.[5] Thus, it has been said, * that every common trespass, or a mere diminution of the *1638 value of the premises, is not a ground for an injunction; but, if the trespass continue so long as to become a nuisance, or if the diminution of the value of the premises amount to irreparable mischief, then the Court will undoubtedly interfere.[1] The most common cases in which the Court exercises this jurisdiction occur, where it is called upon to restrain a party from building so near the plaintiff's house as to darken his ancient lights.[2] Injunctions have also been granted to stop

328; Dana *v.* Valentine, 5 Met. 8; Wilcox *v.* Wheeler, 47 N. H. 488; see Boston Waterpower Co. *v.* Boston & Worcester R. R. Corp., 16 Pick. 512, 525; Bigelow *v.* The Hartford Bridge Co., 14 Conn. 565; Perry *v.* Parker, 1 Wend. & M. 284; Cunningham *v.* Rome R. R. Co., 27 Geo. 409; Eastman *v.* Company, 47 N. H. 71; Earl *v.* De Hart, 1 Beasley, 280. [Inspection may be ordered, though not prayed for. Barlow *v.* Bailey, 18 W. R. 783. And see, as to issues of fact, Russell *v.* Wentworth, L. R. 5 Ch. App. 45; and, as to appointment of expert, Attorney-General *v.* Colney Hatch Lunatic Asylum, L. R. 4 Ch. App. 146.]

[3] Attorney-General *v.* Nichol, 16 Ves. 338, 342; White *v.* Cohen, 1 Drew. 312. When the nuisance operates to destroy health, or to diminish the comfort of a dwelling, an action at Law furnishes no adequate remedy, and the party injured is entitled to protection by injunction. Hohmann's Boiling Spring Bleaching Co., 1 McCarter, 335; [Ball *v.* Ray, L. R. 8 Ch. App. 467; Broder *v.* Saillard, 2 Ch. Div. 692].

[4] Attorney-General *v.* Cambridge Consumers' Gas Co., L. R. 6 Eq. 282, 297; see Heath *v.* Bucknall, L. R. 8 Eq. 1, 6, [and Lord Bramwell, M. R., Wilson *v.* Sanborn, 45 N. H. 169. But in Cooper *v.* Lamont, L. R. 4 Eq. 409, it was held that a Court of Chancery will restrain the continuance of a nuisance by injunction whenever maintaining damages might be recovered in respect of it by an action at Law.

[5] Hammersmith Company *v.* East India Company, 1 Hare, 164; Attorney-General *v.* Nichol, 16 Ves. 338, 342; Hilton *v.* Taylor, 10 Rees, 75; 2 Phil. 200; Hilton *v.* Spooner, *ubi sup.*; Attorney-General *v.* Southwark Gas Consumers' Company, 2 De G., M. & G. 341; Sutton *v.* De Hart, and Wood *v.* Sutcliffe, *ubi sup.*; Tipping *v.* St. Helen's Smelting Co., L. R. 1 Ch. Ap. 66; Walker *v.* Brewster, L. R. 5 Eq. 25; Imperial Gas Co. *v.* Broadbent, 7 H. L. Ca. 600; S. C., *nom.* Broadbent *v.* Imperial Gas Company, 7 De G., M. & G. 436; Cook *v.* Forbes, L. R. 5 Eq. 166; Attorney-General *v.* Cambridge Consumers' Gas Co., L. R. 4 Ch. Ap. 71, 80, 81; Ingraham *v.* Dannell, 5 Met. 118; Mohawk & Hudson R. R. Co. *v.* Antcher, 3 Paige, 213; Webber *v.* Gage, 39 N. H. 182, 188; Burnham *v.* Kempton, 44 N. H. 97; Olmstead *v.* Loomis, 6 Barb. 152; Lyon *v.* McLaughlin, 32 Vt. 423; Morris Canal & Banking Co. *v.* Central R. R. Co., of N. J., 1 C. E. Green, 419, 422; Holsman *v.* Boiling Spring Bleaching Co., 1 McCarter, 335; Eastman *v.* Amoskeag Manuf. Co., 47 N. H. 71, 79; Bassett *v.* Company, 47 N. H. 426; Merrifield *v.* Lombard, 13 Allen, 16, 18; Hill *v.* Sayles, 12 Cush. 454; Bonner *v.* Upham, 13 Pick. 462; [Haskell *v.* New Bedford, 108 Mass. 216].

[1] Coulson *v.* White, 3 Atk. 21; White *v.* Cohen, 1 Drew. 312; Johnstone *v.* Hall, 2 K. & J. 414; Hodgson *v.* Duer, 2 Jur. N. S. 1014; Elwell *v.* Crowther, 10 W. R. 615; Hepburn *v.* Lordan, 2 H. & M. 345; compromised on appeal, 2 H. & M. 454; and see 11 Jur. N. S. 646; [Morgan *v.* Palmer, 18 N. H. 336].

[2] Ryder *v.* Bentham, 1 Ves. S. 543; Back *v.* Stacy, 2 Russ. 121; East India Company *v.* Vincent, 2 Atk. 83; Turner *v.* Spooner, 1 Dr. & Sm. 467; Davies *v.* Marshall, 1 Dr. & Sm. 557; Cooper *v.* Hubbuck, 30 Beav. 160; and see Isenberg *v.* East India House Estate Company, 10 Jur. N. S. 221, L. C.; Jackson *v.* Duke of Newcastle, 8 Sim. 321, L. C.; Law *v.* Lane, 18 Ves. 197, L. C.; Wynstanley *v.* Lee, 1 H. & M. 445; Cowper *v.* Baron, 32 Beav. 101; Radcliffe *v.* Duke of Portland, 3 Giff. 702; Martin *v.* Headon, 11 Jur. N. S. 6; Curriers' Company *v.* Corbett, 2 Dr. & Sm. 355; Stokes *v.* City Offices Company, 13 W.

*1639 the pollution of streams;[3] and to prevent the * pulling down of banks of rivers, whereby the plaintiff was exposed to inundations from which the banks had protected him;[1] and the diversion of watercourses;[2] and to restrain the use of a rifle range until it had been ren-

R. 537; 2 H. & M. 250; Laurence *v.* Austin, 11 Jur. N. S. 576; Clarke *v.* Clark, 11 Jur. N. S. 914; L. R. 1 Ch. Ap. 16; Martin *v.* Headon, L. R. 2 Eq. 425; Heath *v.* Bucknall, L. R. 8 Eq. 1; Staight *v.* Burn, L. R. 5 Ch. Ap. 163; Dent *v.* Auction Mart Co., L. R. 2 Eq. 238; Yates *v.* Jack, L. R. 1 Ch. Ap. 295; Robson *v.* Whittingham, L. R. 1 Ch. Ap. 442; Durell *v.* Pritchard, L. R. 1 Ch. Ap. 244; Smith *v.* Owen, 14 W. R. 422; Hynam *v.* Dunn, 1 W. N. 293; Webb *v.* Hunt, 1 W. N. 165; Shone *v.* City of London Real Property Company, 1 W. N. 165; Wavell *v.* Watson, 1 W. N. 344; Beadel *v.* Perry, L. R. 3 Eq. 465; Senior *v.* Pawson, L. R. 3 Eq. 430; [Dunball *v.* Walters, 35 Beav. 565; Lanfranchi *v.* Mackenzie, L. R. 4 Eq. 421; Potts *v.* Smith, L. R. 6 Eq. 311; Dyers' Co. *v.* King, L. R. 9 Eq. 438; Kino *v.* Rudkin, 6 Ch. Div. 160; National Provincial Plate Glass Ins. Co. *v.* Prudential Assurance Co., 6 Ch. Div. 757. And see, as to increase of ancient lights, Taplin *v.* Jones, 11 H. L. Cas. 290;] Fifty Associates *v.* Tudor, 6 Gray, 255; Story *v.* Odin, 12 Mass. 157; Atkins *v.* Chilson, 7 Met. 403; M'Cready *v.* Thomson, 1 Dud. L. & E. 131; Robeson *v.* Pittinger, 1 Green Ch. 57; Gerber *v.* Grabel, 16 Ill. 217; see Maynard *v.* Esher, 17 Penn. 232; Cherry *v.* Stein, 11 Md. 1; Haverstick *v.* Sipe, 33 Penn. (St.) 368; Mahan *v.* Brown, 13 Wend. 261; Parker *v.* Foote, 19 Wend. 309; Myers *v.* Gemmel, 10 Barb. 537; Hubbard *v.* Town, 33 Vt. 295; Banks *v.* American Tract Society, 4 Sandf. Ch. 438; Ray *v.* Lines, 10 Ala. 63; Butt *v.* Imperial Gas Co., L. R. 2 Ch. Ap. 158.

[The weight of American authority is against the right to acquire by prescription an easement in air and light. Randall *v.* Sanderson, 111 Mass. 114; Mullen *v.* Stricker, 19 Ohio, 135; Parker *v.* Foote, 19 Wend. 109; Morrison *v.* Marquardt, 24 Iowa, 35; Powell *v.* Sims, 5 W. Va. 1; Stein *v.* Hanck, 4 Cent. L. J. 518 (Ind.); Napier *v.* Bullwinkle, 5 Rich. 311.]

In Connecticut, it is declared by statute that a right to light cannot be acquired by prescription: Rev. St. 1849, tit. 29, c. 1, § 18; so also in Massachusetts: Genl. Sts. c. 90, § 32.

[3] Elmhirst *v.* Spencer, 2 M'N. & G. 45; Oldaker *v.* Hunt, 6 De G., M. & G. 376; 19 Beav. 485; Attorney-General *v.* Luton Board of Health, 2 Jur. N. S. 180; Attorney-General *v.* Corporation of Birmingham, 4 K. & J. 528; Manchester and Sheffield Railway Company *v.* Worksop Board of Health, 23 Beav. 198; Goldsmid *v.* Tunbridge Wells Improvement Commissioners, L. R. 1 Eq. 161; L. R. 1 Ch. Ap. 349; Spokes *v.* Banbury Board of Health, L. R. 1 Eq. 42, 51; Attorney-General *v.* Bradford Canal Co., L. R. 2 Eq. 71; Attorney-General *v.* Richmond, L. R. 2 Eq. 306; Feilden *v.* Corporation of Blackburn, 1 W. N. 256; Crossley *v.* Lightowler, L. R. 3 Eq. 279; Attorney-General *v* Colney Hatch Lunatic Asylum, L. R. 4 Ch. Ap. 146; Holsman *v.* Boiling Spring Bleaching Co., 1 McCarter, 335; Merrifield *v.* Lombard, 13 Allen, 16. [See, as to pollution of wells, Womersley *v.* Church, 17 L. T. N. S. 190; and running water, Attorney-General *v.* Steward, 5 C. E. Green, 415; Pennington *v.* Brinsop Hall Coal Co., 5 Ch. Div. 769.] For forms of orders, see Lingwood *v.* Stowmarket Paper-making Company, L. R. 1 Eq. 77, 336.

[1] Robinson *v.* Lord Byron, 1 Bro. C. C. 588; Lane *v.* Newdigate, 10 Ves. 192, 194; Chalk *v.* Wyatt, 3 Mer. 688; [Crompton *v.* Lea, L. R. 19 Eq. 115;] Seton, 901; Del. & Rar. Canal & C. & A. R. & T. Co. *v.* Rar. & Del. Bay R. Co., 1 C. E. Green, 321, 379; Gardner *v.* Newburgh, 2 John. Ch. 162; Van Bergen *v.* Van Bergen, 2 John. Ch. 272; Belknap *v.* Belknap, 2 John. Ch. 463; Hammond *v.* Puller, 1 Paige, 197; Belknap *v.* Trimble, 3 Paige, 577, 601; Reid *v.* Gifford, 1 Hopk. 416; S. C., 6 John. Ch. 19; Robinson *v.* Lord Byron, 1 Bro. C. C. 588; Burnham *v.* Kempton, 44 N. H. 78, 101; Winnipiseogee Lake Co. *v.* Worcester, 29 N. H. 448; Ballou *v.* Hopkinton, 4 Gray, 324; Bemis *v.* Upham 13 Pick. 169; Hill *v.* Sayles, 12 Cush. 454; Bardwell *v.* Ames, 22 Pick. 353. Equity will restrain the obstruction of a mill privilege by another mill on the same stream. Crittenden *v.* Field, 8 Gray, 621; Sheldon *v.* Rockwell, 9 Wis. 166. [The Court will also restrain by injunction the serious interference with a party wall. Phillips *v.* Boardman, 4 Allen, 147; Standard Bank *v.* Stokes, 9 Ch. Div. 68. And, upon the principle that he who seeks equity must do equity, so long as the plaintiff's wall laid on his own land projects over the defendant's land, the Court will not compel the defendant to desist from using it as a party-wall. Gultenberger *v.* Woods, 51 Cal. 523. See Elliston *v.* Morrison, 3 Tenn. Ch. 280. And see, as to the mutual rights of owners of a party-wall. Earl *v.* Beadleston, 42 N. Y. Sup. Crt. 294, First Natl. Bank *v.* Taylor, 44 Iowa, 343; Eckleman *v.* Miller, 57 Ind. 88.]

It is within the jurisdiction of a Court of Equity in New Hampshire, to restrain, by injunction, a citizen of that State from injuring the real estate of the plaintiffs, though situated out of the State. Great Falls Manuf. Co. *v.* Worster, 23 N. H. 462.

[2] [Bickett *v.* Morris, L. R. 1 Sc. & D. 47; Acquacknock Water Co. *v.* Watson, 2 Stew. Eq. 366; Farrell *v.* Richards, 3 Stew. Eq. 511;] Shields *v.* Arndt, 3 Green Ch. 234; Webb *v.* Portland Manuf. Co., 3 Sumner, 189; Holsman *v.* Boiling Spring Bleaching Co., 1 McCarter, 335; Burnham *v.* Kempton, 44 N. H. 94, 95; Crossley *v.* Lightowler, L. R. 3 Eq. 279, 296, 297; Roath *v.* Driscoll, 20 Conn. 533; Knapp *v.* Douglas Axe Co., 13 Allen, 1; Hulme *v.* Shreve, 2 Green Ch. 279;

dered free from danger to the plaintiff, who was the occupier of adjacent lands;[3] [and to protect right of way.[4]]

In cases of this description, where a party sues in respect of an alleged injury to his legal rights, it seems that an interlocutory injunction is granted solely upon the principle of preserving property until a decision on the legal rights can be had.[5] In order to entitle the plaintiff to such an interference, for the purpose of protecting his property, pending the decision of his legal title, he must show at least a strong *primâ facie* case in support of the title which he asserts, and also that he has not been guilty of any * improper delay in applying for the interposi- *1640 tion of the Court.[1] The Court has then to consider the degree of inconvenience and expense to which granting the injunction would subject the defendant, in the event of his being in the right,[2] and, on

Corning *v.* Troy Iron & Nail Factory, 39 Barb. 311; S. C., 44 Barb. 402, 466; [S. C. 40 N. Y. 191;] Burwell *v.* Hobson, 12 Gratt. 322; West *v.* Walker, 2 Green Ch. 279; Dexter *v.* Providence Aqueduct Co., 1 Story, 387; [Owen *v.* Fields, 102 Mass. 90].

[3] Banister *v.* Bagge, 44 Beav. 287. As to ancient lights, watercourses, and other easements, see Seton, 894, 898, 901, 902, 924.

[4] Ardley *v.* Guardians of St. Pancras, W. N. (1870), 203; Baltimore R. Co. *v.* Strauss, 37 Md. 237; Henderson *v.* Alloway, 3 Tenn. Ch. 688.]

[5] The object of an injunction before answer is to preserve all things in their then condition, not to determine any right by anticipation, or to undo or restore any thing. Murdock's Case, 2 Bland, 461; Cheever *v.* Rut. & Bur. R. R. Co., 39 Vt. 653. Courts of Equity will not ordinarily take upon themselves to decide the fact that a nuisance exists, when that fact is controverted, but will require that the party, asking the interference of the Court, shall first establish his right at Law. Burnham *v.* Kempton, 44 N. H. 78; Eastman *v.* Company, 47 N. H. 71; Cummings *v.* Barrett, 10 Cush. 186; [Varney *v.* Pope, 69 Me. 192.] It is the duty of the Court rather to protect acknowledged rights than to establish new and doubtful ones. Burnham *v.* Kempton, 44 N. H. 92; Routh *v.* Driscoll, 20 Conn. 555; [Roskel *v.* Whitworth, L. R. 5 Ch. App. 630].

But if the evidence is satisfactory, the Court will grant an injunction against a nuisance without having the question, whether there is a nuisance tried before a jury. Inchbald *v.* Robinson, Inchbald *v.* Barrington, L. R. 4 Ch. Ap. 388; *ante*, 1629, notes; Wason *v.* Sanborn, 45 N. H. 169, 171, and cases cited.

[1] See Del. & Rar. Canal & C. & A. R. & T. Co. *v.* Rar. & Del. Bay R. Co., 1 C. E. Green, 380, 381. The plaintiff can be relieved by an injunction only in cases where he has exercised due precaution to prevent an injury. Ram *v.* Wilson, 22 Maine, 211. As to the effect of delay, or laches, or neglecting remedies, or acquiescing in or encouraging the acts complained of, see Beaston *v.* Jones, 5 D. & S. 80; Attorney-General *v.* Eastlake, 11 Hare, 205, 224; Pillow *v.* Thompson, 20 Texas, 206; Tash *v.* Adams, 10 Cush. 252; Fuller *v.* Melrose, 1 Allen, 166; Borland *v.* Thornton, 12 Cal. 440; Gray *v.* Ohio & Pennsylv. R. R. Co., 1 Grant Cas. (Penn.) 412; Briggs *v.* Smith, 5 R. I. 213; Phelps *v.* Peabody, 7 Cal. 50; Little *v.* Price, 1 Md. Ch. 182; Burden *v.* Stein, 27 Ala. 104; Buxton *v.* James, 5 D. & S. 80; Attorney-General *v.* Eastlake, 11 Hare, 205, 228; Wason *v.* Sanborn, 45 N. H. 169, 171, 172; Sheldon *v.* Rockwell, 9 Wis. 166; Peabody *v.* Flint, 6 Allen, 52, 57; Senior *v.* Pawson, L. R. 3 Eq. 330.

For the principles of refusing injunctions on original motion, or on appeal, for laches, and the effect of objection or protest, see G. W. Ry. *v.* Oxford, &c., 3 De G., M. & G. 341, 355; Attorney-General *v.* Sheffield, 3 De G., M. & G. 327; Coles *v.* Sims, Kay, 56; 5 De G., M. & G. 1; [and see Scanlan *v.* Howe, 9 C. E. Green, 273. *Infra*, 1663, note 7. See also, where, after the lapse of five years, the bill is to set aside judicial proceedings as fraudulent. Harwood *v.* Railroad Co., 17 Wall. 78. In patent cases. Andrews *v.* Spear, 4 Dill. 472; American Middlings Purifier Co. *v.* Atlantic Milling Co., 4 Dill. 100; American Middlings Purifier Co. *v.* Christian, 4 Dill. 448. In the case of an injunction in aid of a legal right, it will not be refused for delay short of the limitation which would bar the right. Fulwood *v.* Fulwood, 9 Ch. Div. 176; and see Bains *v.* Perry, 1 Lea, 37.]

[2] See Wing *v.* Fairhaven, 8 Cush. 363; Torrey *v.* The Camden, &c. R. R. Co., 3 C. E. Green, 293. The closing of a road used as a highway for travel, by injunction, can only be justified by the clearest necessity. Del. & Rar. Canal & C. & A. R. & T. Co. *v.* Rar. & Del. Bay R. Co., 1 C. E. Green, 321, 381; Boston & Lowell R. R. Co. *v.* Salem & Lowell R. R. Co., 2 Gray, 1; Pontchartrain R. Co. *v.* New Orleans & Carrollton R. Co., 11 La. An. 253; [Thornton *v.* Grant, 10 R. I. 477].

But where a plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the Court to inquire in what way the defendant can best remove it. The plaintiff is entitled to an injunction at once, unless the removal of the

the other hand, the nature of the injury which the plaintiff may sustain, in the event of his complaint turning out to be well founded, and the Court refusing to interfere, pending the decision of the legal question; and, thus balancing the question between the two parties, and the extent of inconvenience likely to be incurred on the one side and on the other, the Court must exercise its discretion whether the injunction should be granted or withheld.[3] Should the Court, in the exercise of this discretion, determine upon granting the injunction, it will, if the legal title is disputed, put the parties in the position of speedily obtaining a decision upon such title;[4] and for that purpose either a trial of the legal
*1641 * title will be directed before the Court itself, or an issue will be directed to a Court of Common Law.[1] If there is no danger of irreparable mischief in the mean time, the motion for an injunction will be directed to stand over, till after the trial of the legal title.[2]

A person seeking an injunction to restrain an injury to his legal rights must apply to the Court without delay: for, if the injury has been completed at the time of the filing of the bill, the Court will not interfere except in cases in which extreme, or at all events, very serious damage will result from the injunction being withheld.[3]

It is not now necessary, in every case, to apply to the Court of Chancery to prevent the repetition or continuance of an injury to a legal right: for, by the Common Law Procedure Act, 1854, in all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought an action, he may claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same prop-

injury is physically impossible; and it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to. Attorney-General *v.* Colney Hatch Lunatic Asylum, L. R. 4 Ch. Ap. 146; see City of Salem *v.* Eastern R. R. Co., 98 Mass. 431, 444.

[3] Wason *v.* Sanborn, 45 N. H. 169; Wilcox *v.* Wheeler, 47 N. H. 488; Bassett *v.* Company, 47 N. H. 4263; Eastman *v.* Company, 47 N. H. 71; Ingraham *v.* Dunnell, 5 Met. 123–127; Hartridge *v.* Rockwell, R. M. Charlt. 260; Reed *v.* Dews, R. M. Charlt. 365; Attorney-General *v.* Ely, &c. Railway Co., L. R. 6 Eq. 106.

[4] Hilton *v.* Earl Granville, C. & P. 283, 292; 4 Beav. 130; Harman *v.* Jones, C. & P. 299; Sanxter *v.* Foster, *ib.* 302; Rigby *v.* Great Western Railway Company, 2 Phil. 44; Spottiswoode *v.* Clarke, *ib.* 154; 1 C. P. Coop. t. Cott. 254; 10 Jur. 1043; Haines *v.* Taylor, 2 Phil. 209; 10 Beav. 75; Stevens *v.* Keating, 2 Phil. 333; Ridgway *v.* Roberts, 4 Hare, 106; Buxton *v.* James, 5 De G. & S. 80; Hodgson *v.* Earl Powis, 1 De G., M. & G. 6; Standish *v.* Corporation of Liverpool, 1 Drew. 1; Attorney-General *v.* Eastlake, 11 Hare, 205; Bankart *v.* Houghton, 27 Beav. 425; Mayor of Cardiff *v.* Cardiff Waterworks Company, 4 De G. & J. 596; Warden, &c. of Dover Harbor *v.* London, Chatham & Dover Railway Company, 3 De G., F. & J. 559; Eaden *v.* Firth, 1 H. & M. 573; Burnham *v.* Kempton, 44 N. H. 78, 97; Eastman *v.* Company, 47 N. H. 71; *ante*, 1639, notes; Inchbold *v.* Barrington, L. R. 4 Ch. Ap. 388.

[1] Eaden *v.* Firth, *ubi sup.*; and see 25 & 26 Vic. c. 42; Freeman *v.* Tottenham & Hampstead Railway Company, 11 Jur. N. S. 254; 13 W. R. 1004, L. JJ.; *ante*, p. 1081.

[2] Eaden *v.* Firth, and Freeman *v.* Tottenham & Hampstead Railway Company, *ubi sup.*; see *ante*, 1629, 1639, notes.

[3] Per Sir G. J. Turner L. J., Durell *v.* Pritchard, L. R. 1 Ch. Ap. 244, 250; S. C. *nom.* Darrell *v.* Pritchard, 12 Jur. N. S. 16, 18; but see S. C. *nom.* Hindley *v.* Emery, L. R. 1 Eq. 52; Laurence *v.* Austin, 11 Jur. N. S. 576; 13 W. R. 981, M. R.; but see Hindley *v.* Emery, 11 Jur. N. S. 878; 14 W. R. 25, where the plaintiff, having come in time as to part of his case, an inquiry was directed as to the damages occasioned by so much of the injury as was completed previously to the filing of the bill; and see Deere *v.* Guest, 1 M. & C. 516.

erty or right; and the plaintiff may at any time after the commencement of the action, and whether before or after judgment, apply *ex parte* to the Court or a Judge for such writ.[4]

The Court will also interfere by injunction, to restrain the infringement of a patent, or piracy of a copyright. This interference *was originally based upon the principle that the law did not *1642 give a complete remedy to those whose property was invaded: for, if each infringement of the patent or copyright was made a distinct cause of action, the remedy would be worse than the evil.[1] The inventors or authors might be ruined, by the necessity of perpetual litigation, without ever being able to have a final establishment of their rights; and, in addition, the plaintiff had no means at Law of restraining the future use of his invention, or the publication of his work, injuriously to his title and interest.[2] These considerations do not apply to the same extent as formerly: for now, an injunction, inspection, or account may be obtained at Law in patent cases.[3] This has not, however, abrogated the original equitable jurisdiction.

An injunction to restrain the infringement of a patent is not obtainable in Equity as a matter of course. The equitable title flows from the legal title; and it was formerly the practice, on opening the case, to require the plaintiff to bring an action for the purpose of establishing his legal title;[4] but now, the legal right must be determined by the Court of Chancery: unless, under the particular circumstances of the case, the Court is satisfied that the question can be more conveniently tried in a Court of Common Law.[5] It is the duty of the Court to grant an interlocutory injunction, if the validity of the patent, and the fact of the infringement, are satisfactorily established.[6] If, however, either or both of these facts are uncertain, it depends on the degree of doubt

[4] 17 & 18 Vic. c. 125, §§ 79, 82; and see Jessel *v.* Chaplin, 2 Jur. N. S. 931; 4 W. R. 619, Ex.; Shaw *v.* Stanton, 6 W. R. 327, Ex. Injunctions obtained in Equity, on an application *ex parte*, to continue until the further order of the Court, or some Judge thereof, under the early practice of the Court in Massachusetts, were granted with considerable facility, on the ground that, being *ex parte*, it would not affect the merits on an ultimate hearing, and that, if its operation were considerably injurious to the defendant, it was competent for him to move to dissolve it on affidavit, on application to any Judge, upon short notice and cause shown. Somewhat more caution has been observed in this matter latterly, on consideration that if such an injunction is not necessary to prevent irreparable injury, or render the purpose of the suit unavailing, it may operate injuriously to interrupt an important enterprise, and because, after *subpœna* served, the defendant has notice of the suit, and proceeds at the peril of all the consequences that may ensue. Wing *v.* Fairhaven, 8 Cush. 363, 364.

[1] 2 Story Eq. Jur. §§ 930-936; Orr *v.* Littlefield, 1 Wood. & M. 13; [Potter *v.* Whitney, 1 Low. 87].

[2] Hogg *v.* Kirby, 8 Ves. 215, 223; Harmer *v.* Plane, 14 Ves. 130; Lawrence *v.* Smith, Jac. 471; Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 705, 706; Baily *v.* Taylor, 1 R. & M. 73; Campbell *v.* Scott, 11 Sim. 31; 4 Jur. 479; Lewis *v.* Fullarton, 2 Beav. 6. The Court may order an inspection of the alleged infringement, see Singer Manufacturing Company *v.* Wilson, 13 W. R. 560, V. C. W.; or an analysis: Patent Type Company *v.* Walter, Johns. 727.

[3] 15 & 16 Vic. c. 83, § 42; Chitty Arch. 1435.

[4] Dudley *v.* Kinnersley, Amb. 403, 406.

[5] *Ante*, pp. 1071, 1110; 25 & 26 Vic. c. 42, §§ 1, 2; Bavlis *v.* Watkins, 8 Jur. N. S. 1165, L. JJ.; Young *v.* Fernie, 1 De G., J. & S. 353; 10 Jur. N. S. 58.

[6] Bridson *v.* M'Alpine, 8 Beav. 229; Boyill *v.* Gaultier, L. R. 2 Eq. 195; 12 Jur. N. S. 494, M. R. [A patentee may sustain an action for an injunction to restrain a threatened infringement of his patent, even if no actual infringement has taken place. Frearson *v.* Loe, 9 Ch. Div. 48, 62.]

whether the Court will grant the injunction; and the Court will, in such case, consider the degree of convenience or inconvenience to the parties; and may either refuse the injunction, refuse it on the terms of an account being kept,[7] or order the motion to stand over until the plaintiff's legal title is established.[8]

*1643 *Similar principles apply to cases of copyright.[1] At first, the Court of Chancery would not give assistance, unless the complainant had a clear legal right; but it now lends its aid when the legal title is either directly established by decision, or is apparently established by usage and possession.[2] If, however, the legal title is doubtful, the Court may refrain from interfering before it is ascertained and determined: for the equitable title flows from the legal title; and, therefore, where the one is doubtful, the other does not necessarily follow.[3] The Court also frequently refuses an injunction, where it acknowledges

[7] For form of undertaking to keep accounts, see Seton, 942.

[8] Bridson *v.* M'Alpine, *ubi sup.*; Bridson *v.* Benecke, 12 Beav. 1; and see Bolton *v.* Bull, 3 Ves. 140; Harmer *v.* Plane, *ubi sup.*; Hill *v.* Thompson, 3 Mer. 622; Kay *v.* Marshall, 1 M. & C. 373; Bacon *v.* Jones, 4 M. & C. 433; Collard *v.* Allison, *ib.* 487; Sanxter *v.* Forster, C. & P. 302; Butlin *v.* Masters, 2 Phil. 290; Stevens *v.* Keating, *ib.* 333; Rodgers *v.* Nowill, 6 Hare, 325, 339; 3 De G., M. & G. 614; Caldwell *v.* Vanvlissengen, 9 Hare, 415; Smith *v.* London and South Western Railway Company, Kay, 408; Price's Candle Company *v.* Bauwen's Candle Company, 4 K. & J. 727; Tuck *v.* Silver, Johns. 218; Gardner *v.* Broadbent, 2 Jur. N. S. 1041, V. C. S.; Clark *v.* Fergusson, 1 Giff. 184; Whitton *v.* Jennings, 1 Dr. & Sm. 110; Eaden *v.* Firth, 1 H. & M. 573; Bovill *v.* Goodier, L. R. 2 Eq. 195; Davenport *v.* Goldberg, 2 H. & M. 282; Betts *v.* Neilson, 13 W. R. 804; Affid., 3 De G., J. & S. 82; [L. R. 3 Ch. App. 429; Elmslie *v.* Boursier, L. R. 9 Eq. 217; Betts *v.* Gallais, L. R. 10 Eq. 392;] *ante*, p. 1071 *et seq.*; Newall *v.* Wilson, 2 De G., M. & G. 282; The Universities of Oxf. & Camb. *v.* Richardson, 6 Ves. 689, note (*a*); Ogle *v.* Ege, 4 Wash. C. C. 584; Isaacs *v.* Cooper, *ib.* 259; Rogers *v.* Abbott, *ib.* 514; Livingston *v.* Von Ingen, 9 John. 570; Sullivan *v.* Redfield, 1 Paine C. C. 441; Orr *v.* Littlefield, 1 Wood. & M. 13; Goodyear *v.* Day, 2 Wallace Jr. 283; [Betts *v.* Neilson, L. R. 3 Ch. App. 429; Penn *v.* Jack, L. R. 5 Eq. 81; Penn *v.* Bibby, L. R. 3 Eq. 308; Amory *v.* Brown, L. R. 8 Eq. 663; Hassall *v.* Wright, L. R. 10 Eq. 509, the last treating of the rights of an assignee]. For the statutes as to patents, see 5 & 6 Will. IV. c. 83; 2 & 3 Vic. c. 67; 7 & 8 Vic. c. 69; 14 & 15 Vic. c. 82; 15 & 16 Vic. c. 83; 16 & 17 Vic. cc. 5, 115; 22 Vic. c. 13; and for a collection of cases in Equity, as to injunctions relating to patents, with forms of orders, see Seton, 909–914.

[The Court will restrain a patentee from issuing circulars threatening legal proceedings against infringers, unless he will undertake to commence proceedings to assert the validity of his patent. Axmaud *v.* Lund, L. R. 18 Eq. 330; Rollins *v.* Hinks, L. R. 13 Eq. 355.]

[1] Lord Cranworth, in Jefferys *v.* Boosey, 4 H. L. Ca. 815, said the true definition of "copyright" is the sole right of multiplying copies. That, of course, means that one must not copy another's book with or without colorable alterations. That is a general definition of copyright. Sir G. M. Giffard L. J. in Morris *v.* Wright, L. R. 5 Ch. Ap. 284. For the statutes as to copyrights, see Colonies: 10 & 11 Vic. c. 95; Low *v.* Routledge, 10 Jur. N. S. 922; 12 W. R. 1069, V. C. K.; 11 Jur. N. S. 939; 14 W. R. 90, L. JJ.; L. R. 1 Ch. Ap. 42. Designs: 1842, 5 & 6 Vic. c. 100; 1843, 6 & 7 Vic. c. 65; 1850, 13 & 14 Vic. c. 104; 1858, 21 & 22 Vic. c. 70; 1861, 24 & 25 Vic. c. 73; 1862, 25 & 26 Vic. c. 12; Margetson *v.* Wright, 2 De G. & S. 420; MacRae *v.* Holdsworth, *ib.* 496; Norton *v.* Nichols, 4 K. & J. 475. Dramatic and Musical Compositions: 3 & 4 Will. IV. c. 15; 5 & 6 Vic. c. 45. Engravings: 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; 15 & 16 Vic. c. 12; Bogue *v.* Houlston, 5 De G. & S. 267; 16 Jur. 372. International: 7 & 8 Vic. c. 12; 15 & 16 Vic. c. 12; 25 & 26 Vic. c. 68; Buxton *v.* James, 5 De G. & S. 80; Ollendorff *v.* Black, 4 De G. & S. 209; Cassell *v.* Stiff, 2 K. & J. 279; Jefferys *v.* Boosey, 4 H. L. Ca. 815; Low *v.* Routledge, *ubi sup.* Lectures: 5 & 6 Will. IV. c. 65. Literary: 5 & 6 Vic. 45. Sculpture: 54 Geo. III. c. 56; and see Designs, *sup.* Universities and Colleges: 15 Geo. III. c. 53. Works of Art (Paintings, Drawings, Photographs): 25 & 26 Vic. c. 68. [See Routledge *v.* Low, L. R. 3 H. L. 100; Holdsworth *v.* M'Crea, L. R. 2 H. L. 380; and for the principles of estimating damages: Pike *v.* Nichols, L. R. 5 Ch. App. 260.]

[2] 2 Story Eq. Jur. § 935.

[3] *Ante*, p. 1642.

a right, if the conduct of the party complaining has led to the state of things which occasions the application;[4] and an injunction has also been refused, where the matter which was the subject of the alleged piracy formed but a very inconsiderable part of the defendant's work: so that the damage done to the plaintiff might be calculated in a few hours.[5]

There must be separate bills upon each distinct invasion of *a *1644 patent or copyright: unless there is a privity between the parties who have infringed the invention or pirated the work.[1]

There must be also an affidavit of title, when the injunction is applied for *ex parte*, or the plaintiff's legal title is denied. In the case of a patent, the party making the application must swear as to his belief, at the time of making it, that the invention was newly introduced into the country:[2] for although, when he obtained his patent, he might, very honestly, have sworn as to his belief of such being the fact, yet circumstances may have subsequently intervened, or information been communicated, sufficient to convince him that it was not his own invention, and that he was under a mistake when he made his previous declaration to that effect.[3] In cases of copyright, where the proprietor is entitled under an assignment, he is bound to show that the assignment was made to him in writing, except in cases falling within the 13th section of 5 & 6 Vic. c. 45: for it has been determined, at Law, that a copyright cannot be assigned in any other way.[4] But if the plaintiff happens to be in the situation of assignee of an assignee, it will be sufficient for him to show that the assignment to himself was in writing, without tracing the title through the mesne assignees from the original author. Under such circumstances, the Court will assume that the title is regular, until the contrary is shown.[5] The title, however, must be a legal and not an equitable one; it must be something more than an agreement to assign, or a writing which evidences the intention of the parties: for a bill cannot be sustained unless the person who has the legal title is brought before the Court.[6]

It would greatly exceed the limits of our present inquiry to discuss the general rights of inventors and authors; or to state the circumstances under which an exclusive property, in virtue of these rights,

[4] Platt *v.* Batton, 19 Ves. 447; S. C. *nom.* Platts *v.* Batton, G. Coop. 303; Randell *v.* Murray, Jac. 311; Saunders *v.* Smith, 3 M. & C. 711.

[5] Baily *v.* Taylor, 1 R. & M. 73; Whittingham *v.* Wooler, 2 Swanst. 428.

[1] Dilly *v.* Doig, 2 Ves. J. 486. The plaintiff must sue, however, as opportunely, and file as unnecessary a number of bills as if he does, the Court will order them to be consolidated, or make some other equivalent order. Foxwell *v.* Webster, 10 Jur. N. S. 147; 12 W. R. 185, L. C.; 2 De G. & Sm. 250; 9 Jur. N. S. 1180; *ante*, pp. 339, 340, [797, 9, 3]. For form of bill in a patent case, see Vol. III.

[2] Mayer *v.* Spence, 1 J. & H. 87; 6 Jur. N. S. 672; Whitton *v.* Jennings, 1 De. & Sm. 110, 111.

[3] Hill *v.* Thompson, 3 Mer. 622, 624; Sturz *v.* De la Rue, 5 Russ. 322, 328.

[4] Power *v.* Walker, 3 M. & S. 7; Morris *v.* Kelly, 1 J. & W. 481; Moore *v.* Walker, 4 Camp. 9, n.; Latour *v.* Bland, 2 Starkie, N. P. 482; Cumberland *v.* Copeland, 1 H. & C. 194, and see Stevens *v.* Beamish, 1 K. & J. 168; 6 De G., M. & G. 223; [see Warne *v.* Routledge, L. R. 18 Eq. 497].

[5] Morris *v.* Kelly, 1 J. & W. 481.

[6] Cahusac *v.* Duncombe, 9 Sim. 151; 2 Jur. 654.

*1645 may be acquired or lost;[7] but, in examining those * occasions in which injunctions will be granted, it is to be remembered that the Court will not interfere when the work is of a clearly irreligious, immoral, libellous, or obscene description. If an action cannot be maintained, nothing can be done in a Court of Equity: which is only ancillary to the law; and therefore, it will not give relief, except where the law will give damages.[1] Not only will the Court refuse to interfere, when it plainly sees that the work is obscene or immoral, but, even if there is a doubt as to its evil tendency, an injunction will be refused;[2] and it may be laid down, as a universal rule, that where there is any doubt as to the exclusive legal title of the party claiming an injunction in aid of it, the Court will not exercise the jurisdiction, without giving an opportunity of trying such title.[3]

At times, there is considerable difficulty in determining whether a work is pirated or not:[4] for instance, it is allowable to make a *bonâ fide* extract, quotation, or abridgment, or a *bonâ fide* use of common materials, in the composition of another book;[5] for a man may fairly adopt a part of another's labors in making an extract or quotation, but he must not do it unfairly, or, as Lord Ellenborough termed it, *animo furandi*. So he may abridge, if the invention, learning, or judgment bestowed in making that abridgment will really constitute a new work: but he must not do either, in a colorable manner, to gain an advantage to himself by a fraudulent evasion of the statute.[6] So, in the case of a

[7] An injunction can be granted to restrain a publication only in cases where the publication will interfere with the plaintiff's right either of literary or other property, in the subject-matter of the publication. Brandreth *v.* Lance, 8 Paige, 24. The Court of Chancery has not jurisdiction to restrain the publication of a libel, upon a bill filed by the party whose character or business will be injured by the publication. *Ibid.* [See, to the same effect, Prudential Assurance Co. *v.* Knott, L. R. 10 Ch. App. 142; Life Association *v.* Boogher, 4 Cent. L. J. 40, a decision of the St. Louis Court of Appeals; Boston Diatite Co. *v.* Florence Man. Co., 114 Mass. 69; Whitehead *v.* Kitson, 119 Mass. 484; Singer Man. Co. *v.* Domestic Sewing Machine Co., 49 Ga. 70. And see Celluloid Man. Co. *v.* Goodyear Dental Co., 13 Blatchf. 375. Equity deals only with matters of civil right, and will not grant an injunction to restrain an illegal act merely because it is illegal, as the nuisance created by the unlicensed sale of liquors, and noisy and indecent performances. Campbell *v.* Scholfield, 3 Pittsb. 443. But see 1637, note.]

[1] Lawrence *v.* Smith, Jac. 471; Hime *v.* Dale, 2 Camp. 27, n.

[2] Walcot *v.* Walker, 7 Ves. 1; Southey *v.* Sherwood, 2 Mer. 435, 438; Burnett *v.* Chetwood, 2 Mer. 441, n.

[3] Bramwell *v.* Halcomb, 3 M. & C. 737; Spottiswoode *v.* Clarke, 2 Phil. 152; 1 C. P. Coop. t. Cott. 254; 10 Jur. 1043.

[4] The plaintiff published a book, and the defendant afterwards published a book on the same subject, in which he mentioned the plaintiff's book as one of the authorities consulted by him. The plaintiff claimed that the defendant's book was a piracy, and showed (amongst other things) that the plaintiff had referred to a large number of authorities, and the defendant had referred to the same. The defendant stated that he had taken the references from a previous writer, from whom the plaintiff had taken them, and showed that he, the defendant, had referred to two authorities not mentioned by the plaintiff; but as to two of the authorities referred to by the plaintiff, and also by the defendant, the defendant was unable to state where he had found them; the Court, under the circumstances, refused to grant the plaintiff an injunction; and held that an author who has been led by a former author to refer to older writers, may, without committing piracy, use the same passages in the older writers which were used by the former author; and also, that an author has no monopoly in any theory propounded by him. Pike *v.* Nicolas, L. R. 5 Ch. Ap. 251.

[5] Short abridgments are allowed. Bell *v.* Walker, 1 Bro. C. C. 451; Gyles *v.* Wilcox, 2 Atk. 143.

[6] Butterworth *v.* Robinson, 5 Ves. 709; Longman *v.* Winchester, 16 Ves. 269; Matthewson *v.* Stockdale, 12 Ves. 270; Whittingham *v.* Wooler, 2 Swanst. 428; Wilkins *v.* Aiken, 17 Ves. 422; Saunders *v.* Smith, 3 M. & C. 711; Lewis *v.* Fallarton, 2 Beav. 6;

map or road-book, the Court will interfere to prevent a mere republication of a work which the labor and skill of another person had supplied to the world. The piracy, on such occasions, is frequently detected * by the identity of the inaccuracies and errors;[1] and the *1646 question, whether one author has made a piratical use of another's work, does not necessarily depend upon the quantity of that work which he has quoted or introduced into his own book.[2]

The Court usually takes upon itself the task of inspection; and compares the work of the original author with the work alleged to be pirated;[3] but an inquiry may be directed whether the books differ, and in what respect.

The injunction, when issued, restrains the publication of those parts which are found to have been pirated.[4] Where, however, the Court, availing itself of the evidence read pending the motion, was led to conclude that, if the parts affected with the character of piracy were taken away, there would be left an imperfect work which could not, to any useful extent, serve the purpose intended by the publication, the injunction to restrain the publication of any parts pirated from the plaintiff's work was granted, without waiting till all the parts pirated could be distinctly marked.[5]

And, in general, if the parts pirated are so mingled with the original portions of a work that they cannot be separated, the Court will enjoin the publication of the whole: although a very large proportion of the work may be unquestionably original. Upon this subject, Lord Eldon observed, that "He who has made an improper use of that which does not belong to him, must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses, in any work, to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if

Spottiswoode v. Clarke, *ubi sup.*; Jarrold v. Houlston, 3 K. & J. 708; Hotten v. Arthur, 1 H. & M. 603; Kelly v. Morris, L. R. 1 Eq. 697; Murray v. Ashlee, L. R. 7 Eq. 54; Morris v. Wright, L. R. 5 Ch. App. 279; Cox v. Land & Water Journal Co., L. R. 9 Eq. 324; [Kelly v. Hutton, L. R. 3 Ch. App. 703].

[1] Cary v. Faden, 5 Ves. 24, and see Longman v. Winchester, *ubi sup.*

[2] Bramwell v. Halcomb, 3 Myl. & Cr. 737; Murray v. Bogue, 1 Drew. 353; and see Butterworth v. Robinson, 5 Ves. 709; Longman v. Winchester, 16 Ves. 269; Matthewman v. Strickland, 12 Ves. 270; Whittingham v. Wooler, 2 Swanst. 428; Wilkins v. Aikin, 17 Ves. 422; [Scott v. Stanford, L. R. 3 Eq. 718]. To constitute piracy of an original work, it is not necessary that the whole or even large portions of it should be taken, but it is only necessary that so much should be taken as sensibly to diminish the value of the original work, or substantially appropriate the labors of the author. Folsom v. Marsh, 2 Story, 100.

It is piracy to collect together and reprint from Law Reports all the cases on a particular subject, though the collection as a whole may be new, and with the addition of reports previously unpublished [notes and] comments. Hodgson v. Welch, 2 Jur. N. S. 236; see Wheaton v. Peters, 8 Pet. 591; Cary v. Faden, 5 Sumner's Ves. 24, note (b), 26, Mr. Hovenden's notes; Gray v. Russell, 1 Story, 11.

[3] See Whittingham v. Wooler, 2 Swanst. 428; Jarrold v. Houlston, 3 K. & J. 708.

[4] Carnan v. Bowles, 2 Bro. C. C. 80; ——— v. Lee, 4 Ves. 681; Lewis v. Bowles, 1 Bro. 499; Mawman v. Tegg, 2 Russ. 385; [Law v. Ward, L. R. 6 Eq. 416; Morris v. Ashlee, L. R. 7 Eq. 34].

[5] Lewis v. Fullarton, 2 Beav. 6.

by that means the injunction which restrained the publication of my literary matter prevents also the publication of his own literary matter, he has only himself to blame." [6]

*1647 *By analogy to the principle upon which the Court proceeds in cases of copyright, it will also interfere to restrain the publication of manuscript treatises, or private letters which bear the character of literary composition.[1] This was established, with regard to manuscripts, in *Mr. Webb's* and *Mr. Forrester's* cases: the former of whom had his Precedents of Conveyancing stolen out of his chambers; and the latter had his notes copied by a clerk to the gentleman to whom he had lent them: [2] in both instances, the printing and publishing them were restrained by injunction. The same protection was extended to Lord Clarendon's History, a copy of which had been given by his son to Mr. Gwynne: for it was not to be presumed, from such a gift, that he was to have the profit of multiplying it in print, although he might make every use of it except that.[3]

Upon the same principle, the publication of works of art, which the author thinks proper to keep private, or even of a catalogue describing them, will be restrained.[4]

Letters which bear the character of literary compositions must be treated as within the laws protecting the rights of literary property; and a violation of those rights is affected with the same consequences as the publication of a treatise in manuscript. Upon this ground Pope's, Swift's, and Lord Chesterfield's Letters have all been protected by means of an injunction; [5] but a question has been raised, and a doubt suggested, how far the like protection would be given, where the letters published did not fall, in strictness, within the terms of literary compositions.[6] It is now, however, settled that the writer of a letter has a joint property in it, with the person to whom it is addressed. The receiver has a special property in it; but no more: it is a gift to him for the purpose of reading, and in some cases for the purpose of keeping it; but *ultra* the purposes for which it was sent, the property of the letter remains in the sender: which being so, it cannot be published without the writer's consent.[7] And it is immaterial whether the publication is made with a view to profit or not: if for profit,

[6] Mawman *v.* Tegg, 2 Russ. 385, 391; and see Jarrold *v.* Houlston, *ubi sup.*

[1] See Brandett *v.* Lance, 8 Paige, 24; 2 Story Eq. Jur. § 943.

[2] Webb *v.* Rose, cited 2 Bro. P. C. ed. Toml. 138; Forrester *v.* Waller, cited *ibid.*; Barr. 2331; and see Southey *v.* Sherwood, 2 Mer. 435.

[3] Duke of Queensberry *v.* Shebbeare, 2 Eden, 329.

[4] Prince Albert *v.* Strange, 1 M'N. & G. 25; 13 Jur. 109; 2 De G. & S. 652.

[5] Pope *v.* Curl, 2 Atk. 342; Thompson *v.* Stanhope, Amb. 737.

[6] 2 Story Eq. Jur. §§ 944, 945. An author of letters or papers of whatever kind, whether they be letters of business or private letters, or literary compositions, has a property and an exclusive copyright therein, unless he unequivocally dedicate them to the public, or to some private person; and no person has any right to publish them without his consent, unless such publication be required to establish a personal right or claim or to vindicate character. Folsom *v.* Marsh, 2 Story, 100; 2 Story Eq. Jur. § 946 *et seq.*

[7] [See Hopkinson *v.* Lord Burghley, L. R. 2 Ch. App. 447.] If the solicitor of a company writes a letter apparently on behalf of the company, he is not entitled to prevent its publication, although he swears it was written in his private capacity. Howard *v.* Gunn, 32 Beav. 462.

* the party is then selling, and, if not for profit, he is then giv- *1648
ing, that of which a portion belongs to the writer.[1] But, notwithstanding this right of property, the conduct of the plaintiff may be such as not to entitle him to the interference of the Court. Thus, the plaintiff was left to his legal remedy, where he had held the defendant out to the public as a person giving false intelligence upon spurious authority, and the intelligence had come from the plaintiff himself: as was proved and confirmed by several letters which formed the subject of dispute.[2]

Injunctions will also be granted to restrain infringements of the right to the title of a book or periodical.[3]

A similar jurisdiction exists in Equity to restrain, by injunction, the improper use by one man of the name or trade-mark of another,[4] and is exercised upon similar principles to those which are applied in cases of copyrights, patents, and other rights of a similar description. But it rests upon property, and not upon the fraud on the public; and, therefore, will not be exercised, unless it appears that the plaintiff has sustained, or is likely to sustain, pecuniary loss from the acts complained of.[5]

[1] Earl of Granard *v.* Dunkin, 1 Ball & B. 207; Pope *v.* Curl, *ubi sup.*; Gee *v.* Pritchard, 6 Swanst. 402.

[2] Lord and Lady Percival *v.* Phipps, 2 V. & B. 19.

[3] Hogg *v.* Kirby, 8 Ves. 215; Prowett *v.* Mortimer, 2 Jur. N. S. 414, V. C. S.; Clement *v.* Maddick, 1 Giff. 98; 5 Jur. N. S. 592; Ingram *v.* Stiff, 5 Jur. N. S. 947; and see Bradbury *v.* Dickens, 27 Beav. 53; Correspondent Newspaper Company *v.* Saunders, 11 Jur. N. S. 540; 13 W. R. 804, V. C. W.; Maxwell *v.* Hogg, 1 W. N. 329; 12 Jur. N. S. 916, V. C. S.; L. R. 2 Ch. Ap. 307.

[4] See 22 Lond. Law Mag. 148; 23 Amer. Jur. 138; Sykes *v.* Sykes, 3 B. & C. 541; Canham *v.* Jones, 2 V. & B. 218; Stewart *v.* Smithson, 1 Hilton, 119; Williams *v.* Johnson, 2 Bosw. 1; Merrimack Manuf. Co. *v.* Garner, 4 E. D. Smith, 387; Clark *v.* Clark, 25 Barb. 76; Lemoine *v.* Garston, 2 E. D. Smith, 343; Colleen *v.* Brunton, 5 McLean, 256; Gillott *v.* Kettle, 3 Duer, 624; Ames *v.* King, 2 Gray, 379; Bowman *v.* Floyd, 3 Allen, 76; see Genl. Sts. Mass. c. 56. [See also, McLean *v.* Fleming, 96 U. S. 245; where the subject is largely and ably discussed by Mr. Justice Clifford; Canal Co. *v.* Clark, 13 Wall. 311; Glen *v.* Hall, 6 Lans. 158; as to the use of a trade name, see Hookham *v.* Pottage, L. R. 8 Ch. App. 91; Wotherspoon *v.* Currie, L. R. 5 H. L. 508; Taylor *v.* Carpenter, 3 Sto. 458. To warrant the injunction, the resemblance between the trade-marks must be such as would deceive the ordinary mass of purchasers. Brooklyn White Lead Co. *v.* Masury, 25 Barb. 416; Colman *v.* Crump, 70 N. Y. 573; Caswell *v.* Davis, 58 N. Y. 223; Gorham Co. *v.* White, 14 Wall. 511; Newman *v.* Alford, 51 N. Y. 192; Lee *v.* Bacher, 14 Blatchf. 442; Metzler *v.* Wood, 8 Ch. Div. 606; Singer Machine Manufacturers *v.* Wilson, 3 App. Cas. 376. The plaintiff may be repelled by fraud and deception as to the origin and qualitity of the articles as to which he claimed a trade-mark: Seabury *v.* Grosvenor, 14 Blatchf. 262; or by misrepresentation that the patent was still subsisting under which the article was originally made: Cheavin *v.* Walker, 5 Ch. Div. 850. It seems that there is no property in the name of a place, which will entitle the owner to an injunction against its assumption by a neighboring landowner. Day *v.* Brownrigg, 10 Ch. Div. 294.]

[5] Webster *v.* Webster, 3 Swanst. 490, n.; Martin *v.* Wright, 6 Sim. 297; Routh *v.* Webster, 10 Beav. 561; Clark *v.* Freeman, 11 Beav. 112; Edelsten *v.* Edelsten, 1 De G., J. & S. 185; Batty *v.* Hill, 1 H. & M. 264; Hall *v.* Barrows, [4 De G., J. & S. 150;] Leather Cloth Company *v.* American Leather Cloth Company, 11 H. L. Ca. 523; and see Emperor of Austria *v.* Day, 3 De G., F. & J. 217; 2 Giff. 628. The Court has jurisdiction to restrain the publication of any document tending to the destruction of property, whether consisting of money or of professional reputation by which property is acquired. On this principle the publication of a notice, stating that the plaintiff was a partner in a bankrupt firm, was restrained. Dixon *v.* Holden, L. R. 7 Eq. 488; Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551. [But Dixon *v.* Holden, and Springhead Spinning Co. *v.* Riley, have been expressly overruled, so far as they seemed to sanction an injunction against the publication of a libel. Prudential Assurance Co. *v.* Knott, L. R. 4 Ch. App. 142. See *ante*, 1644, n. 7. In Thorley's Cattle Food Co. *v.* Massam, 6 Ch. Div. 582, the question is reexamined by Malins V. C., under the provisions of the Judiciary Act.]

Any article of manufacture, not protected by patent, may be made and sold by any person; and that too by the name given to *1649 * it by the inventor.[1] But a man has no right to sell his own goods or manufactures under the pretence that they are the goods or manufactures of another. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.[2] Hence there arises so much of a property in a name or mark, that the Court will interfere by injunction against a person using the name or mark of another, even though there be no intentional deception.[3]

With respect to these cases, it may be observed, that the remedy given in Equity will be withheld, if there has been any improper conduct on the part of the plaintiff. On this principle, the Court will refuse to grant an injunction, where the plaintiff has made false representations to the public concerning the article which he seeks to protect.[4]

By "The Merchandise Marks Act, 1862," further remedies are given for the infringement of trade-marks; but it is provided, that nothing therein contained is to take away, or prejudicially affect any remedy at Law or in Equity; or excuse any person from answering, or making discovery; provided, that no evidence or discovery which any person shall be compelled to give or make shall be admissible in evidence against him, in any criminal proceedings, or in any proceedings thereunder.[5]

[1] Blanchard *v.* Hill, 2 Atk. 484; Young *v.* Macrae, 9 Jur. N. S. 322. V. C. W.; [Liebig's Extract of Meat Co. *v.* Hanbury, 17 L. T. N. S. 298; Emerson *v.* Badger, 101 Mass. 82.]

[2] See Brooklyn White Lead Co. *v.* Masury, 25 Barb. 416; Taylor *v.* Carpenter, 3 Story, 458; Marshall *v.* Ross, L. R. 8 Eq. 651; Lee *v.* Haley, L. R. 5 Ch. Ap. 155.

[3] Per Lord Langdale, in Perry *v.* Truefitt, 6 Beav. 73; and see Millington *v.* Fox, 3 M. & C. 338; Motley *v.* Downman, 3 M. & C. 1; Gout *v.* Aleploglu, 6 Beav. 69, n.; Franks *v.* Weaver, 10 Beav. 297; Shrimpton *v.* Laight, 18 Beav. 164; Rodgers *v.* Nowill, 6 Hare, 325; 3 De G., M. & G. 614; Burgess *v.* Burgess, 3 De G., M. & G. 896; Collins Company *v.* Brown, 3 K. & J. 423; Farina *v.* Silverlock, 4 K. & J. 650; 6 De G., M. & G. 214; Welch *v.* Knott, 4 K. & J. 747; Churton *v.* Douglas, Johns. 174; Dent *v.* Turpin, 2 J. & H. 139; Woollam *v.* Ratcliff, 1 H. & M. 259; Batty *v.* Hill, *ib.* 264; Braham *v.* Bustard, *ib.* 447; Cartier *v.* Carlile, 31 Beav. 292; Edelsten *v.* Edelsten, and Hall *v.* Barrows, *ubi sup.*; Bury *v.* Bedford, 9 Jur. N. S. 956, M. R.; 10 Jur. N. S. 503, L. JJ.; Colonial Life Assurance Company *v.* Home & Colonial Company, 33 Beav. 548; M'Andrew *v.* Bassett, 10 Jur. N. S. 492, V. C. W.; *ib.* 550; 12 W. R. 777, L. C.; Banks *v.* Gibson, 11 Jur. N. S. 180; 34 Beav. 566; Ponsardin *v.* Peto, 33 Beav. 642; Glenny *v.* Smith, 2 Dr. & S. 476; Barnett *v.* Leuchars, 14 W. R. 166; Seixo *v.* Proverende, L. R. 1 Ch. Ap. 192; Ainsworth *v.* Walmsley, L. R. 1 Eq. 518; Nunn *v.* D'Albuquergue, 34 Beav. 595; Morgan *v.* M'Adam, 1 W. N. 380; Maxwell *v.* Hogg, L. R. 2 Ch. Ap. 307, 314, 318; Marshall *v.* Ross, L. R. 8 Eq. 651; Leather Club Co. *v.* Lorsont, L. R. 9 Eq. 345. For the principles on which an account is directed in such cases, see Moet *v.* Couston, 33 Beav. 578; Harrison *v.* Taylor, 11 Jur. N. S. 408; Barnett *v.* Leuchars, Nunn *v.* D'Albuquergue, *ubi sup.*

[See Lee *v.* Haley, L. R. 5 Ch. App. 155; Wheeler, &c. Man. Co. *v.* Shakespeare, 39 L. J. Ch. 36; Boardman *v.* Meriden Britania Co., 36 Conn. 207; Meriden Britania Co. *v.* Parker, 39 Conn. 450. "The original" may be used by the inventor and those claiming under him to the exclusion of others. Cocks *v.* Chandler, L. R. 11 Eq. 446. See Upman *v.* Elkan, L. R. 12 Eq. 140; Gillott *v.* Esterbrook, 48 N. Y. 374; Gourand *v.* Trust, 3 Hun, 627; Meneely *v.* Meneely, 1 Hun, 367.]

[4] Perry *v.* Truefitt, 6 Beav. 66; Pidding *v.* How, 8 Sim. 477; Flavel *v.* Harrison, 10 Hare, 467; Leather Cloth Company *v.* American Leather Cloth Company, 11 H. L. Ca. 523; Marshall *v.* Ross, L. R. 8 Eq. 651; Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345; and see Edelsten *v.* Vick, 11 Hare, 78.

[5] 25 & 26 Vic. c. 88, § 11. The rights of parties in reference to trade-marks, &c., are

* Injunctions may also be granted to restrain corporations and *1650 other public bodies from committing acts which are *ultra vires*, or from appropriating their property for purposes other than those for which they were constituted, or to prevent the excessive or undue exercise by them of parliamentary powers.[1] Instances of such interference are of very frequent occurrence; but are too numerous to be referred to in detail within the limits of the present Treatise.[2]

regulated by statute in Massachusetts, which also provides for restraining by injunction, the unlawful use thereof. Gen. Sts. c. 56; see Ames *v.* King, 2 Gray, 379; Bowman *v.* Floyd, 3 Allen, 76.

[1] If a public body, which has powers given it by a statute for the performance of a particular object, exercises its powers so as to injure the property of others, it is responsible for the injury, unless the act done was absolutely necessary for the performance of the object of the statute. Attorney-General *v.* Colney Hatch Lunatic Asylum, L. R. 4 Ch. Ap. 146. And Equity is bound to interfere by injunction, if the exigency of the case require it. Del. & Rar. Canal & C. & A. R. & T. Co. *v.* Rar. & Del. Bay R. Co., 1 C. E. Green, 321, 378.

[Although an injunction will not issue to enjoin a municipal corporation from opening a street over particular land (Chicago *v.* Wright, 69 Ill. 318), yet it will lie where the corporation is proceeding without having taken steps to condemn the land according to law. Pierpont *v.* Harrisville, 9 W. Va. 215; see Poirier *v.* Fetter, 20 Kan. 47. Or where the corporation has condemned the land without providing compensation for the owner. Folley *v.* City of Passaic, 11 C. E. Green, 216. And a municipal corporation may be enjoined from purchasing land not needed for a public purpose. Lewis *v.* Providence, 10 R. I. 97.

A State may, through its officers, maintain proceedings by injunction to restrain a public corporation from doing acts in violation of the law and constitution; as where a county is about wrongfully to issue its bonds in favor of a railroad. State *v.* County Court, 51 Mo. 350; State *v.* Calloway County, 51 Mo. 325. And so, the issuance of negotiable bonds by a county will be enjoined, when the statute authorizing the issuance has not been complied with. Union Pacific R. Co. *v.* Lincoln County, 3 Dill. 300; Winston *v.* Tenn. & Pac. R. Co., 1 Baxt. 60. So if the bonds are unlawful. Curtenius *v.* Grand Rapids R. Co., 37 Mich. 583. And their payment will be enjoined, if issued. Missouri R. Co. *v.* Commissioners, 12 Kan. 230. And see, as to the jurisdiction by injunction generally over public bodies, People *v.* Canal Board, 55 N. Y. 390; Self *v.* Jenkins, 71 N. C. 578; Aurora, &c. R. Co. *v.* Lawrenceburgh, 56 Ind. 80.

Injunction will not lie to restrain a municipal corporation from executing an unlawful town ordinance. Cohen *v.* Goldsboro, 77 N. C. 2. Nor from passing a proposed ordinance upon the ground that it involves an unconstitutional interference with vested rights. Des Moines Gas Co. *v.* Des Moines, 44 Iowa, 505. Nor from holding an election, under a legislative act, to test the wishes of the citizens in reference to a tax. Rondanez *v.* Mayor of New Orleans, 29 La. Ann. 271. Nor to enjoin the Mayor and Aldermen of a city from removing a person from office, and appointing a successor. Delahanty *v.* Warner, 75 Ill. 185.

The power to hold an election is political, and will not be restrained by injunction. Harris *v.* Schryock, 82 Ill. 119. Nor will an injunction lie at the suit of the incumbent of a public office to restrain a claimant of the office from exercising its duties. Jones *v.* Commissioners, 77 N. C. 282. Nor to enjoin a public officer from receiving the fees of office. Stone *v.* Wetmore, 42 Ga. 601.

If a corporation use property taken for its purposes without paying the compensation to which the owner was entitled, and for which he has recovered judgment against the corporation, an injunction will lie. Gilman *v.* Sheboygan R. Co., 40 Wis. 653; after failure to make the money by execution: Peoria, &c. Ry. Co. *v.* Schertz, 84 Ill. 135. The Court will, at the instance of a shareholder, restrain a corporation by injunction from surrendering its charter, or doing an act which would work a forfeiture of its charter. Ward *v.* Society of Attorneys, 1 Coll. 370; Rendall *v.* Crystal Palace Co., 4 K. & J. 426. But see, where the bill was filed to restrain the lease of corporate works under legislative authority. Black *v.* Delaware, &c. Canal Co., 7 C. E. Green, 130. See also Goodwin *v.* New York R. Co., 43 Conn. 494.

The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. Railway Co. *v.* McCarthy, 96 U. S. 258.]

[2] See cases collected in Seton, 296 *et seq.*; 929 *et seq.*; and forms of orders, 925 *et seq.*; 928 *et seq.*; and for the subsequent cases, see Simpson *v.* Westminster Palace Hotel Company, 8 H. L. Ca. 712; 2 De G., J. & J. 141; Stockton & Darlington Railway Company *v.* Brown, 9 H. L. Ca. 246; Lind *v.* Isle of Wight Ferry Company, 1 N. R. 13; Wedmore *v.* Mayor, &c. of Bristol, 11 W. R. 136; Maunsell *v.* Midland Great Western Railway (of Ireland) Company, 1 H. & M. 130; 9 Jur. N. S. 660; Peto *v.* Brighton, Uckfield, & Tunbridge Wells Railway Company, 11 W. R. 874; Biddulph *v.* Vestry of St. George, Hanover Square, 9 Jur. N. S. 953; 11 W. R. 739, L. JJ.; Attorney Gen-

Upon grounds of irreparable mischief, Courts of Equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment;[3] and it matters not, in such cases, whether the secrets be secrets of trade, or secrets of title, or *1651 other secrets of the party important to his interests.[4] *The Court, however, refused to grant an injunction to restrain the defendant from imparting the secret of an invention which had been the subject of a patent long since expired;[1] and it will not interfere to prevent the disclosure of secrets, by means of which frauds have been committed.[2]

Another purpose for which injunctions may be applied, is to prevent the alienation of property, where it would work an irremediable or gross injustice.[3] Under such circumstances, an injunction will be granted; and it often has been, when the alienation contemplated was strictly legal, but other circumstances, which the Courts of Law could not take notice of, would have rendered it improper that such an alienation should be made. Thus, in the case of negotiable instruments, if a bill or note affected with fraud is transferred to a *bonâ fide* holder, without notice, the latter may be entitled to recover upon it: for the bill or note would be a good security in the hands of the person to whom it was so transferred; and, therefore, the person against whose rights they may be made available is entitled to protection from that danger, and the mischief attending it.[4] In such cases, the injunction will usually

eral *v.* Metropolitan Board of Works, 1 H. & M. 298; Swaine *v* Great Northern Railway Company, 12 W. R. 391, L. JJ.; Macey *v.* Metropolitan Board of Works, 10 Jur. N. S. 333; Rogers *v.* Hull Dock Company, 10 Jur. N. S. 1245; 13 W. R. 217, L. C.; Hutton *v.* Scarborough Cliff Hotel Company (Limited), 2 Dr. & S. 514, 521; Lloyd *v.* London, Chatham, & Dover Railway Company, 2 De G., J. & S. 568; Galloway *v.* Mayor, &c. of London (No. 1), 2 De G., J. & S. 213; 34 Beav. 203; 2 De G., J. & L. 639; affirmed L. R. 1 H. L. 34; 12 Jur. N. S. 747; Goold *v.* Great Western Deep Dean Coal Company, 6 N. R. 357, L. C.; Simpson *v.* South Staffordshire Waterworks Company, 11 Jur. N. S. 453; Flower *v.* London, Brighton, & South Coast Railway Company, 2 Dr. & Sm. 330; Attorney-General *v.* Mayor, &c. of Kingston-upon-Thames, 11 Jur. N. S. 596; Pentney *v.* Lynn Paving Commissioners, 13 W. R. 983; Vane *v.* Cockermouth Railway Company, *ib.* 1015; Featherstonaugh *v.* Lee Moor Clay Company, L. R. 1 Eq. 318; University Life Ass. Co. *v.* Metropolitan Railway Co., 1 W. N. 167; Midland Railway Co. *v.* London & Northwestern Railway Co., L. R. 2 Eq. 524; [Attorney-General *v.* Chicago, &c. R. Co., 35 Wis. 425]. The grant of a franchise to operate a railroad, does not confer the right to use upon it locomotives so constructed as to throw out burning coals that may set fire to buildings along the line. The Court of Chancery may interfere with such use by injunction. King *v.* The Morris & Essex R. R. Co., 3 C. E. Green, 397.

[3] 2 Story Eq. Jur. § 954. One who invents or discovers, and keeps secret, a process of manufacture, whether proper for a patent or not, has a property therein, which a Court of Chancery will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use or disclose it to third persons. Peabody *v.* Norfolk, 98 Mass. 452.

[4] Earl Cholmondeley *v.* Lord Clinton, 19 Ves. 261; Evitt *v.* Price, 1 Sim. 483; Yovatt *v.* Winyard, 1 J. & W. 394; Davies *v.* Clough, 8 Sim. 262; Lewis *v.* Smith, 1 M'N. & G. 417; Holloway *v.* Holloway, 13 Beav. 209; Morrison *v.* Moat, 9 Hare, 241; 15 Jur. 787; 16 Jur. 321, L. JJ.

[1] Newbery *v.* James, 2 Mer. 446.

[2] Follett *v.* Jeffreyes, 1 Sim. N. S. 1; Gartside *v.* Outram, 3 Jur. N. S. 39, V. C. W.

[3] 2 Story Eq. Jur. § 953. An injunction may be granted to prevent the transfer of a specific thing, which, if transferred, would be irretrievably lost to the owner; such as negotiable securities and stocks. Osborn *v.* United States Bank, 9 Wheat. 738; Darst *v.* Brockway, 11 Ohio, 462; Atlantic De Laine Co. *v.* Tredick, 5 R. I. 171; [Belohradsky *v.* Kuhn, 69 Ill. 547].

[4] Smith *v.* Haytwell, Amb. 66; Lloyd *v.* Gurdon, 2 Swanst. 180; Patrick *v.* Harrison, 3 Bro. C. C. 476; Lord Portarlington *v.* Soulby, 3 M. & K. 104; Earl of Milltown *v.*

be granted, on an *ex parte* application, supported by an affidavit verifying the truth of the fraudulent circumstances, lest the defendant should, upon intimation of the suit, defeat its object by negotiating the security.[5] Where a bill of exchange has been negotiated by means of a forgery of the name of the payee as indorser, a *bonâ fide* holder of it will be restrained from suing the acceptor upon it; and the Court will, at the hearing, direct the forged instrument to be delivered up to be cancelled: for, though the holder may have paid a value for it, yet, if the indorsement under which he received it is a forgery, it is the same thing as if there was no indorsement of it, and then he is not in truth the holder of it: for he has no title by indorsement, and that was the only way by which he could obtain a title to it.[6]

* Upon a like principle, the Court will interfere to restrain the *1652 transfer of stock,[1] or the payment of dividends, or the sale of specific chattels, where the title to the stock is controverted between principal and agent;[2] or where it is proposed to pay the dividends on erroneous principles;[3] or where it is necessary to protect the enjoyment of specific chattels, which cannot be the subject of compensation in damages.[4]

The Court, acting upon the principles above pointed out, will also grant an injunction to restrain a party from making vexatious alienations of the subject-matter of the suit, *pendente lite*.[5] It will, therefore, enjoin a vendor from conveying the legal title to real estate, pending a suit for the specific performance of a contract for the sale of that estate:[6] but it will not interfere in this manner, before the hearing, if there is any serious question whether any contract exists between the parties.[7]

In like manner, sales may be restrained in all cases where they are inequitable, or may operate as a fraud upon the rights or interests of third persons: as in cases of trusts and special authorities, where the party is abusing his trust or authority;[8] and where sales have been

Stewart, 8 Sim. 371; 3 M. & C. 18; Quarrier *v.* Colston, 1 Phil. 147; Maitland *v.* Backhouse, 16 Sim. 58; 12 Jur. 45, L. C.; Espey *v.* Lake, 10 Hare, 260; and for a collection of cases and forms of orders, see Seton, 918, 919.

[5] Smith *v.* Attwell, 3 Atk. 566; Hood *v.* Aston, 1 Russ. 412.

[6] Lebaire *v.* La Nauze, 1 Y. & C. Ex. 294; and see Ehlermann *v.* Goldschmidt, 1 De G., F. & J. 4.

[1] Ante, 1651, note 3; 2 Story Eq. Jur. § 907.

[2] Lord Chedworth *v.* Edwards, 8 Ves. 46; but see Cox *v.* Paxtons, 1 Mad. Ch. Pr. 2d ed. 185; 3d ed. 215.

[3] Reeve *v.* Parkins, 2 J. & W. 390; Sturge *v.* London & North Western Railway Company, 7 De G., M. & G. 158; 1 Jur. N. S. 713; Henry *v.* Great Northern Railway Company, 4 K. & J. 1, 1 De G. & J. 606.

[4] Lady Arundell *v.* Phipps, 10 Ves. 139; Wood *v.* Rowcliffe, 2 Phil. 382; 2 Seton Dec. (3d Eng. ed.) 937.

[5] Daly *v.* Kelly, 4 Dow, 449; Powell *v.* Wright, 7 Beav. 444, 452; Rhodes *v.* Buckland, 16 Beav. 212, 219; and see Turner *v.* Wright, 4 Beav. 40; Great Western Railway Company *v.* Birmingham & Oxford Railway Company, 2 Phil. 597; Shrewsbury & Chester Railway Company *v.* Shrewsbury & Birmingham Railway Company, 1 Sim. N. S. 410.

[6] Echliff *v.* Baldwin, 16 Ves. 267; Daly *v.* Kelly, *ubi sup.*

[7] Hadley *v.* London Bank of Scotland, 3 De G., J. & S. 68.

[8] Anon., 6 Mad. 10. A mortgagee may be restrained by injunction from selling the equity of redemption, by virtue of judgments, in satisfaction of the mortgage debt. Van Mater *v.* Conover, 3 C. L. Gazet. 88. [The Courts will, under circumstances, restrain a mortgagee, *pendente lite*, selling the mortgaged property; and will also restrain the alienation of property charged by the judgment or decree of another Court. Builer *v.* Mutual Loan Ass., W. N. (1869) 80; Sidney *v.* Sidney, W. N. (1867) 218.]

made to satisfy certain trusts and purposes, and there is danger of a misapplication of the proceeds, Courts of Equity will also restrain the purchaser from paying over the purchase-money.[9] So also, husbands may be restrained from transferring property, in fraud of the equitable rights of their wives.[10]

Acting upon the same principles, the Court will, where there is a dispute respecting the right of presentation to an ecclesiastical benefice, not only restrain the party having the legal right of presentation from presenting, but it will also enjoin the bishop from inducting, and from taking advantage of a lapse, pending the litigation, by collating to the benefice, till the decree of the Court.[11]

*1653 *The Court has also, upon the same ground, restrained the trustees of a dissenting chapel, from appointing, as a minister of that chapel, a person not duly qualified according to the constitution of the chapel, to hold the office: although it refused that part of the motion which asked for an injunction to restrain the trustees from permitting persons not duly qualified from officiating occasionally, during the short time that might elapse before the hearing, when the facts upon both sides must be known.[1]

An injunction will also be granted to restrain the employment of a ship in a manner forbidden by the charter-party;[2] or the indorsement of the certificate of a ship's registry;[3] or the sailing of a ship, upon the application of a part-owner, whose share is unascertained, in order to ascertain that share, and to obtain the usual security given in the Court of Admiralty for the due return of the ship.[4]

So an injunction will be granted against the removal of timber, wrongfully cut down.[5]

Injunctions will also be granted to compel the due observance of agreements and covenants, where there is no effectual remedy at Law.[6]

[9] Green *v.* Lowes, 3 Bro. C. C. 217; Mathews *v.* Jones, 2 Anst. 506; Hawkshaw *v.* Parkins, 2 Swanst. 549.

[10] Anon., 9 Mod. 43; Roberts *v.* Roberts, 2 Cox, 422; Flight *v.* Cook, 2 Ves. S. 619; Cadogan *v.* Kennett, Cowp. 432, 436.

[11] Nicholson *v.* Knapp, 9 Sim. 326; Attorney-General *v.* Cuming, 2 Y. & C. C. C. 139; and see Edenborough *v.* Archbishop of Canterbury, 2 Russ. 112; and Seton, 904; *ib.* 943, No. 1.

[1] Milligan *v.* Mitchell, 1 M. & K. 446; Attorney-General *v.* Munro, 2 De G. & S. 122; Attorney-General *v.* Murdoch, 7 Hare, 445; 1 De G., M. & G. 86; Daugars *v.* Rivaz, 28 Beav. 233; 6 Jur. N. S. 854; 1 W. N. 301, L. JJ.; Attorney-General *v.* Gould, 28 Beav. 485; Perry *v.* Shipway, 1 Giff. 1; 5 Jur. N. S. 535; 4 De G. & J. 353; 5 Jur. N. S. 1015.

[The Court refused to interfere in the case of an independent church organization. Trustees *v.* Proctor, 66 Ill. 11. And an incorporated medical society, Greg *v.* Massachusetts Med. Soc., 111 Mass. 185. And a Board of Trade, Fisher *v.* Board, 80 Ill. 85.]

[2] De Mattos *v.* Gibson, 4 De G. & J. 276; 5 Jur. N. S. 347; Sevin *v.* Deslandes, 7 Jur. N. S. 837, M. R.; Collins *v.* Lamport, 11 Jur. N. S. 1; 13 W. R. 283, L. C.

[3] Thompson *v.* Smith, 1 Mad. 395; and see Follett *v.* Delany, 2 De G. & S. 235; Clarke *v.* Batters, 1 K. & J. 242; Armstrong *v.* Armstrong, No. 1, 21 Beav. 71; 1 Jur. N. S. 859, 860; De Mattos *v.* Gibson, and Sevin *v.* Deslandes, *ubi sup.*; Orr *v.* Dickinson, Johns. 1; 5 Jur. N. S. 672; Holderness *v.* Lamport, 29 Beav. 129; 7 Jur. N. S. 564.

[4] Haly *v.* Goodson, 2 Mer. 77; Christie *v.* Craig, *ib.* 137.

[5] Anon., 1 Ves. J. 93.

[6] [Altman *v.* Royal Aquarium Society, 3 Ch. Div. 228.] As to injunctions in reference to agreements, see 2 Seton Dec. (3d Eng. ed.) 921 *et seq.* As to the jurisdiction in Equity to enjoin the collection of the purchase-money of an estate, where the title fails, or is in controversy, &c., see Bumpus *v.* Platner, 1 John. Ch. 213; Johnson *v.* Gere, 2 John. Ch. 546; Platt *v.* Gilchrist, 3 Sandf. S. C. 118; Shannon *v.* Marselis, Saxton, 413; Jaques *v.* Esler, 3 Green Ch. 462; Morrison *v.*

Thus, in the old case of the parish bell, where certain persons, owning a house in the neighborhood of a church, entered into an agreement to erect a cupola and clock, in consideration that the bell should not be rung at five o'clock in the morning to their disturbance: the agreement being violated, an injunction was afterwards granted to prevent the bell being rung at that hour.[7] * Upon the same ground, a *1654 celebrated play-writer, who had covenanted not to write any dramatic performances for another theatre, was, by injunction, restrained from violating the covenant.[1] So an author, who had sold his copyright in a work, and covenanted not to publish any other to its prejudice, was restrained by injunction from so doing;[2] and an actor will be restrained from performing in violation of an agreement.[3]

Upon the same principle, an injunction will be awarded, to restrain the erection of buildings in breach of a covenant not to build in a particular manner, or on a particular site;[4] and it is not necessary, in

Beckwith, 4 Monroe, 73. [A defect in the title of land sold is no defence to a bill to enforce the vendor's lien, or to foreclose a mortgage on the land given to secure the purchase-money: Edwards *v.* Bodine, 26 Wend. 109; Miller *v.* Avery, 2 Barb. Ch. 582; Hulfish *v.* O'Brien, 5 C. E. Green, 230; Price *v.* Lawton, 12 C. E. Green, 325; Curd *v.* Davis, 1 Heisk. 574; but it may be a defence to a personal decree for any surplus of the purchase-money after exhausting the lien. Withers *v.* Morrell, 1 Edw. Ch. 562; Hurley *v.* Coleman, 3 Head, 266. And where the purchaser is in possession under a deed with covenants of title, a defect of title is no ground for enjoining the collection of the purchase-money, at Law, and no defence to a bill to enforce the vendor's lien or a purchase-money mortgage. Woodruff *v.* Brown, 2 Head, 275; Cohen *v.* Woollard, 2 Tenn. Ch. 680; Hill *v.* Dawson, 5 C. E. Green, 228; Hart *v.* Hannibal, &c. R. Co., 65 Mo. 509. It is otherwise if there be fraud in the sale: Ingram *v.* Morgan, 4 Humph. 66; Topp *v.* White, 12 Heisk. 165; or where there has been a breach of the covenants, and the vendor insolvent: Young *v.* Butler, 1 Head, 611; Baird *v.* Goodrich, 3 Heisk. 20; or a breach of covenant against encumbrances: Dayton *v.* Dennerry, 10 C. E. Green, 110; or fraudulent representations as to the quantity of land: Dayton *v.* Melick, 12 C. E. Green, 362; or outstanding title shown in persons not made parties: Champlin *v.* McLeod, 54 Miss. 484; or the contract is executory: Buchanan *v.* Alwell, 8 Humph. 316. Epp *v.* White, 12 Heisk. 165. But the injunction would be limited to the protection of the purchaser. Bridges *v.* Robinson, 2 Leigh, 95, 120. And a bill to enjoin the collection of the purchase-money is fatally defective if it do not specifically set forth the defence of title relied on. Edwards *v.* Clinton, 4 W. Va. 462; Jones *v.* Fulghum, 3 Tenn. Ch. 193. And see, where the contract is specifically enforced at the instance of the vendee, the vendee being kept out of possession, and the property allowed to lie idle, Phillips *v.* Silvester, L. R. 8 Ch. App. 173. The vendor of a leasehold interest has an implied lien thereon to secure the purchase-money. Choat *v.* Tighe, 10 Heisk. 621; In *re* Brentwood Brick and Coal Co., 4 Ch. Div. 562.]

[7] Martin *v.* Nutkin, 2 P. Wms. 266. Where a block of buildings has been erected, with particular covenants respecting the enjoyment thereof, each purchaser or owner will be entitled to an injunction to prevent a breach of the covenants, as by the erection of livery stables, slaughter houses, glue factories, &c. Barrow *v.* Richards, 8 Paige, 351; Williams *v.* Jersey, 1 C. & P. 91; see Parker *v.* Nightingale, 6 Allen, 341.

[1] Morris *v.* Colman, 18 Ves. 437; Clarke *v.* Price, 2 Wils. 157.

[2] Barfield *v.* Nicholson, 2 S. & S. 1; Colburn *v.* Simms, 2 Hare, 543; Ainsworth *v.* Bentley, 14 W. R. 630; [Ward *v.* Beeton, L. R. 19 Eq. 207.]

[3] Lumley *v.* Wagner, 5 De G. & S. 485; 1 De G., M. & G. 604; Webster *v.* Dillon, 3 Jur. N. S. 432; *contra*, Kemble *v.* Kean, 6 Sim. 333; see also Fechter *v.* Montgomery, 33 Beav. 22.

[And see, where the contract fixed the damages in case of breach, Hahn *v.* Concordia Soc., 42 Md. 460. See also, Sanquirico *v.* Benedetti, 1 Barb. 315.

[4] Rankin *v.* Huskisson, 4 Sim. 13; Patching *v.* Dubbins, Kay, 1; Coles *v.* Sims, Kay, 56; 5 De G., M. & G. 1; Pigott *v.* Stratton, John. 344; 1 De G., F. & J. 33; Lord *v.* London, Chatham, & Dover Railway Company, 2 De G., J. & S. 568; Western *v.* Macdermott, L. R. 1 Eq. 499, M. R.; Peck *v.* Matthews, L. R. 5 Eq. 346. Each of the original owners of houses in a row entered into covenants with the original owner of all the land on which they stood as to what should be done in the garden attached to each house; an injunction was granted at the suit of the owner of one of the houses, restraining a breach of the covenants by the owners of another house, notwithstanding that small breaches of the covenants by other

order to justify the interference of the Court, that the covenant should run with the land.[6]

Injunctions have also been granted to restrain a person, who has covenanted not to exercise a certain trade within certain limits, from exercising such trade within the prescribed limits.[6] It is, however, quite settled that the mere sale of the good-will of a business does not *1655 imply a contract on the part of the vendor not * to set up a similar business, nor restrict him as to the place of carrying on that business.[1]

Where bankers had sanctioned an arrangement entered into by certain persons, copartners, who were indebted to them, whereby it was agreed that, upon the retirement of one of the copartners (the plaintiff), the assets should be transferred to the continuing partners, who were to take upon themselves the partnership liabilities, and that the bankers should release the plaintiff, who was the retiring partner, from his liability to them, but they afterwards attempted, by means of the debt, to make the retiring partner a bankrupt, they were restrained from so doing by injunction.[2]

And so, an injunction has been awarded to restrain the publication by the defendant (in violation of his agreement) of the fact that the plaintiff had consented to a judgment being entered up against him by the defendant.[3]

Injunctions have also been frequently granted, to restrain lessees, who had covenanted to keep the banks of rivers or ponds in repair, from

owners had not been interfered with, and that he himself had committed a small breach. Western *v.* Macdermott, L. R. 2 Ch. Ap. 72.

A restriction of the manner of using land granted, not against public policy, and beneficial to adjacent land of the grantor, whether inserted by way of condition or covenant, or otherwise, may be enforced in Equity against the grantee, or his assigns with notice. Whitney *v.* Union Railway Co., 11 Gray, 359; see Parker *v.* Nightingale, 6 Allen, 341.

[6] Tulk *v.* Moxhay, 2 Phil. 774; 13 Jur. 89; 11 Beav. 571; Moxhay *v.* Inderwick, 1 De G. & S. 708; Wilson *v.* Hart, 11 Jur. N. S. 735; 13 W. R. 988, V. C. W.; 2 H. & M. 551; affirmed L. R. 1 Ch. Ap. 463; 12 Jur. N. S. 460, L. JJ.; Clements *v.* Welles, L. R. 1 Eq. 200; 11 Jur. N. S. 991, M. R.; Western *v.* Macdermott, L. R. 2 Ch. Ap. 72; Whitney *v.* Union Railway Co., 11 Gray, 359; Barrow *v.* Richards, 8 Paige, 351; Feilden *v.* Slater, L. R. 7 Eq. 523. [Covenants controlling the enjoyment of land, though not binding at Law, will be enforced in Equity, provided the person into whose hand the land passes has taken it with notice of the covenant. Kirkpatrick *v.* Peshine, 9 C. E. Green, 206; McLean *v.* McKay, L. R. 5 P. C. 327; Hakell *v.* Wright, 8 C. E. Green, 389; Linzee *v.* Mixer, 101 Mass. 512; Dorr *v.* Harrihan, 101 Mass. 531; and see where lots are bounded upon a specified street, Zearing *v.* Raber, 74 Ill. 409; see also Lord Manners *v.* Johnson, 1 Ch. Div. 673.]

[6] Williams *v.* Williams, 2 Swanst. 253; Smith *v.* Mules, 9 Hare, 556; Simpson *v.* Chapman, 4 De G., M. & G. 154; Churton *v.* Douglass, John. 174; 5 Jur. N. S. 887; Clarkson *v.* Edge, 33 Beav. 227; 10 Jur. N. S. 871; Fox *v.* Scard, *ib.* 327; and see Sainter *v.* Ferguson, 1 M'N. & G. 286; 14 Jur. 255; Angier *v.* Webber, 14 Allen, 211; Leather Cloth Company *v.* Lorsont, L. R. 9 Eq. 345; [Berger *v.* Armstrong, 41 Iowa, 447; Richardson *v.* Peacock, 11 C. E. Green, 40. Compare Spicer *v.* Hoop, 51 Ind. 365; Caswell *v.* Gibbs, 33 Mich. 331; Harkinson's Appeal, 78 Pa. St. 196. So, where the contract is not to engage in the same business for a specified time: Baumgarten *v.* Broadaway, 77 N. C. 8; or at the same place under the forfeiture of a specified sum. Ropes *v.* Upton, 125 Mass. 258.]

[1] Churton *v.* Douglass, *ubi sup.*; and see cases cited 2 Swanst 254, n. (*a*); [Shackle *v.* Baker, 14 Ves. 468; White *v.* Jones, 1 Robt. 331; Moreau *v.* Edwards, 2 Tenn. Ch. 347. See, as to effect of sale of good-will and business on the right to use the partnership name, Levy *v.* Walker, 10 Ch. Div. 436].

[2] Attwood *v.* Banks, 2 Beav. 192; see Pim *v.* Wilson, 3 Phil. 653.

[3] Jamieson *v.* Teague, 3 Jur. N. S. 1206.

destroying or impairing them;[4] or an outgoing tenant from removing dung or crops, contrary to express covenants contained in his lease:[5] or to restrain the ploughing up of meadow lands;[6] and in one of the earliest cases upon this subject, an injunction was granted till the hearing, by the House of Lords, upon appeal, to restrain a lessee from digging sand and gravel, in violation of a covenant, secured by a penalty.[7]

Though a lessee is required, by Law, to cultivate the lands demised to him in a husbandman-like manner, conformable to the custom of the country,[8] yet this is usually defined by some express covenant. It has, upon this subject, been determined at Law, that a covenant to occupy in a good and husbandman-like manner, according to the custom of the country, will be broken by contravening the prevalent course of husbandry in the neighborhood; and that, even if the contract be simply to occupy the estate in a good and husbandman-like manner, this will throw a liability upon the tenant to cultivate the land according to the practice of the neighborhood;[9] and even, though a farm be held under a written agreement, the custom of the neighborhood may well be insisted upon, provided it be not either expressly or by implication excluded * by the terms of the agreement.[1] The same principle *1656 has been acted upon in Equity, where an injunction has been granted to restrain a tenant from year to year (who, it was said, was equally bound as a tenant for a longer period, to manage his farm in a husbandman-like manner), from removing crops, manure, &c., contrary to the custom of the country.[2] In a previous case, a tenant was restrained from ploughing up pasture land: although the lease did not contain an express covenant not to convert pasture into arable;[3] but the landlord was held entitled to the injunction, on the ground of there being a covenant to manage pasture in a husbandman-like manner.[4] Upon the same principle, the Court has interfered to restrain a tenant from sowing mustard, saffron, woad, and other deleterious crops: as being contrary to the course of husbandry.[5]

A distinction has been made, as to enforcing, by injunction, the specific performance of express covenants, and of implied agreements; and the Court has refused to interfere to restrain a tenant, who was holding over, from removing articles contrary to the custom of the country: as the Court would not imply special covenants, as to cultivation, from the mere act of holding over.[6]

[4] Lord Bathurst v. Burden, 2 Bro. C. C. 64; Lord Kilmorey v. Thackeray, cited *ib.* 65.

[5] Johnson v. Goldswaine, 3 Anst. 749; Gaast v. Lord Belfast, *ib.* n.; Pulteney v. Shelton, 5 Ves. 147; *ib.* 260, n. (a); Lord Grey de Wilton v. Saxon, 6 Ves. 106.

[6] Aylet v. Dodd, 2 Atk. 238; Woodward v. Gyles, 2 Vern. 119; Rolfe v. Peterson, 2 Bro. P. C. ed. Toml. 436.

[7] City of London v. Pugh, 4 Bro. P. C. ed. Toml. 395.

[8] Powley v. Walker, 5 T. R. 372.

[9] Legh v. Hewitt, 4 East, 154.

[1] Wigglesworth v. Dallison, Doug. 201; Senior v. Armytage, 1 Holt N. P. C. 197; Webb v. Plummer, 2 B. & Ald. 746. [See Frank v. Brunnemann, 8 W. Va. 102.]

[2] Onslow v. ——, 16 Ves. 173.

[3] See Atkins v. Chilson, 7 Met. 404.

[4] Drury v. Molins, 6 Ves. 328.

[5] Pratt v. Brett, 2 Mad. 62.

[6] Kimpton v. Eve, 2 V. & B. 349.

A covenant to repair, and, at the end of the term, to surrender buildings in good condition, does not preclude an injunction against pulling them down and carrying away the materials, just before the end of the term.[7]

Where there is a covenant not to convert premises into a shop, or to carry on a trade without a license in writing, the permission of the lessor, without writing, to carry on one trade, will not amount to a general license for any trade, so as to preclude the lessor from his right to an injunction.[8]

It appears formerly to have been considered, that the Court should not, in any case, interfere to restrain the breach of an agreement, if it was of such a character that it could not decree the specific performance of it.[9] But it seems that now, the Court will restrain a person from committing acts in breach of an agreement, although it cannot *1657 compel the performance of it;[10] and that where * an agreement consists of two distinct parts, one of which the Court can enforce, although it cannot enforce the other, and the bill is filed simply for an injunction to restrain the violation of the former part, the Court will grant the injunction, notwithstanding that it could not enforce the agreement *in toto*.[1]

An agreement may be enforced by injunction, although the violation is not shown to be injurious;[2] and the Court will not, it seems, refuse to interfere, on the ground that a mistake has been committed by both parties in the form of the covenant; on the ground that the plaintiff has committed other infringements of the covenant; or on the ground of inconvenience to the public.[3]

Injunctions may also be granted, to relieve a party against the consequences of the non-performance of a covenant or agreement, where such consequences involve either a forfeiture or the imposition of a penalty.[4]

[7] Mayor, &c., of London *v.* Hedger, 18 Ves. 355; Hindley *v.* Emery, L. R. 1 Eq. 52; 11 Jur. N. S. 874, V. C. W.

[8] Macher *v.* Foundling Hospital, 1 V. & B. 188.

[9] Kemble *v.* Kean, 6 Sim. 333; Kimberley *v.* Jennings, *ib.* 340; Baldwin *v.* Useful Knowledge Society, 9 Sim. 393; 2 Jur. 961; Hooper *v.* Brodrick, 11 Sim. 47; Pickering *v.* Bishop of Ely, 2 Y. & C. C. C. 249; 7 Jur. 479; Stocker *v.* Wedderburn, 3 K. & J. 393; Dietrichsen *v.* Cabburn, 2 Phil. 52; 1 C. P. Coop. t. Cott. 72; 10 Jur. 601; Hills *v.* Croll, 2 Phil. 60; 9 Jur. 645; 1 C. P. Coop. t. Cott. 83.

[10] Lumley *v.* Wagner, 5 De G. & S. 485; 1 De G., M. & G. 604; 16 Jur. 871; Great Northern Railway *v.* Manchester, Sheffield & Lincolnshire Railway, 5 De G. & S. 138; Webster *v.* Dillon, 3 Jur. N. S. 432, V. C. W.; but see Mair *v.* Himalaya Tea C., L. R. 1 Eq. 411; 11 Jur. N. S. 1013, V. C. W. [And although there be no express negative covenant: Montague *v.* Flockton, L. R. 16 Eq. 189; and although the contract is terminable at the option of the parties: Singer Sewing Machine Co. *v.* Button Hole Co., 1 Holmes, 253; see Sanquirico *v.* Benedetti, 1 Barb. 315; Brown's Appeal, 62 Pa. St. 17; Keeler *v.* Green, 6 C. E. Green, 27; and see as to covenant against assignment, Dyke *v.* Taylor, 3 De G., F. & J. 467.]

[1] Rolfe *v.* Rolfe, 15 Sim. 88; see Ogden *v.* Fossick, 11 W. R. 128. L. JJ.; but see Brett *v.* East India & London Shipping Company, 2 H. & M. 404.

[2] Dickenson *v.* Grand Junction Canal, 15 Beav. 260; but see Lloyd *v.* London, Chatham, & Dover Railway Company, 11 Jur. N. S. 380; 13 W. R. 698, L. JJ.; 2 De G., J. & S. 568. [See Rochdale Canal Co. *v.* King, 2 Sim. N. S. 78, 86; Attorney-General *v.* Mid-Kent R. Co., L. R. 3 Ch. App. 100; Feilden *v.* Slater. L. R. 7 Eq. 523, 531.]

[3] *Ibid.* [Raphael *v.* Thames Valley R. Co., L. R. 2 Ch. App. 147.]

[4] There seems to be a distinction taken in Equity, between penalties and forfeitures.

The doctrine upon the subject of relief from penalties, has thus been stated by Lord Thurlow: "Where a penalty has been inserted, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only is accessional, and to secure the damage really incurred."[5] But where the parties, instead of securing the performance of the agreement by a penalty, have fixed upon a certain sum by way of liquidated damages, to be paid in the event of the non-performance of the agreement, a Court of Equity (except in certain cases of waste, which will be noticed hereafter) refuses to interfere in restraining the recovery of such damages.[6]

Upon these principles, Courts of Equity interpose to restrain proceedings at Law for the recovery of penalties. But where a forfeiture had happened under a by-law of a corporation, which provided that members should receive notice of default in paying a call, and incur the forfeiture by non-payment ten days after the notice sent, Sir William Grant refused to relieve: although the lapse arose from accidental circumstances, and absence from town when the notice was sent; and he mentioned a case, in Ireland, of * a person who, after *1658 having paid some instalments on a lease, neglected to make a further payment, and forfeited the instalments he had paid.[1] And though relief has sometimes been given against the forfeiture of a covenant for renewal,[2] which, in Ireland, formed a distinct head of local Equity,[3] yet the inclination of the Courts is to the contrary: unless the right has been forfeited, in consequence of fraud, accident, mistake, or any similar Equity.[4]

A common instance of this species of relief is that which is given against a clause of re-entry for non-payment of rent.[5] This has been a ground of equitable interference from the earliest times; but every lessee, or person claiming under the lease, must take proceedings in Equity within six months after the execution of the judgment in ejectment; and no injunction will be granted or continued at the suit of any

In the former, relief is always given, if compensation can be made; for it is deemed a mere security. In the latter, although compensation can be made, relief is not always given. 2 Story Eq. Jur. §§ 1320, 1321, 1322, 1323, and notes.

[5] Sloman *v.* Walter, 1 Bro. C. C. 418.

[6] On this point see 1 Swanst. 318 n.; Saister *v.* Ferguson, 1 M'N. & G. 286; 14 Jur. 255; Coles *v.* Sims, 5 De G., M. & G. 1; 18 Jur. 683, 685; Skinner *v.* Dayton, 2 John. Ch. 535; S. C., 17 John. 357; Livingston *v.* Tompkins, 4 John. Ch. 425; Walker *v.* Wheeler, 2 Conn. 299; 2 Story Eq. Jur. § 1318.

[1] Sparks *v.* Liverpool Water Works Company, 13 Ves. 428.

[2] Rawstorne *v.* Bentley, 4 Bro. C. C. 415. [See Techenler *v.* Biddle, 4 Dill. 55; Biddle *v.* Ramsey, 52 Mo. 153.]

[3] O'Neil *v.* Jones, 1 Ridg. 170; Kane *v.* Hamilton, *ib.* 180; Bateman *v.* Murray, *ib.* 187; Boyle *v.* Lysaght, *ib.* 384; Vern. & Scriv. 135; Macrath *v.* Lord Muskerry, *ib.* 166; 1 Ridg. 169; Jackson *v.* Saunders, 1 Sch. & Lef. 443; 2 Dow, 437; Lennon *v.* Napper, 2 Sch. & Lef. 682; Magrane *v.* Archbold, 1 Dow, 107; Earl of Mountmorris *v.* White, 2 *id.* 459; Barrett *v.* Barker, 5 *id.* 1; Keating *v.* Sparrow, 1 Ball & B. 367; Jessop *v.* King, 2 *id.* 81; Barrett *v.* Pearson, *ib.* 189.

[4] Allen *v.* Hilton, 1 Fonb. Eq. 132; Bayley *v.* Corporation of Leominster, 3 Bro. C. C. 529; Baynham *v.* Guy's Hospital, 3 Ves. 295; Eaton *v.* Lyon, *ib.* 690; City of London *v.* Mitford, 14 Ves. 41.

[5] Eden Injunct. 43-45, and notes.

lessee, or person claiming under the lease, against the proceedings at Law in any action on ejectment, unless, within forty days next after a full and perfect answer filed by the claimant in such ejectment, he brings into Court and lodges with the proper officer such sum as the lessor, or landlord, swears to be due and in arrear, over and above all just allowances, and also the costs taxed in the suit: there to remain till the hearing of the cause, or to be paid out to the lessor, or landlord, on good security, subject to the decree of the Court.[6] This relief is granted upon the principle that compensation is made to the landlord by the payment of the rent with interest: a doctrine contradicted by general experience, and often found fault with as imperfect and unjust.[7]

Lord Northington appears to have been of opinion, that the Court might, by analogy, relieve, where a tenant had committed a forfeiture by cutting down timber.[8] It is, however, scarcely necessary to remark how extremely inadequate pecuniary compensation must generally be in such a case; and it is probable, if the question is ever maturely considered, that a contrary determination will be come to.

*1659 * The Court has also power, in the case of leases for a term of years absolute, or determinable on a life or lives, or otherwise, and also in the case of a lease for the life of the lessee, or the life or lives of any other person or persons, to relieve against forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise, without fraud or gross negligence, and there is an insurance on foot, at the time of the application to the Court, in conformity with the covenant to insure: upon such terms as to the Court may seem fit.[1] But the same person cannot be relieved more than once, in respect of the same covenant or condition; nor can any relief be granted where a forfeiture, under the covenant in respect of which relief is sought has been already waived out of Court in favor of the person seeking the relief.[2]

It has been held, that this jurisdiction does not arise unless the defendant is taking active measures to enforce the forfeiture;[3] and when relief is given, the plaintiff must, in general, pay the costs of the defendant, unless the latter has forfeited his right to them by misconduct.[4]

[6] Common Law Procedure Act, 1852 (15 & 16 Vic. c. 76), §§ 210, 211, re-enacting 4 Geo. II. c. 28; Cole Eject. 415; Chitty's Arch. 1056; and see Bowser *v.* Colby, 1 Hare, 109. As to staying proceedings before trial, see 15 & 16 Vic. c. 76, § 212; Cole Ejct. 418, 421; Chitty's Arch. 1054.

[7] Hill *v.* Barclay, 16 Ves. 402, 405; 18 Ves. 56, 61; Bracebridge *v.* Buckley, 2 Pri. 216; Reynolds *v.* Pitt, 19 Ves. 134, 140; see 2 Story Eq. Jur. (3d ed.) § 1315 in note (2), § 1316 and notes.

[8] Northcote *v.* Duke, 2 Eden, 319, 322; Amb. 511.

[1] 22 & 23 Vic. c. 35, §§ 4, 9; Sugd. Stat. 312; Shelford, R. P. Acts, 685; extended to Common Law Courts by 23 & 24 Vic. c. 126, §§ 1–3. Formerly, no relief could be given; see Rolfe *v.* Harris, 2 Pri. 206, n.; Reynolds *v.* Pitt, *ib.* 212; 19 Ves. 134; White *v.* Warner, 2 Mer. 459; and see Meek *v.* Carter, 4 Jur. N. S. 992; 6 W. R. 852, V. C. S.

[2] 22 & 23 Vic. c. 35 § 6; Sugd. Stat. 312; Woodfall, 519–523.

[3] Page *v.* Bennett, 6 Jur. N. S. 419; 8 W. R. 300, V. C. S

[4] Page *v.* Bennett, 2 Giff. 117; 6 Jur. N. S. 419; 8 W. R. 339.

A record of the granting of the relief is to be made, by indorsement on the lease or otherwise.[5]

Where it is clear that the covenant is of such a nature that a Court of Equity cannot make a compensation for the breach of it, as in the case of covenants not to assign without license,[6] relief will not be given against the penalty. Considerable discussion has taken place, how far the Court would relieve against a forfeiture incurred by the breach of a covenant to repair. In the case of *Sanders* v. *Pope*,[7] Lord Erskine, upon the authority of a determination of Lord Macclesfield,[8] expressed a strong opinion in favor of the equitable jurisdiction; but the doctrine, after full and elaborate discussion, has been established to the contrary.[9] The same determination would, consequently, be made with respect to the breach of a covenant to build: though the authorities * are conflicting as to the power to decree a specific per- *1660 formance in such case.[1]

Where the forfeiture of the lease at Law is admitted, the tenant must show reasonable ground for belief that he is entitled to equitable relief, before an interlocutory injunction will be granted to restrain the landlord from proceeding to enforce the forfeiture. It seems, also, that where the landlord is aware that the lease is or must be forfeited, but stands by and allows the tenant to expend money on the property, he will be restrained from proceeding to enforce the forfeiture at Law.[2]

Injunctions or restraining orders may also be issued, for the protection of a ward of Court from removal,[3] or marriage;[4] in cases of interpleader;[5] and to restrain a partner from acting in opposition to

[5] 22 & 23 Vic. c. 35, § 5.

[6] Walter v. Morgan, 9 Mod. 112; Woodfall, 525 532.

[7] 12 Ves. 282.

[8] Hack v. Leonard, 9 Mod. 91.

[9] Hill v. Barclay, 16 Ves. 402; 18 Ves. 56; Brecbridge v. Buckley, 2 Pri. 200; Nokes v. Gibbon, 4 Drew. 681; 3 Jur. N. S. 726; Nokes v. Lish, 3 Drew. 735; Job v. Banister, 2 K. & J. 374; 3 Jur. N. S. 93, L. C.; and see Hanham v. South London Water Works Company, 2 Mer. 65, n.

[1] There are two instances of specific performance decreed of covenants to rebuild: Cox of London v. Nash, 3 Ath. 512; 1 Ves. S. 12. Allen v. Harding, 2 Eq. Ca. Ab. 17, pl. 6; and in Mackay v. Vargas, 3 Ves. 184, Lord Rosslyn stated that specific performance might be decreed. Lords Thurlow and Kenyon, on the other hand, have pronounced a contrary opinion. Errington v. Aynesly, 2 Bro. C. C. 341; Lucas v. Commerford, 3 Bro. C. C. 166; 1 Ves. J. 235. [See to the same effect, Wilkinson v. Clements, L. R. 8 Ch. App. 96; Buck v. Allison, 76 N. Y. 307; Justices v. Cox, 18 Ga. 473; and see *infra*, 1665, n. 3.] That a covenant to repair cannot be specifically performed, see Rayner v. Stone, 2 Eden, 128; Hunt v. Beaudon, 8 Ves. 159, and see Bracey v. Wehnert, 25 Beav. 348; 4 Jur. N. S. 549; Sanderson v. Cockermouth Railway Company, 11 Beav. 497; Lytton v. Great Northern Railway Company, 2 K. & J. 394; 2 Jur. N. S. 436; Seames v. Edge, Johns. 669; Norris v. Jackson, 1 J. & H. 339; 7 Jur. N. S. 540; Taylor v. Portington, 7 De G., M. & G. 328; Samuda v. Lawford, 4 Giff. 42; Fry, 21; Woodfall, 477, as to specific performance of covenants of this nature.

[2] North Staffordshire Steel Company v. Cannose, 11 Jur. N. S. 555, L. JJ. [And see Ramsden v. Dyson, L. R. 1 H. L. 129. An injunction may properly be granted to restrain an insolvent landlord from disturbing his tenant in the possession of a farm: Walker v. Walker, 51 Ga. 22; but see, where the injunction sought and refused was to repair, Jervis v. Henwood, 10 C. L. Green, 160. So where the bill was by the lessee against the lessor to enjoin the latter from demolishing a building: Johnston v. Glenn, 40 Md. 299.]

[3] See *ante*, p. 1355. For cases, and forms of orders, see Seton, 713-721.

[4] For cases, and form of order, see Seton, 727 732; and see Pearce v. Crutchfield, 14 Ves. 206.

[5] *Ante*, p. 1567. [And see (23 Am. ed.) 393 *et seq.*; Seton Dec. 3d Eng. ed. 1962. For cases, and form of order, see Seton, 962, 963.

the partnership agreement, or from depreciating the partnership property.[6]

Courts of Equity will likewise prevent a person from setting up an unconscientious advantage at Law, so as to interpose impediments to the just rights of the other party.[7] Thus, if an ejectment is brought to try a right to land, the Court of Chancery will restrain the party in possession from setting upon a term of years, or other interest in a trustee, lessee, or mortgagee, which may hinder the fair trial of the right;[8] but this will not be done in every case: for, as the Court proceeds upon the principle that the party in possession ought not, in conscience, to use an accidental advantage, if there is any circumstances which meets this principle, the Court will not interfere. Therefore, if the possessor is a purchaser for valuable consideration, without notice of the title of the claimant, this is a title, in conscience, equal to that of the claimant; and the Court will not restrain the possessor
*1661 from * using any advantage he may be able to gain to defend his possession.[1]

Where repeated attempts are made to litigate the same question, which the Courts of ordinary jurisdiction will, in many cases, admit, the Court of Chancery will put an end to the oppression which may be occasioned by the abuse of this privilege. Thus, as a judgment in ejectment is not final or conclusive, but the same proceedings may be repeated for ever, a perpetual injunction will be granted, to prevent the repetition of them, when the assertion of such right becomes oppressive to the opposite party.[2] It is on this ground that the Courts of Equity have interfered, by bills of peace.[3]

[6] Hall *v.* Hall, 12 Beav. 414, 419; 20 Beav. 139; Marshall *v.* Watson, 25 Beav. 501, 504; Turner *v.* Major, 3 Giff. 442; Bradbury *v.* Dickens, 57 Beav. 53; and for cases, and forms of orders, see Seton, 917, 918. [See as to partnership name, Levy *v.* Walker, L. R. 10 Ch. Div. 436; Banks *v.* Gibson, 34 Beav. 569. As to partnership good-will, Steuart *v.* Gladstone, L. R. 10 Ch. Div. 626; Robertson *v.* Quiddington, 28 Beav. 529; Reynolds *v.* Bullock, 26 W. R. 678.]

[7] 2 Story Eq. Jur. § 903; Eden Injunc. (2d Am. ed.) 406 *et seq.*

[8] Ld. Red. 134; Bond *v.* Hopkins, 1 Sch. & Lef. 412, 430; Pulteney *v.* Warren, 6 Ves. 89; Leigh *v.* Leigh, 1 Sim. 349.

[1] Jerrard *v.* Saunders, 2 Ves. J. 454, 457, 458; Maundrell *v.* Maundrell, 7 Ves. 567; 10 Ves. 246; Baker *v.* Mellish, *ib.* 544, 549; Hylton *v.* Morgan, 6 Ves. 293; Byrne *v.* Byrne, 2 Sch. & Lef. 537; Barney *v.* Luckett, 1 S. & S. 419; Northey *v.* Pearce, *ib.* 420.

[2] Lord Bath *v.* Sherwin, Prec. in Ch. 261; 4 Bro. P. C. ed. Toml. 373; Leighton *v* Leighton, 1 P. Wms. 671; 4 Bro. P. C. ed. Toml. 378; Devonshire *v.* Newenham, 2 Sch. & Lef. 199, 211; Hodgson *v.* Duce, 2 Jur. N. S. 1014, V. C. S.

[3] See Morris Canal, &c. Co. *v.* Jersey City, 1 Beasley, 227. In Massachusetts, injunctions may be issued to restrain towns from raising by taxation or pledge of its credit, or paying from its treasury, any money, which they have voted to raise or pay, for a purpose other than those for which towns have the legal right and power to raise or pay money. Genl. Sts. c. 18, § 79; see Tash *v.* Adams, 10 Cush. 252; Babbitt *v.* Savoy, 3 Cush. 530; Hood *v.* Lynn 1, Allen, 103; Frost *v.* Belmont, 6 Allen, 152; so in Maine, Clark *v.* Wardwell, 55 Maine, 61; provided due diligence is used in making application for such injunctions: Tash *v.* Adams, *supra;* Fuller *v.* Melrose, 1 Allen, 166; Claflin *v.* Hopkinton, 4 Gray, 502; Frost *v.* Belmont, 6 Allen, 152. So in New York, towns may be enjoined from expending money raised by taxation for illegal purposes. De Baun *v.* New York, 16 Barb. 392; see Foster *v.* Coleman, 10 Cal. 278; Wilson *v.* Mayor of New York, 4 E. D. Smith (N. Y.), 675. But an injunction will not be granted to prevent the collection of taxes, because of irregularities in the assessment. Chicago, &c. R. R. Co. *v.* Frary, 22 Ill. 34; Dodd *v.* City of Hartford, 25 Conn. 232; Greene *v.* Mumford, Simmons *v.* Same, 5 R. I. 472; Mills *v.* Gleason, 11 Wis. 470; [Arnold *v.* Middletown, 39 Conn. 401. A Court

The object of an interlocutory injunction is to maintain the matters in question in the suit *in statu quo*, until the hearing of the

of Chancery will not entertain a bill for relief, by injunction, against an erroneous or illegal assessment of taxes, except where the enforcement of the assessment will lead to a multiplicity of suits, or produce irreparable injury, or where the assessment, being valid on its face, may be shown to be invalid by extrinsic testimony. Davis *v.* Chicago, 11 Wall. 108; Hennewinkle *v.* Georgetown, 15 Wall. 548; Hassan *v.* City of Rochester, 67 N. Y. 528; Heywood *v.* City of Buffalo, 14 N. Y. 534; Liebstein *v.* Mayor of Newark, 9 C. E. Green, 200; Village of Nunda *v.* Crystal Lake, 79 Ill. 311; Clark *v.* Ganz, 21 Minn. 387; Oliver *v.* Memphis, &c. R. Co., 30 Ark. 128; Douglass *v.* Harrisville, 9 W. Va. 162; Blessing *v.* Galveston, 42 Tex. 641; South Platte Land Co. *v.* Buffalo County, 7 Neb. 253; George *v.* Dean, 47 Tex. 73; Savings, &c. Soc. *v.* Austin, 46 Cal. 415; Union Pacific R. Co. *v.* McShane, 3 Dill. 304; McDonald *v.* Murphree, 45 Miss. 705; Memphis & Charleston R. Co. *v.* Gaines, 3 Tenn. Ch. 478. And see Greedup *v.* Franklin County, 30 Ark. 101, and Stephen *v.* Daniels, 27 Ohio St. 527. But the Court will not take jurisdiction if the remedy is plain and adequate at law. Dunham *v.* Miller, 75 Ill. 379; Brown *v.* Concord, 57 N. H. 375; Ala. Gold Life Ins. Co. *v.* Lott, 54 Ala. 499; Baldwin *v.* Tucker, 16 Fla. 258; Hagenbuch *v.* Howard, 34 Mich. 1. Or for irregularities in the assessment or collection. Albany, &c. Min. Co. *v.* Auditor-General, 37 Mich. 391. A violation of the constitution, State or National, either by the statute or its administration by a board of assessors, will also authorize the interposition of the Court by its injunctive process. State Railroad Tax Cases, 92 U. S. 615; Osborn *v.* United States Bank, 9 Wheat. 738; Foster *v.* Kenosha, 12 Wis. 616. The rule is less rigid where the assessment or tax is levied by counties, or incorporated towns than when levied by the State for its own purposes. State Railroad Tax Cases, 92 U. S. 615. Thus, the owner of land may, it seems, enjoin the county auditors from advertising the land for sale, where he has leviable personal property sufficient to pay the taxes. Abbott *v.* Edgerton, 33 Ind. 196. Injunction will also lie against the sale of personal property where the taxes have been fully paid: Lewis *v.* Spencer, 7 W. Va. 689; or if the collector be insolvent: Dennis *v.* Jones, 72 Ill. 78; but see Wells *v.* Dayton, 11 Nev. 151; or if there be no remedy provided to recover taxes wrongfully collected: First National Bank *v.* Douglass County, 3 Dill. 298. The bill should, however, show that the complainant has exhausted the means provided by law for relief, and is ready to pay the lawful taxes: Rio Grande R. Co. *v.* Scanlan, 44 Tex. 649; or has paid them, or offered to pay them without requiring a receipt in full: Parmley *v.* St. Louis, &c. R. Co., 3 Dill. 25; State Railroad Tax Cases, 92 U. S. 615; Hagaman *v.* Cloud County, 19 Kansas, 394; Woothen *v.* Badgett, 32 Ark. 496; Marsh *v.* Supervisors, 42 Wis. 502; Burlington, &c. R. Co. *v.* York County, 7 Neb. 487; London *v.* Wilmington, 78 N. C. 109. The tax payers of a municipal corporation may, without the intervention of the Attorney-General, prevent, by bill, the corporate authorities from exercising a threatened usurpation of power, or violating a duty imposed by law, whereby the burden of taxation will be increased. New Orleans, &c. R. Co. *v.* Dunn, 51 Ala. 128; Malthis *v.* Town of Cameron, 62 Mo. 504. And the persons to whom the taxes are to go are not necessary parties. Leitch *v.* Wentworth, 71 Ill. 146. But it belongs to the law-making power to determine the fairness and justness of a tax. Linton *v.* Mayor, &c. of Athens, 53 Ga. 588. And if the landowners stand by, and permit a local improvement to be carried out by the corporate authorities, they can have no relief against the assessment. Bond *v.* Mayor of Newark, 4 C. E. Green, 376; Lafayette *v.* Fowler, 34 Ind. 140; Sexsmith *v.* Smith, 32 Wis. 299. But see Taylor, McBean & Co. *v.* Chandler, 9 Heisk. 349; Bogert *v.* City of Elizabeth, 12 C. E. Green, 568.

The property-owner may also resort to an injunction to prevent the corporate authorities of a town from continuously taking down the enclosures of ground as a mode of opening a highway: McIntyre *v.* Storey, 80 Ill. 127; but the legality of an ordinance to arrest and fine persons for carrying on a private market cannot be thus tested: Levy *v.* City of Shreveport, 27 La. Ann. 620; or to compel a city to collect licenses in money, and not in its own warrants: Louisiana National Bank *v.* City of New Orleans, 27 La. Ann. 446; and see, as to restraining the city authorities from increasing its debts beyond the limits of its charter, Collings *v.* City of Camden, 12 C. E. Green, 293; or from exercising their functions as *de facto* officers: State *v.* Wolfenden, 74 N. C. 103.

A tax-payer cannot maintain a suit against State officers to prevent them from executing and issuing bonds which the legislature has unconstitutionally authorized and required to be issued. Morgan *v.* Graham, 1 Woods, 124. It is otherwise as against a municipal corporation: Hodgman *v.* Chicago, &c. R. Co., 20 Minn. 48; and the state may, through its officers, institute the proceedings. State *v.* County Court, 51 Mo. 350; State *v.* Calloway County, 51 Mo. 395.

An action will lie to enjoin the collection of taxes assessed without authority of law: Riley *v.* Western Union Telegraph Company, 47 Ind. 511; or fraudulently excessive, for the excess: Evans *v.* Gage, 1 Ill. App. 292; Merrill *v.* Humphrey, 24 Mich. 170; Pa. &c. Hotel Co. *v.* Lieb, 84 Ill. 602; and to restrain the issuance of a tax deed, where the sale was the result of a combination between the collector and principal bidders, to prevent competition. Gage *v.* Graham, 57 Ill. 144. So, if the remedy at Law be rendered impossi-

cause;[4] and the Court will not, therefore, except under very special circumstances, grant, upon an interlocutory application before decree, an injunction which virtually directs the defendant to perform an *1662 act.[5] There is, indeed, a passage in the MS. report * of the case of *Worden* v. *Ellers*,[1] from which it may be inferred to have been Lord Hardwicke's opinion that the Court might, upon motion, order the defendant to pull down a building which was clearly a nuisance to the plaintiff,[2] and there is an early case in Tothill, of an order

ble or incomplete, as by the insolvency of the collector. Richardson *v.* Scott, 47 Miss. 236; and see Kilbourne *v.* Allyn, 7 Lans. 352. But not to restrain the collection of a tax, upon an illegal assessment, where there is a remedy to review and correct the assessment by *certiorari* or *mandamus*. Mutual Benefit Life Assurance Co. *v.* Supervisors, 3 Abb. App. Dec. 344; Cerwin *v.* Campbell, 45 How. Pr. 9.

Injunction will lie where the proposition for the levy of a tax was defeated, and the tax certified by mistake: Cattell *v.* Lowry, 45 Iowa, 478; and to restrain county commissioners from making publication of a delinquent tax list in a mode not justified by the law: Sinclair *v.* Commissioners, 23 Minn. 404; and to restrain the issue of a deed upon a sale of land for taxes, where there was no valid assessment. Marsh *v.* Supervisors, 42 Wis. 502; Schettler *v.* Fort Howard, 43 Wis. 48.

Equity will not enjoin the collection of a tax on property that has been converted into United States' securities for the express purpose of avoiding taxation. Mitchell *v.* Commissioners, 91 U. S. 206; Ogden *v.* Walker, 59 Ind. 460].

[4] Lawrence *v.* Austin, 11 Jur. N. S. 576, 577; 13 W. R. 981, M. R. [An injunction is a preventive, not a punitive remedy, and, in general, cannot be employed to correct or repair an injury already done. Lexington National Bank *v.* Guynn, 6 Bush, 466; Waugelin *v.* Goe, 50 Ill 459; nor in aid of a doubtful right: Higbee *v.* Camden R. Co., 5 C. E. Green, 435; nor to prevent trivial injuries: Babcock *v.* N. J. Stockyard Co., 5 C. E. Green, 296; Morris R. Co. *v.* Prudden, 5 *id.* 530; Clark's Appeal, 62 Pa. St. 447; nor where the remedy is at Law, and plaintiff will not be injured if left to pursue it: Brown *v.* Met. Gas Light Co., 38 How. Pr. 133].

[5] Blakemore *v.* Glamorganshire Canal Company, 1 M. & K. 154; Great Western Railway Company *v.* Birmingham & Oxford Railway Company, 2 Phil. 597; 12 Jur. 106; Shrewsbury & Chester Railway Company *v.* Shrewsbury & Birmingham Railway Company, 1 Sim. N. S. 410; 15 Jur. 548; Durell *v.* Pritchard, L. R. 1 Ch. Ap. 244; S. C. *nom.* Darrell *v.* Pritchard, 12 Jur. N. S. 16 L. JJ.; and see *ante*, 1641.

[In Krehl *v.* Burrell, 7 Ch. Div. 551, a mandatory injunction was granted on final hearing, requiring the defendant to take down a costly building erected pending the litigation].

As to mandatory injunctions, see Senior *v.* Pawson, L. R. 3 Eq. 330; Beadel *v.* Perry, L. R. 3 Eq. 465; Attorney Genl. *v.* Mid-Kent Railway Company and South Eastern Railway Company, L. R. 3 Ch. Ap. 100; [Smith *v.* Smith, L. R. 20 Eq. 500;] Knapp *v.* Douglas Axe Co., 13 Allen, 1; Carlisle *v.* Stevenson, 3 Md. Ch. 499; Thomas *v.* Hawkins, 20 Geo. 126; 2 Seton Dec. 874, 936, 937; [Creely *v.* Bay State Brick Co., 103 Mass. 514].

[1] 18 Dec. 1739; 6 Serjt. Hill's MSS. 2; and 12 *id.* 76; Eden on Inj. 199.

[2] In Beadel *v.* Perry, L. R. 3 Eq. 465, a mandatory injunction was granted on motion by Sir John Stuart V. C. to restrain the defendant from continuing a wall which had been built by him opposite to the ancient lights of the plaintiff's house at a greater height above the plaintiff's ancient lights than the distance between it and those lights. In giving judgment in this case he said: "Reference has been made to a supposed rule of the Court, that mandatory injunctions cannot properly be made except at the hearing of the cause. I never heard of such a rule. Lord Cottenham was, so far as I know, the first Judge who proceeded by way of mandatory injunction, and he took great care to see that the party applying was entitled to relief in that shape." In a similar case, but one in which, under the circumstances, instead of an injunction, the Court directed an inquiry as to the amount of damages sustained by the plaintiff, Sir W. Page Wood V. C. (now Lord Hatherley) said: "I have no doubt as to the jurisdiction of the Court to order the buildings to be pulled down." Senior *v.* Pawson, L. R. 3 Eq. 330. "The powers of a Court of Equity in regard to nuisances, [upon final hearing,] are corrective as well as preventive. It may order them to be abated, as well as restrain them from being erected." Chancellor Green, in Del. & Rar. Canal and C. & A. R. & T. Co. *v.* Rar. & Del. Bay R. Co., 1 C. E. Green, 321, 379; Pennsylvania *v.* Wheeling Bridge Co., 13 How. U. S. 519; Van Bergen *v.* Van Bergen, 2 John. Ch. 272; Hammond *v.* Fuller, 1 Paige, 197; Earl *v.* De Hart, 1 Beasley, 280. [A mandatory injunction will not be ordered on a preliminary or interlocutory motion, and only on final hearing, to execute the decree of the Court. Audenreid *v.* Railroad Company, 68 Penn. St. 370; McCauley *v.* Kellogg, 2 Woods, 13; Rogers Locomotive &c. Works *v.* Erie Railway Co., 5 C. E. Green, 379. In the last named case the authorities are reviewed. An injunc-

to show cause why a defendant, who had ploughed up ancient pasture land, should not lay it down again in grass.[3] The contrary doctrine is, however, now firmly established. In the case of *Ryder* v. *Bentham*,[4] Lord Hardwicke, upon a motion for an order to pull down certain scaffolding, observed, that he never knew an order to pull down any thing, made on motion. Lord Thurlow, in a subsequent case, upon a motion to restrain a party from digging a ditch, and to compel him to put every thing in the same state in which it was before by filling up so much as he had already dug, refused the latter part of the motion.[5] So, in another case, Lord Eldon refused an order, specifically to repair the banks of a canal, stop-gates, and other works.[6] In the case of *Hooper* v. *Brodrick*,[7] an injunction was granted, *ex parte*, restraining the defendant from discontinuing to use certain premises as an inn; but was dissolved upon the ground that there was no jurisdiction to restrain a person from not keeping an inn: which is the same in effect as ordering him to keep one.

But though the Court will not, directly and in terms, compel the performance of an act upon motion, yet there are many cases in which the effect may be indirectly obtained by an order merely restrictive. Thus, in the case of *Robinson* v. *Lord Byron*,[8] the * effect *1663 was obtained by an injunction restraining the defendant from

tion is no remedy for past injuries. McMinnville &c. R. Co. *v.* Huggins, 7 Coldw. 217; Rutherford *v.* Metcalf, 5 Hayw. 58; Owen *v.* Ford, 49 Mo. 436; and see Hugg *v.* City of Camden, 2 Stew. Eq. 6; where the bill was filed to enjoin a city from employing other counsel than the complainant, and the injunction was refused. So an injunction was refused restraining a city council from employing the services of another architect than the complainant. Windrin *v.* Philadelphia, 1 Leg. Gaz. Rep. 311. An injunction requiring a party to do a particular thing, as to surrender possession of premises, is never allowed before final hearing. Kamm *v.* Stark, 1 Sawy. 547].

[3] Rolls *v.* Miller, Toth. 144.

[4] 1 Ves. S. 543.

[5] Anon., 1 Ves. J. 140.

[6] Lane *v.* Newdigate, 10 Ves. 192.

[7] 11 Sim. 47.

[8] 1 Bro. C. C. 588; and see Hervey *v.* Smith, 1 K. & J. 389; Lord Norbury *v.* Kitchin, 1 W. N. 366, V. C. W. [An injunction was granted to restrain the defendant from doing any act to obstruct the passage of smoke out of flues. Harvey *v.* Smith, 1 K. & J. 389. So, where a bridge was, in one night, built over a cottage by a railroad company to forestall an injunction, the Court enjoined the company from using the bridge. Cited by Lord Langdale, in Ranken *v.* East and West India Docks R. Co., 12 Beav. 298. So, where a mill dam was raised with a view to flood the ground over which a railroad was to run, after notice to condemn the land, an injunction was granted against causing the water to rise higher than it was accustomed, at and previous to the notice. Longwood Valley R. Co. *v.* Baker, 12 C. E. Green, 166; see to same effect, Tatem *v.* Gilpin, 1 Del. Ch. 14, 23; Ladies Benevolent Society *v.* Benevolent Society, 2 Tenn. Ch. 77. The Court will grant a mandatory interlocutory order upon a party to permit the inspection of a house, if necessary, for the purposes of suit: Kynaston *v.* East India Co., 3 Swanst. 248; or to permit access to the furniture in a house for the purpose of valuation by a person agreed upon in the contract sought to be enforced: Smith *v.* Peters, L. R. 20 Eq. 511. An injunction will be granted, in aid of a contract, to restrain the defendant from permitting any other person to take the blood and offal of slaughtered animals. Manhattan Manufacturing Co. *v.* New Jersey Stock-Yard, 8 C. E. Green, 161; see Manhat an Co. *v.* Van Keuren, 8 C. E. Green, 251. The Court has power, upon an interlocutory application, to issue an injunction which will operate to compel a defendant, in order to obey it, to do some substantive act but the jurisdiction should only be exercised where irreparable injury would follow from neglect to do the act required. Cole Silver Mining Co. *v.* Virginia &c. Water Co. 1 Sawyer, 665; Cambden *v.* Philadelphia R. Co., 4 Brewst. 563. In Cooke *v.* Chilcott, 3 Ch. Div. 694, 702, a vendor had bound himself to erect a pump and reservoir to supply water from a well to all houses built on his land, and it was held that the covenant run with the land, that it could not be specifically enforced because it would require the continued supervision of the Court, but that it would be enforced indirectly by an injunction restraining the defendant from allowing the work to remain unperformed. See next note].

preventing the water from flowing in such regular quantities as it had ordinarily done, before the day on which the alleged nuisance commenced. In *Lane* v. *Newdigate*,[1] a similar effect was obtained, by restraining the defendant from impeding the plaintiff from navigating, using, and enjoying a canal, by continuing to keep the canal, banks, or works out of repair, by diverting the water, or preventing it, by the use of locks, from remaining in the canal, or by continuing the removal of a stop-gate.[2] [Injunction will not lie to enforce performance of continuous acts.[3]]

Section II. — *Interlocutory Injunctions and Restraining Orders.*

An injunction may be obtained at any time, in vacation as well as in term, and whether the Court be sitting or not;[4] and at almost every stage of the cause.[5] An application for an interlocutory injunction[6] should, however, be made without delay: as it may be refused, if there has been any delay or acquiescence on the part of the plaintiff.[7]

[1] 10 Ves. 192; and see Rankin *v.* Huskisson, 4 Sim. 13; Blackmore *v.* Glamorganshire Canal Navigation, 1 M. & K. 154; Spencer *v.* London & Birmingham Railway Company, 8 Sim. 193; Goodale *v.* Goodale, 16 Sim. 316; Shrewsbury & Chester Railway Company *v.* Shrewsbury & Birmingham Railway Company, 1 Sim. N. S. 410; Whittaker *v.* Howe, 3 Beav. 383, 389; Ranken *v.* East & West India Docks Railway Company, 12 Beav. 298, 305; Greatrex *v.* Greatrex, 1 De G. & S. 692; Lumley *v.* Wagner, 1 De G., M. & G. 604; 5 De G. & S. 485; Isenberg *v.* East India House Company, 10 Jur. N. S. 221, L. C.; and Seton, 936, 937; Hynam *v.* Dunn, 1 W. N. 293; Wavell *v.* Watson, 1 W. N. 344; Beadel *v.* Perry, 1 W. N. 362.

[2] See Beadel *v.* Perry, L. R. 3 Eq. 465, cited *ante*, 1662, note.

[3] ["When what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labor and care, the Court has never found its way to do this by injunction." Per Sir W. M. James L. J., in Powell, &c. Coal Co. *v.* Taff Vale R. Co., L. R. 9 Ch. App. 331, where the bill sought to enforce a statutory right on the part of the complainant to use the defendant's railway. And see Port Clinton R. Co. *v.* Cleveland R. Co., 13 Ohio St. 544. So where the object of the bill was to enforce an agreement for the use of the defendant's railway by the complainant: Blackett *v.* Bates, L. R. 1 Ch. App. 117; or to run it in a particular way: McCann *v.* South Nashville Street R. Co., 2 Tenn. Ch. 773. So of an agreement to build a railroad. Heathcote *v.* North Stafford R. Co., 20 L. J. N. S. 82; South Wales Ry. Co. *v.* Wythes, 5 De G., M. & G. 880; Ross *v.* Union Pacific R. Co., 1 Woolw. 26; Fallon *v.* Railroad Co., 1 Dill. 121. And see Danforth *v.* Phila., &c. Ry. Co., 3 Stew. Eq. 12, and the Reporter's learned note. So of a covenant to rebuild or repair. Wilkinson *v.* Clements, L. R. 8 Ch. App. 96; Beck *v.* Allison, 56 N. Y. 367; Justices *v.* Croft, 18 Ga. 473; *ante*, 1660, n. 1. So of an agreement to build a house. Mastin *v.* Halley, 61 Mo. 196; Tilman *v.* Cannon, 3 Humph. 637. So of a continuous agreement to deliver blocks of marble of particular dimensions. Marble Company *v.* Ripley, 10 Wall. 358. So of a contract to cultivate land in particular crops and in a designated mode. Starnes *v.* Newsom, 1 Tenn. Ch. 239. So as to the continuous management of a mine under the covenants of a lease. Wheatley *v.* Westminster Brymbo Coal Co., L. R. 9 Eq. 538; see also Blanchard *v.* Detroit R. Co., 31 Mich. 43; Atlantic R. Co. *v.* Speer, 32 Ga. 550. And the remedy for the enforcement of a duty imposed upon a corporation by its charter is not by injunction, but by mandamus. Union Pacific R. Co. *v.* Hall, 91 U. S. 343; People *v.* Albany & Vermont R. Co., 24 N. Y. 267. Equity will not enforce an agreement to enter into a partnership, or, as a member, to use personal skill in the business of the firm: Buck *v.* Smith, 29 Mich. 166; nor, generally, restrain by injunction the breach of a contract which it cannot enforce: Fothergill *v.* Rowland, L. R. 17 Eq. 132.]

[4] Temple *v.* Bank of England, 6 Ves. 770; [Crawford *v.* Ross, 39 Ga. 44; Pendleton *v.* Dalton, 64 N. C. 329].

[5] Bacon *v.* Jones, 4 M. & C. 433, 436; 2 Jur. 994.

[6] *Ante*, p. 1613.

[7] Gordon *v.* Cheltenham Railway Company, 5 Beav. 229, 237; Buxton *v.* James, 5 De G. & S. 80, 84; Attorney-General *v.* Eastlake, 11 Hare, 205; Coles *v.* Sims, Kay, 56, 70; 5 De G., M. & G. 1; Great Western Railway Company *v.* Oxford, Worcester, &Wol-

An interlocutory injunction is merely a mode by which the Court preserves the property in dispute, with the least injury to all parties, until it can finally determine their respective rights.[8] * And *1664 it will not be granted, in a doubtful case, to restrain the commission of an act for which, if wrongful, ample compensation can be obtained in damages[1] at the hearing of the cause, while, by granting an injunction, serious injury would be inflicted on the party sought to be restrained; nor will the Court interfere, by injunction, between the parties to a contract the specific performance of which it would refuse to decree.[2] Where the rights of the parties are doubtful, the Court will, on an application for an interlocutory injunction, consider the comparative injury which will result from granting or withholding the injunction,[3] as well as the justice of the case as it appears on the evidence.[4]

If the object of the suit is to obtain discovery in aid of the proceedings in another Court, the application for the injunction cannot be made until after the interrogatories have been filed.[5]

Where the nature of the act to be restrained is such that an immediate stoppage of it is absolutely necessary, to protect property from destruction, or where the mere act of giving notice to the defendant, of the intention to make the application, might be, of itself, productive of the mischief apprehended, by inducing him to accelerate the act, in order that it might be complete before the time for making the application should have arrived, the Court will award the injunction without notice, or even before service of the copy of the bill;[6] but the Court is

verhampton Railway Company, 3 De G., M. & G. 341, 350; Attorney-General *v.* Sheffield Gas Company, 3 Sim. 327; Attorney-General *v.* Lane Board of Health, 2 Jur. N. S. 189; Cooper *v.* Hubbuck, 30 Beav. 150; Wattle *v.* Bristol & South Wales Railway Company, 10 W. R. 210; *ante*, 1640, note; Sheldon *v.* Bachwell, 9 W. R. 166; [Baltimore *v.* Ohio R. Co., 37 Md. 237; Traphagan *v.* Jersey City, 2 Stock. Eq. 226; McLean *v.* Hennessy, 96 U. S. 245.] As to the principles on which interlocutory injunctions are granted, see also Attorney-General *v.* Corporation of Liverpool, 1 M. & C. 171, 210; Greenhalgh *v.* Manchester & Birmingham Railway Company, 3 M. & C. 784, 791; Williams *v.* Earl of Jersey, C. P. 91, 96; Hilton *v.* Earl Granville, 5 Sim. 292; 4 Beav. 130; Fielding *v.* How, 8 Sim. 477; Spottiswoode *v.* Clarke, 2 Phil. 154; 1 C. P. Coop. t. Cott. 254; Pinchin *v.* London & Blackwall Railway Company, 5 De G., M. & G. 851; Wood *v.* Sutcliffe, 2 Sim. N. S. 163; Johnson *v.* Wyatt, 2 De G., J. & S. 18; Lawrence *v.* Austin, 14 W. R. 981; Bayley *v.* Conder, L. R. 1 Eq. 388; Walker *v.* Jones, 12 Jur. N. S. 381, P. C.

[8] Lawrence *v.* Austin, *ubi sup.*

[1] See *ante*, p. 1557, note *y*; [Cazier *v.* Coach Co. *v.* Canton Horse R. Co., 2 Stew. Eq. 299.]

[2] Garrett *v.* Banstead & Epsom Downs Railway Company, 13 W. R. 878; Munro *v.* Wivenhoe, Brightlingsea Railway Company, 13 W. R. 880.

[3] Hadley *v.* London Bank of Scotland, 3 De G., J. & S. 63.

[4] Garrett *v.* Banstead & Epsom Downs Railway Company, 11 Jur. N. S. 591; Munro *v.* Wivenhoe & Brightlingsea Railway Company, 11 Jur. N. S. 612.

[5] *Ante*, p. 1557; Fuller *v.* Ingram, 7 W. R. 302; and see Chilton *v.* Campbell, 20 Beav. 561; Lloyd *v.* Adams, 4 K. & J. 467.

[6] See Seton, 871; Wing *v.* Fairhaven, 8 Cush. 363, 364, cited *ante*, 1641 note; Perry *v.* Parker, 1 Wood. & M. 280.

In cases of great urgency, or where irreparable injury may ensue, as in waste, &c., where the application follows quickly after the injury complained of, the Court will grant the injunction without notice, or appearance, or service served. Hartridge *v.* Rockwell, R. M. Charlt. 260; see New York Printing Co. *v.* Fitch, 1 Paige, 97; Ogden *v.* Kip, 6 John. Ch. 160, 161; Murdock's Case, 1 Bland, 461; Mayor, &c. of Rochester *v.* Curtiss, 1 Clarke, 366. [In Tennessee, the practice has been to grant the preliminary injunction, without notice, upon an ex parte statement under oath. Haynes *v.* Hardeman, 1 Lea, 342; Rutherford *v.* Metcalf, 3 Heisk. 58; Flippin *v.* Knaffle, 2 Tenn. Ch. 213]. But injunctions cannot be granted in the Courts of the United States without notice. Perry *v.* Parker, *supra*; *ante*, 1614, note.

more strict, in requiring the facts to be fully stated, on an application made *ex parte*, than on an application made on notice, and upon which the other side does not appear.[7] Where an injunction has been granted on an *ex parte* application, it will be dissolved, without regard to the merits, if any material facts have been suppressed.[8]

*1665 * An *ex parte* injunction will be granted to restrain the negotiation of a bill of exchange, where it has been fraudulently or improperly obtained; for, as it would be a good bill of exchange, and, therefore, a negotiable instrument in the hands of a *bonâ fide* holder, the plaintiff has a right to be protected from that danger, and the mischief attending it.[1] An injunction will also be granted to prevent the personal representative of a testator from receiving the assets, when he is either insolvent, or wasting the property in such a manner that there is a great danger of its being lost: although, to induce the Court to interfere against an executor, a strong special ground must be made.[2] An *ex parte* injunction will likewise be ordered, in a suit for specific performance, to restrain a vendor, who has contracted to sell his property to another, from conveying away the legal estate in the premises.[3]

Ex parte injunctions have also been issued, in cases of obstruction of ancient lights;[4] and in many other cases, where the danger to the interest of the party applying was imminent. Thus, where a foreign vessel was driven into Plymouth by stress of weather, Lord Eldon, at the instance of the supercargo and part-owner, granted an injunction to prevent the master from selling the ship's cargo, till answer or further order, upon an affidavit that he had heard the captain was about to do so, and on certificate of bill filed.[5] And an *ex parte* injunction was granted, in like manner, to restrain the proprietor of a coach, who had sold the good-will of his business, and undertaken not to set up another coach on the same road, from running a coach contrary to his undertaking.[6] So also, where the representatives of a mortgagor had obtained the mortgage deeds from the mortgagee, by fraud, Lord Eldon, upon affidavit and certificate of bill filed, granted an injunction to restrain the defendants from selling or mortgaging the estate; and ordered the deeds to be brought into Court immediately.[7]

It sometimes happens that, upon an application, *ex parte*, for an injunction, the Court will, if it thinks that the case is not so urgent as to

[7] Maclaren *v.* Stainton, 16 Beav. 279, 290.

[8] Hilton *v.* Earl Granville, 4 Beav. 130; C. & P. 283; Clifton *v.* Robinson, 16 Beav. 355; Hemphill *v.* M'Kenna, 3 Dr. & War. 183; Spurgeon *v.* Hooker, 1 De G. & S. 484; Castelli *v.* Cook, 7 Hare, 89, 94; 13 Jur. 675; Dalglish *v.* Jarvie, 2 M'N. & G. 231; Pinchin *v.* London & Blackwall Railway Company, 5 De G., M. & G. 851; Phillips *v.* Prichard, 1 Jur. N. S. 750; Fuller *v.* Taylor, 11 W. R. 532. [See Endicott *v.* Mathis, 1 Stockt. Eq. 110; Black *v.* Huggins, 2 Tenn. Ch. 780.]

[1] Patrick *v.* Harrison, 3 Bro. C. C. 476; —— *v.* Blackwood, 3 Anst. 851; Smith *v.* Haytwell, Amb. 66; Hood *v.* Aston, 1 Russ. 412; Lloyd *v.* Gurdon, 2 Swanst. 180; 2 Story Eq. Jur. § 906; Darst *v.* Brockway, 11 Ohio, 462; *ante*, p. 1651.

[2] Middleton *v.* Dodswell, 13 Ves. 266; Mansfield *v.* Shaw, 3 Mad. 100.

[3] Echliff *v.* Baldwin, 16 Ves. 267; *ante*, p. 1652.

[4] Attorney-General *v.* Nichol, 16 Ves. 338; Back *v.* Stacy, 2 Russ. 121. For cases on this subject, see *ante*, p. 1638.

[5] Delafield *v.* Guanabeus, MSS. 26 March, 1809.

[6] Williams *v.* Williams, 2 Swanst. 253; *ante*, p. 1654.

[7] Wallis *v.* Willis, MSS. Nov., 1802.

require its immediate interference, or that the affidavits in support of it are not positive enough, order notice of the application to be given to the defendant.[8] In such cases, if the defendant * has *1666 not appeared, the notice of motion must express that leave has been obtained of the Court to serve it.[1]

It is not usual now to grant an injunction, on an *ex parte* application. The general practice, in such cases, is to grant what is called an interim order: by which the defendant is restrained, until after a particular day mentioned: liberty being given to the plaintiff to serve notice for an injunction for the day before such day. The plaintiff is also required to give an undertaking to abide by the order of the Court, as to any damages the defendant may be put to by reason of the interim order; and such other terms are imposed upon him as the nature of the case may require.[2] The undertaking is ordinarily given through counsel, and forms part of the order; but where the order is granted in vacation, without the attendance of counsel, the undertaking is inserted in the Registrar's book, and signed by the plaintiff, or his solici-

[8] See Lord Byron *v.* Johnston, 2 Mer. 29; Attorney-General *v.* Utica Ins. Co., 2 John. Ch. 375; Mayor, &c. of London *v.* Bolt, 5 Sumner's Ves. 129, note (*a*).

[1] *Ante*, p. 1596.

[2] Chappell *v.* Davidson, 8 De G., M. & G. 1; 2 K. & J. 123; Ingram *v.* Stiff, 5 Jur. N. S. 947; Tuck *v.* Silver, Johns. 218; Adamson *v.* Wilson, 10 L. T. N. S. 24; Wakefield *v.* Duke of Buccleugh, 13 W. R. 856; and see Whaley *v.* Brancker, 10 Jur. N. S. 535; Seton, 870. In some States, Courts are ordinarily required, before issuing an injunction previous to notice or appearance, and generally have the power to compel, the party, at whose request the injunction issued, to give bonds with sureties to the adverse party conditioned for the payment of all damages which may arise from the issuing of the injunction if it is dissolved. See Genl. Sts. Mass. c. 138, § 16; Rule in Ch. N. Hamp. 36; 38 N. H. 612, 613; The Derby Bank *v.* Heath, 45 N. H. 524; Towle *v.* Towle, 46 N. H. 431; Merrifield *v.* Jones, 2 Curtis, 306; Chancery Rule in New Jersey, §§ 41, 42; 2 McCarter, 522; [Black *v.* Caruthers, 6 Humph. 87; Coltart *v.* Ham, 2 Tenn. Ch. 356; Code of Tenn. § 4439; Harman *v.* Howe, 27 Gratt. 676; Brown *v.* Easton, 3 Stew. Eq. 725.

An injunction bond is good to the extent of the conditions prescribed by law, any other conditions not being binding. Holliday *v.* Meyers, 11 W. Va. 276; Coltart *v.* Ham, 2 Tenn. Ch. 356. It is good though it specify no amount for which the obligors are bound. North Carolina Gold Amalg. Co. *v.* North Carolina Ore Dressing Co., 79 N. C. 48. The bond enures to the benefit of all the defendants although made payable to only one of them. Boden *v.* Dill, 58 Ind. 273. And if payable to all, there may be a joint action of all the obligees, and the recovery of a joint judgment for the whole of their demands. Pearce *v.* Alley, 4 W. Va. 22. But, under a peculiar bond conditioned to pay all the obligees jointly, it has been held that no damages could be recovered except such as were sustained by all the obligees. Rees *v.* Peltzer, 1 Ill. App. 315. Leave may be given to sue on the bond, although the Court has the power to assess the damages. Brown *v.* Easton, 3 Stew. Eq. 725. The liability attaches upon a judgment on the merits, without a formal order of dissolution: Fox *v.* Hudson, 20 Kan. 246; and depends, as well for the obligee as the obligor, upon the precise terms of the bond: Somerville *v.* Mayes, 54 Miss. 31.]

In New Jersey, by rule in Chancery, the damages may be ascertained in such manner as the Chancellor shall direct. Rule 42; 2 McCarter, 522. [But if the bond omit from the condition the words "such damages to be ascertained in such manner as the Chancellor shall direct," the Court has no power over the surety, and his liability must be determined by a suit at Law. Easton *v.* N. Y., &c. R. Co., 11 C. E. Green, 359.]

But in the United States Courts the plaintiff and his sureties on an injunction bond cannot be ordered by the Court sitting in Equity to pay the damages sustained by reason of the injunction. Merrifield *v.* Jones, 2 Curtis, 306; Bean *v.* Heath, 12 How. U. S. 168. [In Arkansas, the Circuit Court on its Chancery side has no jurisdiction to render a judgment for damages on an injunction bond on dissolution. Clayton *v.* Martin, 31 Ark. 217. It is otherwise in Tennessee. Black *v.* Caruthers, 6 Humph. 87; Code, § 4442. In Illinois the damages must be assessed by the Chancellor before a recovery can be had on the bond at Law. McWilliams *v.* Morgan, 76 Ill. 551; Alwood *v.* Mansfield, 81 Ill. 344. And see, as to the damages recoverable, Oelrichs *v.* Spain, 15 Wall. 211; Lawton *v.* Green, 64 N. Y. 326; Hannibal, &c. R. Co. *v.* Shipley, 1 Mo. App. 264. And see 1089, n. 8.]

tor.[3] Where a limited company is the plaintiff, the undertaking must be given by some responsible person.[4] The undertaking is irrespective of the suit; and is, therefore, not vacated by the bill being subsequently dismissed.[5]

The application for an injunction is made by motion.[6] If it is not made *ex parte*, a notice of motion must be served in the usual *1667 * manner;[1] and if it is intended to serve the notice of motion before the expiration of the time limited for the appearance of the defendant, or to make the application on short notice, the special leave of the Court must be first obtained; and the fact that it has been given must be stated in the notice of motion.[2] Leave will be given to serve the notice of motion with the copy of the bill;[3] but not to serve it before the bill is filed.[4]

Strictly speaking, after the defendant has appeared, a notice of mo-

[3] Seton, 870. For form of order in such case, see *ib.* 867, No. 3.

[4] Anglo-Danubian Company (Limited) *v.* Rogerson, 10 Jur. N. S. 87, M. R. Where there was no officer of the company resident in London, the undertaking was permitted to be given on a separate piece of paper, and transmitted to the Registrar. Pacific Steam Co. *v.* Gibbs, 14 W. R. 218.

[5] Newby *v.* Harrison, 7 Jur. N. S. 981; 9 W. R. 849, L. JJ., overruling S. C., 1 J. & H. 678; [Newcomen *v.* Coulson, 7 Ch. Div. 764;] and see, as to the undertaking and assessment of damages, De Mattos *v.* Gibson, 1 J. & H. 79; 7 Jur. N. S. 282; Southworth *v.* Taylor, 28 Beav. 616; Bingley *v.* Marshall, 11 W. R. 1018. For form of order for inquiry as to damages, see Seton, 868, No. 5; Brett *v.* Imperial Gas Co., 1 W. N. 104.

[6] It may also be made by petition; but this is not done in modern practice. As to motions, see *ante*, p. 1591 *et seq.* It is said that, in vacation, the application should be made by petition. Wyatt's P. R. 252; Smith *v.* Clarke, 2 Dick. 455; Nichols *v.* Kearsly, *ib.* 645; but this is not the present practice. An application under 23 & 24 Vic. c. 38, § 14, may, however, be made by motion or summons. For forms of notice of motion and summons in such case, see Vol. 3.

[1] See *ante*, p. 1595; and see St. Mass. 1862, c. 131, § 1. For form of notice, see Vol. III.

[2] Ramsbottom *v.* Freeman, 4 Beav. 145; Hill *v.* Rimell, 2 M. & C. 641; Jacklin *v.* Wilkins, 6 Beav. 607; Moggridge *v.* Thomas, 2 C. P. Coop. t. Cott. 166; Newton *v.* Chorlton, 10 Hare Ap. 31; and see *ante*, p. 1594.

[3] In cases of injunctions, a written bill may be filed, and a written copy served, on an undertaking to file a printed bill within fourteen days. See 15 & 16 Vic. c. 86; § 6; *ante*, pp. 396, 442. As to peer defendants, see Lord Milsingtoun *v.* Earl of Portmore, 1 V. & B. 419; and *ante*, p. 442.

[4] Simmons *v.* Heaviside, 22 Beav. 412; *contra*, Parker *v.* Great Northern Railway Company, 4 De G. & S. 138; Fosbrook *v.* Woodcock, 12 Jur. 956. In New Jersey a *subpœna* must be taken out with the injunction, and made returnable within the time prescribed by the rule for a return of the service of the injunction. Lee *v.* Cargill, 2 Stockt. 331; see also on this point, Parker *v.* Williams, 4 Paige, 439; Seebor *v.* Hess, 5 Paige, 85; Patrick *v.* Jackson, 3 Bro. C. C. 467, 477, notes.

In Pennsylvania, an injunction cannot be granted until the parties complained of have been served with a *subpœna* to appear and answer; until then they are not in Court. Blair *v.* Boggs Township School District, 31 Penn. St. 274. It is no ground for the dissolution of an injunction, that the *subpœna* could not be served; nor that the injunction itself was served illegally, or without the jurisdiction of the Court. Corey *v.* Voorhies, 1 Green Ch. 5. But where the plaintiff omits to have the *subpœna* served and returned, at the term to which it is made returnable, the injunction will be dissolved. West *v.* Smith, 1 Green Ch. 309; Brown *v.* Fuller, 2 Beasley, 271, 274.

An injunction was dissolved on the appearance and motion of the defendant, because it did not appear that the plaintiff had endeavored to have the process served. Hightour *v.* Rush, 2 Havw. 351; see West *v.* Smith, 1 Green Ch. 309; Payne *v.* Cowan, 1 Sm. & M. Eq. 27. Where the plaintiff neglects to serve a *subpœna* upon a defendant against whom an injunction has been granted affecting his rights, such defendant may appear voluntarily and apply to have the injunction dissolved, without waiting for the service of the *subpœna*. Waffle *v.* Vanderheyden, 8 Paige, 45; see Howe *v.* Willard, 40 Vt. 654.

In Maryland the fact that the bill was not filed until after the injunction was ordered, is held, at most, to be a mere irregularity, which cannot operate a reversal of the order granting it. Davis *v.* Reed, 14 Md. 152.

Under the practice in California an injunction is ordinarily to be asked for before the bill is filed, so that it can issue with the summons, though it does not take effect until the filing of the bill. Heyman *v.* Landers, 12 Cal. 107. And in New York an injunction order may be allowed, signed and delivered to the officer before the defendant is sum-

tion should always be given; but in cases of urgency, where the threatened mischief is imminent, and would be irremediable, this will be dispensed with.[5]

An application for an injunction must (except in the case of a bill of interpleader[6]) be supported by affidavits, or the admissions of *the defendant in his answer.[1] Formerly, the answer was taken *1668 to be true; and affidavits, except under special circumstances, could not be read against it;[2] but now, in applications for an injunction, or to dissolve an injunction, the defendant's answer is, for the purpose of evidence on such application, to be regarded merely as an affidavit of the defendant; and affidavits may be received and read in opposition thereto.[3]

moned, but cannot legally be served before the summons. Ledingham v. Crews, 5 Beav. 566.

[5] Marsack v. Reed, 2 Ves. S. 112; Aller v. Jones, 15 Ves. 605; Harrison v. Cockerell, 3 Mer. 1; Collard v. Cooper, 6 Mad. 190; Perry v. Weller, 3 Russ. 519; Acraman v. Bristol Dock Company, 1 R. & M. 321; Petley v. Eastern Counties Railway Company, 8 Sim. 485; Langham v. Great Northern Railway Company, 1 De G. & S. 486, 497.

[6] Hunt Club v. Marks, 5 De G. & S. 638; and see ante, p. 1567.

[1] See Yeomans v. Shamp, 2 McCarter, 42; *ante*, 394, 395, in note.

[2] See Rock v. Mathews, 2 De G. & S. 227, 234; Cochrane v. Cunningham, 13 Beav. 366.

[3] 15 & 16 Vic. c. 86, § 50. In Post v. Carleton, 2 Sumner, 83, Mr. Justice Story remarks, "The practice in America has, I believe, become more liberal than it is in England; and if it were necessary, I should not hesitate to admit affidavits to contradict the answer, for the purpose of continuing or even of granting a special injunction, where I perceived that, without it, irreparable mischiefs would arise." It is now quite settled, and has long been settled, that affidavits may be read against the answer in cases of waste, nuisance, &c., to prove acts of waste, &c. See Baliman v. Lord Byron, 1 Bro. C. C. 580, note (3); Merwin v. Smith, 1 Green Ch. 182; Wing v. Fairhaven, 8 Cush. 363; see also Lane v. Hoagland, 1 Ves. 427 and note; Harrison v. Gardiner, 7 Ves. 396 n.; see Montgomery v. Jones, 10 Ves. 360; Sackett v. Hill, 2 Mich. 182; Bouldin v. Baltimore, 15 Md. 84; Marshall v. Beverly, 3 John. Ch. 466; Bassett v. Taylor, 2 Hatch. C. C. 82; Rawson v. Danforth, 1 Stockt. 289. The policy of preventing irreparable mischief has introduced this exception to the rule requiring answers to affidavits in opposition to the answer, in cases of waste, or of similar analogous to waste, but this exception does not extend to questions of title. Earthman v. Kirk, 1 Johns. Ch. 444; Price v. Carwardine, 4 Sumtr. 92, 94. It has been held that on an application for an injunction, the plaintiff may read affidavits filed before the coming in of the answer, in support of the bill, or in contradiction to the answer, but no affidavits filed subsequently to the coming in of the answer can be read. Stanley v. Stanley, 2 Hill Ch. 620; see Brundred v. Paterson Machine Co., 3 Green Ch. 294. But affidavits might be added to the case made by the bill, after answer, as to collateral matters. Shaw v. Wier, 1 Irish Eq. 213. [The affidavits are not evidence at the final hearing, and cannot be considered, and only those parts of the answer which are responsive to the bill can be evidence in favor of the defendants. Attorney-General v. Steward, 6 C. E. Green, 340.]

In New Jersey, on an application for dissolution of an injunction, when new matter is contained in the answer, not responsive to the bill, which is relied upon as a ground for setting aside the injunction, the plaintiff may read affidavits in contradiction of such new matter. Merwin v. Smith, 1 Green Ch. 182; see Morris Canal, &c. Co. v. Jersey City, 1 Beasley, 227; Del. &c. R.R. Co. v. Bar &c. R.R. Co., 1 McCarter, 445; Green v. Pallas, *ib.* 267; Wooten v. Smith, 27 Geo. 216. The allegations of the bill, not met and denied by the answer, are to be taken as true on such an application; and if the answer does not fully meet the case disclosed by the bill, the injunction will be sustained. *Ibid.*; Hardy v. Summers, 10 Gill & J. 317.

When the answer admits the equity of an injunction bill, but sets up an avoidance of it, the injunction will be continued until the hearing. M'Namara v. Lewis, 2 Dev. & Bat. 19; Minturn v. Seymour, 4 John Ch. 497; Lindsay v. Ethridge, 1 Dev. & Bat. 38; Rich v. Thomas, 4 Jones Eq. 71. Contra, see Post, 1 Stockt. 196. [See, to the same effect, Allen v. Croberoft, Barnardiston Ch. 373; Armstrong v. Pettit, 8 C. E. Green, 92; Coleman v. Hudspeth, 49 Miss. 562; Speak v. Ransom, 2 Tenn. Ch. 210.] And on a motion to dissolve, the *facts* disclosed in the answer are alone to be regarded, not the opinions of the defendants. Chase v. Macdaniel, 1 Head. 555.

If the plaintiff waves an answer on oath and relies upon the affidavits of third persons annexed to the bill, to sustain an injunction, in opposition to the defendant's answer on oath denying the equity of the bill, the defendant on an application to dissolve the injunction, may also read the affidavits of third persons in support of his answer. Hatch v. Cass, 4 Paige, 169; Brown v. Hall, 5 Paige, 235; see Village of Seneca Falls v. Matthews, 9 Paige, 301. But where a preliminary in-

*1669 * Where the application is made *ex parte*,[1] and before the defendant has entered an appearance, there must also be a certificate, signed by one of the Record and Writ Clerks, of the filing of the bill.[2]

The affidavits in support of an application for an injunction are usually made by the plaintiff; but they may be made by any person acquainted with the facts.[3] Thus, an injunction was granted to restrain the publication of a work sold as the plaintiff's, upon an affidavit by the plaintiff's agent: the plaintiff himself being abroad.[4]

The affidavits must be sworn after the bill is filed: otherwise they cannot be read, as they have not been made in a cause.[5] The office copies of the affidavits ought to be in Court at the time when the injunction is moved for; and an injunction has been dissolved on the ground that the office copies of the affidavits, upon which it was granted, were not actually in Court when the order was pronounced.[6]

It is, in general, necessary that a plaintiff should swear positively to his title. An injunction has been refused where a plaintiff merely swore, upon his information and belief, that he was a remainder-man under a settlement.[7] A statement that the plaintiff is entitled in fee-simple has also been considered insufficient, as being too general: he must set out his title particularly.[8]

junction was granted absolutely, in the first instance, and the defendant applied to have it dissolved on the ground that the whole equity of the bill was denied by the answer, he was not allowed to read affidavits in support of his answer, except where the answer itself was not conclusive, under the last clause of the 37th Rule in Chancery, New York. Village of Seneca Falls *v.* Matthews, 9 Paige, 504. [If an answer under oath be waived, the defendant has the right to have the injunction dissolved upon the denials of the unsworn answer: Lockhart *v.* City of Troy, 48 Ala. 579: or, at any rate, he may make affidavit to the answer for the purposes of the motion to dissolve the injunction: Manchester *v.* Day, 6 Paige, 296; Lytton *v.* Steward, 2 Tenn. Ch. 586. *Infra*, 1677, note.] In Eastburn *v.* Kirk, 1 John. Ch. 444, it was held, that the admission of *ex parte* affidavits is an exception to the general rule, and is allowable only in cases of waste, or in cases where irreparable mischief might ensue. See also to the same effect, Hoffman *v.* Livingston, 1 John. Ch. 211; Roberts *v.* Anderson, 2 John. Ch. 204; Leroy *v.* Dickinson, 1 Car. Law Repos. 497; Merwin *v.* Smith, 1 Green Ch. 182; Bellona Co.'s Case, 3 Bland, 442; Moore *v.* Reed, 1 Ired. Eq. 418; Swindall *v.* Bradley, 3 Jones Eq. 353; [Davis *v.* Fulton, 1 Tenn. 121; Moredock *v.* Williams, 1 Tenn. 325]. In Benton *v.* Gibson, 2 Hayw. 136, affidavits were allowed to be read in support of a bill for an injunction against the answer, and the injunction continued.

[1] Wing *v.* Fairhaven, 8 Cush. 363, 364.

[2] For form of certificate, see Vol. III.

[3] Youngblood *v.* Schamp, 2 McCarter, 42; see Campbell *v.* Morrison, 7 Paige, 157; Bank of Orleans *v.* Skinner, 9 Paige, 305. Where the bill is filed by a corporation, the officer, or other person who has the principal personal knowledge of the facts, should swear to them. Youngblood *v.* Schamp, *supra*.

[4] Lord Byron *v.* Johnston, 2 Mer. 29; but see Mollett *v.* Enequist, 25 Beav. 609; 4 Jur. N. S. 1009. [*Ante*, 395, note.]

[5] Francome *v.* Francome, 11 Jur. N. S. 123; 13 W. R. 355, L. C.; *contra*, Fennall *v.* Brown, 18 Jur. 1051, V. C. W.; *ante*, pp. 394. 891. But in New Jersey the affidavit is ordinarily made before the bill is filed, and is annexed and filed with the bill. Youngblood *v.* Schamp, 2 McCarter, 42, 44.

[6] Jackson *v.* Cassidy, 10 Sim. 326; Elsey *v.* Adams, 4 Giff. 398.

[7] Davies *v.* Leo, 6 Ves. 784.

[8] Whitelegg *v.* Whitelegg, 1 Bro. C. C. 57. As to affidavits of title, see Poor *v.* Carleton, 3 Sumner, 80–83; Manser *v.* Jenner, 2 Hare, 603; Powers *v.* Heery, R. M. Charlt. 523; Higgins *v.* Woodward, 1 Hopk. 342; Whitelegg *v.* Whitelegg, 1 Bro. C. C. 57, note (*a*), and cases cited; Amelung *v.* Seekamp, 9 Gill & J. 468; Beatty *v.* Beatty, 2 Moll. 541; Storm *v.* Mann, 4 John. Ch. 21; Duvall *v.* Waters, 1 Bland, 576; Joley *v.* Stockley, 1 Hogan, 247; Lowe *v.* Lucey, 1 Irish Eq. 93; S. C., 1 Craw. & Dix, 634. There must be positive evidence of actual title. Hough *v.* Martin, 2 Dev. & Bat. 379; Price *v.* Meth. Epis. Church, 4 Ham. 547; Morris Canal, &c. Co. *v.* Central R.R. Co. of N. Jersey, 1 C. E. Green, 419. In Read *v.* Dews, R. M. Charlt. 358, it is said

*Upon the same principle, it is required that, where an appli- *1670
cation to restrain the violation of a patent-right is made *ex parte*, or the validity of the patent is denied, the plaintiff should swear as to his belief at the time of making the application (and not as to his belief at the time he obtained the patent), that he is the original inventor.[1]

So, upon a bill to restrain an infringement of copyright, the plaintiff (except in cases falling within the 13th sec. of 5 & 6 Vic. c. 45) must show that the assignment was in writing, if he is the assignee of an assignee: though it will be sufficient to state the assignment under which he himself claims, without producing the assignment to his assignor.[2]

The evidence must also prove some actual violation of the plaintiff's rights, or a sufficient ground to apprehend it.[3] Thus, in cases of waste, an affidavit merely as to belief that the defendant intends to commit waste, without stating any grounds for it, will not be sufficient: there must either be some fact, like the sending a surveyor to mark out trees, or some threat;[4] and where the application relates to a matter which is merely pecuniary, the Court must be satisfied that there is some probability of the bill not being dismissed at the hearing.[5]

If the application for the injunction is *ex parte*, the party applying must deliver copies of the affidavits upon which it was granted, upon payment of the proper charges, immediately upon the receipt of the usual request and undertaking,[6] or within the time specified in the request, or directed by the Court.[7]

The witnesses may also be examined orally, and be cross-examined on their affidavits, in the manner before described;[8] but unless the defendant gives notice that he intends to read his answer on the application, he cannot be cross-examined upon it.[9] *Under special *1671
circumstances, affidavits filed after the motion is opened may be admitted.[1]

An affidavit, which was properly intituled in the cause at the time it

that the general principle to be collected from the books is, that the person applying for an injunction must show an actual or probable right. See also Georgia *v.* Brailsford, 2 Dall. 402, 415. [*Ante*, 1619, n. 3.]

[1] Hall *v.* Thompson, 3 Mer. 622, 624; Sturz *v.* De La Rue, 5 Russ. 322, 328; Whitton *v.* Jennings, 1 Dr. & Sm. 119; S. C. *nom.* Whitton *v.* Jennings, 6 Jur. N. S. 164; Mayer *v.* Spence, 1 J. & H. 87; *ante*, p. 1644.

[2] *Ante*, p. 1644.

[3] Taylor Land. & Ten. § 695.

[4] Gibson *v.* Smith, 2 Atk. 182; Jackson *v.* Cator, 5 Ves. 688; Harrison *v.* Gardiner, 7 Ves. 309, 310; Lechmere *v.* Lavie, *ib.* 417; Hanway *v.* McIntosh, 11 Ves. 54; and see Bird *v.* Lake, 1 H. & M. 111. Where one has the power and threatens to do the wrong, an injunction will be issued. M'Arthur *v.* Kelly, 5 Ohio, 139. But an injunction will not be granted to prevent a threatened wrong, unless the danger is imminent, and the injury is irremediable in any other form. Spooner *v.* McConnel, 1 McLean, 328; Mayor, &c. Rochester *v.* Curtiss, 1 Clarke, 336; [Citizens' Coach Co. *v.* Camden Co., 2 Stew. Eq. 299].

[5] Attorney-General *v.* Mayor, &c. of Wigan, 5 De G., M. & G. 52; 18 Jur. 299, 300. An offer to keep an account is not a sufficient answer to the motion. Renard *v.* Livinstein, 2 H. & M. 628.

[6] Ord. XXXVI. 4; *ante*, p. 900.

[7] Ord. XXXVI. 9; *ante*, p. 900.

[8] *Ante*, p. 888 *et seq.*; Besemeres *v.* Besemeres, Kay Ap. 17; Normanville *v.* Stanning, 10 Hare Ap. 20; Nichols *v.* Ibbetson, 7 W. R. 430, V. C. W.

[9] Wightman *v.* Wheelton, 24 Beav. 397; 3 Jur. N. S. 124; and see Whitton *v.* Jennings, *ubi sup.*

[1] East Lancashire Railway Company *v.* Hattersley, 8 Hare, 72, 86; Smith *v.* Swansea Company, 9 Hare Ap. 20; Munro *v.* Wivenhoe & Brightlingsea Railway Co., 13 W. R. 880, L. JJ.; *ante*, p. 1598.

was filed, may be used, on a motion for an injunction, although the title of the cause has since been changed by amendment.[2]

An injunction will not be ordered, if the bill contain any scandalous matter;[3] and if a demurrer,[4] or plea,[5] has been filed, it must, except under special circumstances, be disposed of, before the injunction can be issued; and, for that purpose, it may, on the application of the plaintiff, be ordered to be set down and argued *instanter*;[6] but the usual course now, is for it to be brought on and argued with the motion for the injunction.[7]

If the bill is amended, in the interval between the service of the notice of motion and the day for which it is given, a new notice is necessary; and the plaintiff will be ordered to pay the costs occasioned by the former notice.[8] Where the plaintiff desires to amend his bill during such interval, he should apply specially, by summons, for leave to amend, without prejudice to the notice of motion for the injunction.[9]

A motion for an injunction is now often converted into a motion for a decree; but wherever this is done, the motion should be set down in the cause book.[10] If necessary, the motion will be directed to stand over to a fixed day; and terms will be imposed as to the time for filing affidavits.[11]

The orders pronounced by the Court, in cases of interlocutory injunctions, have varied at different periods.[12] The form most frequently adopted enjoined the party "till further order."[13] In some cases *1672 the injunction has been till "appearance and further * order;"[1] in others, till "answer and further order."[2] The form now usually adopted is "until the hearing of the cause, or until further order."[3]

[2] Hawes *v.* Bamford, 9 Sim. 635.

[3] Davenport *v.* Davenport, 6 Mad. 251. As to scandal, see *ante*, p. 347 *et seq.*

[4] *Ante*, pp. 595, 596; Cousins *v.* Smith, 13 Ves. 164; Jones *v.* Taylor, 2 Mad. 181; Const *v.* Harris, T. & R. 510, note. If justice requires it, an injunction may, however, be issued. Wardle *v.* Claxton, 9 Sim. 412.

[5] *Ante*, p. 691; Anon., 2 Atk. 113; Humphreys *v.* Humphreys, 3 P. Wms. 395, 396; and see Evans *v.* Coventry, 5 De G., M. & G. 911.

[6] Anon. *v.* Bridgewater Canal Company, 9 Sim. 378; and see Jones *v.* Taylor, 2 Mad. 181; London, Chatham, & Dover Railway Co. *v.* Imperial Credit Association, L. R. 3 Ch. Ap. 231.

[7] Seton, 872.

[8] Martin *v.* Fust, 8 Sim. 199; Gouthwaite *v.* Rippon, 1 Beav. 54; 3 Jur. 7; Monypenny *v.* ——, 1 W. R. 99, V. C. T.; London & Blackwall Railway Company *v.* Limehouse Board of Works, 3 K. & J. 123; *ante*, p. 424.

[9] Martin *v.* Fust, *ubi sup.* For form of summons, see Vol. III.

[10] Green *v.* Low (No. 1), 22 Beav. 395. As to motions for decree, see *ante*, p. 819 *et seq.*; and see Micklethwait *v.* Micklethwait, 1 De G. & J. 504, 509; 3 Jur. N. S. 1279, 1280.

[11] Seton, 871. For form of order, see *ib.* 868.

[12] It is said to have been usual to grant injunctions on surmises, with a proviso *si ita sit*. Fodringham *v.* Chomeley, Cary, 37.

[13] Lane *v.* Newdigate, 10 Ves. 192.

[1] Lord Grey De Wilton *v.* Saxon, 6 Ves. 106.

[2] Potter *v.* Chapman, 1 Dick. 146; Robinson *v.* Lord Byron, 1 Bro. C. C. 588; 2 Dick. 703; Drury *v.* Molins, 6 Ves. 328; Lord Tamworth *v.* Lord Ferrers, *ib.* 419. It is stated in the report of Robinson *v.* Lord Byron, *ubi sup.*, in 2 Cox, 4, 5, that the injunction was till "answer or further order;" but this is a mistake; see S. C. Reg. Lib. 1784, B. 143.

[3] Seton, 870; *ib.* 867, No. 1; see Read *v.* Dewes, R. M. Charlt. 360, 361; Read *v.* Consequa, 4 Wash. C. C. 174; Minturn *v.* Seymour, 4 John. Ch. 173; James *v.* Jefferson, 4 Hen? & M. 483. Where an injunction is granted until the answer comes in, the injunction is not dissolved by the coming in of the answer, but is a subsisting injunction until it is dissolved by subsequent order. Turner *v.* Scott, 5 Rand. 332; but see Beal *v.* Gibson, 4 Hen. & M. 481.

Injunctions may be dissolved before answer filed, or afterwards, or after demurrer.

In the case of a bill of discovery, however, the form is "until answer or further order."[4]

Where the question in the suit is distinctly raised on the motion for the injunction, and is ripe for decision, the order on the motion ought to declare the rights of the parties: in order that the defendant may know what the Court considers to be the limit of his rights.[5]

If the bill is for discovery in aid of the defence to an action at Law, the plaintiff is, on making out a *primâ facie* case, entitled to a full discovery; and an injunction to restrain the proceedings at Law will be granted, although his equity is displaced by the defendant's evidence;[6] but he must, in addition to verifying the truth of the statements in the bill which are within his own knowledge, also swear to his belief in the truth of those which rest on information derived from other persons.[7]

The injunction is often ordered, on the terms of the plaintiff paying into Court the amount in dispute.[8] On account, however, of the great rapidity with which a cause can now be brought to a hearing, this course is not so frequently directed as it formerly was.[9] Security for payment of any damages which may be awarded, in pursuance of the plaintiff's undertaking, is sometimes required.[10]

* If the object of the suit is to restrain proceedings in another *1673 Court, the injunction will be awarded against the defendant, his attorneys, and agents. If it is to restrain the commission of waste, or any other inequitable act, it is awarded against the defendant, his servants, workmen, and agents; and these words will be inserted in the order, although the bill and notice of motion only ask for an injunction against the defendant.[1]

Where the plaintiff sues on behalf of himself and others, it seems that an injunction to stay proceedings against the plaintiff only will be granted; and not against the other persons on behalf of whom he sues.[2]

An order for an injunction having been obtained, it should be drawn up, passed, and entered without delay.[3] It frequently happens, how-

[4] Jones v. Com. Bank of Columbus, 5 How. (Miss.) 143. In cases of irreparable mischief, the foundation of an injunction may be in the sound discretion of the Court, whether applied for before or after answer. Poor v. Carleton, 3 Sumner, 70; *ante*, 1668, note; Read v. Dewes, R. M. Charl. 258; Read v. Consequa, 4 Wash. C. C. 174; Maclaren v. Seymour, 4 Johns. Ch. 174.

[5] Sandys v. Pritchard, 16 Beav. 474; Lovell v. Galloway, 17 Beav. 1; Ouldcloth v. Oakley, 2 De G., J. & J. 158; *ante*, p. 1567.

[6] Cather v. Midland Railway Company, 2 Phil. 469, 472.

[7] Sandys v. Pritchard, *ubi sup.*; and see Lovell v. Galloway, *ubi sup.*; Fitzgerald v. Bale, 9 Hare Ap. 65; Harris v. Cowles, 26 Beav. 242; *ante*, p. 1567.

[8] Mellar v. Lucquist, 25 Beav. 609; 4 Jur. N. S. 1009.

[9] Sherwood v. White, 1 Bro. C. C. 452; Acton v. Market, 2 Bro. C. C. 14; Culley v. Hackling, *ib.* 182; Wesket v. Carnevali, *ib.* 182, note; Coglan v. Requeneau, *ib.* 183, note; Potts v. Butler, *ib.* 184, note; S. C. 1 Cox, 330; Armistead v. Durham, 11 Beav. 556, 561; Anderson v. Noble, 1 Drew. 144; Stockport District Waterworks Company v. Jowett, 13 W. R. 977, L. C. For form of order, see Seton, 875, No. 4.

[10] Maitland v. Backhouse, 16 Sim. 58, 69; 12 Jur. 45, L. C.

[1] See Seton, 868, No. 4.

[2] Seton, 869, and see Lord Wellesley v. Earl of Mornington, 11 Beav. 180, 12 Jur. 557, [Speak v. Ransom, 2 Tenn. Ch. 215]. For form of order, see Seton, 867, No. 1.

[3] Armistead v. Durham, 11 Beav. 556, 561, n.

[4] See Bateman v. Watt, 11 Beav. 587.

ever (especially if the order is made in vacation, when the offices are closed), that the matter is so urgent that the object of the injunction might be defeated if the party were bound to wait till the order could be passed, and the writ issued upon it. In such cases, the practice is to serve the party personally with notice in writing, that the injunction has been ordered, and that it will be sealed and served as soon as it can be passed through the offices;[4] or else to procure a transcript of the minutes of the order signed by the Registrar, and to serve the same personally, by delivering a copy of it; showing, at the same time, the original transcript so signed; and either the notice or the copy of the minutes will be sufficient to render the defendant, or other person enjoined, guilty of a contempt, if he acts in opposition to the injunction.[5] In such case, however, there must be no delay in getting the order drawn up, and the injunction issued; and serving it when obtained.[6]

*1674 * The writ of injunction is prepared by the solicitor of the party.[1] It must be signed by one of the Clerks of Records and Writs, and sealed with the seal of that office.[2] At the time the writ is presented for sealing, either a full or an abridged copy of the writ, written on brief paper, and called a docket, must be left; and the order awarding the injunction, or an office copy thereof, must be produced.[3] The writ must be indorsed with the name and place of business of the plaintiff's solicitor, and of his agent if any; or with the name and place of residence of the plaintiff, where he acts in person; and, in either case, with the address for service, if any.[4]

Unless substituted service has been authorized,[5] the service of the

[4] In country cases, the terms of the injunction, as soon as it is granted, are frequently communicated by telegraph to an agent; and he prepares therefrom and serves the formal notice mentioned in the text. For form of notice, see Vol. III.

[5] Hearn *v.* Tennant, 14 Ves. 136; James *v.* Owens, 18 Ves. 524; Rattray *v.* Bishop, 3 Mad. 220. In Ramsdall *v.* Craighill, 9 Ohio, 197, it was held that an injunction operates only from the time process is served. See Elliott *v.* Osborne, 1 Cal. 396. No particular form is necessary to the writ. The substantial requirement is an authentic notification to the defendants of the order of the Court, which they must then, at their peril, obey. Summers *v.* Farish, 10 Cal. 347.

[The prohibitions of an injunction are effectual if the party have notice of its issuance. Farnsworth *v.* Fowler, 1 Swan, 1. And see, on the point of delay in the issuance, Boils *v.* Boils, 1 Coldw. 284. See *infra*, 1684.]

[6] Kimpton *v.* Eve, 2 V. & B. 349; Vansandau *v.* Rose, 2 J. & W. 264; M'Neil *v.* Garratt, C. & P. 98; 5 Jur. 836; and see *post*, pp. 1683, 1684. A writ of injunction ought to be sufficiently explicit upon its face to apprise the party, upon whom it is served, as to what he is restrained from doing; without the necessity of his resorting to the plaintiff's bill, to ascertain what the injunction means. Sullivan *v.* Judah, 4 Paige, 444; Moat *v.* Holbein, 2 Edw. Ch. 188; [Richards *v.* West, 2 Green Ch. 456]. It should be clear and explicit in its terms, and should not deprive the defendant of any right which the case made by the bill does not require he should be restrained from exercising. Laurie *v.* Laurie, 9 Paige, 234. But a defect in the injunction will be cured by the defendant putting in his answer and moving to dissolve. Davile *v.* Peacock, Barnard. 27; Parker *v.* Williams, 4 Paige, 439.

[1] Ord. III. 1.

[2] Ord. I. 37; Braithwaite's Pr. 228. The writ must be written on parchment, in words at length; and a Chancery fee-fund stamp of 20*s.* must be affixed thereto. *Ibid.*; Regul. to Ord. Sched. 4. For form of writ, see Vol. III.

[3] Braithwaite's Pr. 228. The order, or office copy, is usually retained by the Record and Writ Clerk; but, if desired by the solicitor, it will be returned to him, on his giving a receipt for it on the back of the docket. *Ibid.* For form of docket, see Vol. III.

[4] Ord. III. 2, 5, *ante*, pp. 453, 454. For form see Vol. III.

[5] See *ante*, p. 1044; [Delancy *v.* Wallis, 3 Bro. C. C. 12;] Anderson *v.* Lewis, 3 Bro. C. C. 429; Lord Portarlington *v.* Graham, 5 Sim. 418; Kirkman *v.* Honnor, 6 Beav. 400; Heald *v.* Hay, 9 W. R. 369, V. C. S.

injunction or restraining order must be personal; and is effected, by leaving with the person served[6] a true copy of the writ[7] or order; and, at the same time, showing him the original writ as duly issued, or the restraining order as duly passed and entered.[8]

Formerly, if the person restrained from prosecuting any action or proceedings in any Court of Law or Equity disobeyed the injunction or restraining order, the only remedy was by process of contempt against him: but now, in case any action, suit, or proceeding is prosecuted contrary to any writ of injunction or order of either of the Superior Courts of Law or Equity, or of any Judge thereof, in any other Court of Law or Equity: upon the production to such other Court, or any Judge thereof, of such writ of injunction or order, all further proceedings contrary to such injunction or order will be stayed; and thenceforth all further and subsequent proceedings will be utterly null and void: but the liability of any person prosecuting any action, suit, or proceeding, contrary to any such injunction or order, to any attachment, punishment, or other proceeding to which any such person is liable in cases of contempt of either of such Courts, is not altered.[9]

*An interlocutory injunction may be dissolved at any time *1675 before the hearing of the cause;[1] and is *ipso facto* dissolved by the dismissal of the bill;[2] or the allowance of a demurrer to the whole bill: although leave to amend may have been given.[3] An injunction "until answer or further order" is not dissolved by the mere putting in of a sufficient answer: an order for that purpose must be obtained.[4]

An injunction is not in general dissolved by a subsequent amendment of the bill;[5] but where the record was altered by the addition of a plaintiff, it was held to have this effect.[6]

[6] As to service in the case of a corporation aggregate, see Carron Company *v.* Maclaren, 5 H. L. Ca. 416.

[7] The copy should be a full copy, including the signature of the Record and Writ Clerk; and should be indorsed in like manner as the original. Braithwaite's Pr. 228.

[8] Braithwaite's Pr. 228, 229; Woodward *v.* King, 2 Dick. 797; S. C. *nom.* Woodward *v.* Earl Lincoln, 3 Swanst. 626; Ellerton *v.* Thirsk, 1 J. & W. 376; Gooch *v.* Marshall, 8 W. R. 419, V. C. W. [The service of the injunction without service of the summons is irregular but not void, and, until dissolved, the injunction is obligatory. Lash *v.* M'Cormick, 14 Minn. 485.]

[9] Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), § 226; and see Chitty's Arch. 1375, 1376.

[1] Millens *v.* Seymour, 4 John. Ch. 174; Chesapeake, &c. Canal Co. *v.* B. & O. R. R. Co., 4 Gill & J. 7; Poor *v.* Carleton, 3 Sumner, 70.

[2] Bliss *v.* Collins, cited 2 Mer. 62; Green *v.* Pulsford, 2 Beav. 70, 75. The want of due diligence on the part of a plaintiff in the prosecution of his suit is always a cause for dissolving an injunction. Hendrickson *v.* Hays, 1 McCarter, 81; Grey *v.* Duke of Northumberland, 17 Ves. 281; Depeyster *v.* Graves, 2 John. Ch. 148; Corey *v.* Voorhies, 1 Green Ch. 5; West *v.* Smith, 1 Green Ch. 309; Greenin *v.* Hoey, 1 Stockt. 158; Lee *v.* Cargill, 2 Stockt. 331; Schalk *v.* Schmidt, 1 McCarter, 268; Howe *v.* Willard, 40 Vt. 662; [Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 48].

[3] Schneider *v.* Lizardi, 9 Beav. 468; but see Attorney General *v.* Marsh, 16 Sim. 572; 13 Jur. 317.

[4] Ouddeen *v.* Oakley, 2 De G., F. & J. 158; and see Mollett *v.* Enequist (No. 2), 26 Beav. 466.

[5] Davis *v.* Davis, 2 Sim. 515; Warburton *v.* London & Blackwall Railway Company, 2 Beav. 253; Brooks *v.* Purton, 1 Y. & C. C. 271; 6 Jur. 94; Kennedy *v.* Lewis, 14 Jur. 166, V. C. K. B. It is not necessary, though usual, for the order giving leave to amend to state that the amendment is made without prejudice to the injunction. Lofft, pp. 423, 424; Seton, 873; [Selden *v.* Vermilya, 4 Sandf. Ch. 573; Mount Olivet Cemetery Co. *v.* Bedeke, 2 Tenn. Ch. 483].

[6] Attorney General *v.* Marsh, 16 Sim. 572; 13 Jur. 317; and see Davis *v.* Davis, Warburton *v.* London & Blackwall Railway Company, and Kennedy *v.* Lewis, *ubi supra*.

An application to dissolve an interlocutory injunction is made by motion:[7] of which notice should be given in the usual manner.[8] The notice should be given for one of the days appropriated to the hearing of motions; but if it be important that the motion should be made without waiting for such a day, application should be made to the Court, before the notice of motion is served, for permission to give the notice of motion for a particular day; and the fact of such permission being given should be mentioned in the notice of motion.[9] The plaintiff is sometimes, by the interim order, required to undertake that he will accept short notice to discharge the order.[10]

*1676 * It seems that where an injunction is granted against several defendants, one of them may move to dissolve in the absence of the rest.[1] In an interpleader suit, however, the notice of the motion to dissolve the injunction must be served on all the defendants.[2]

If the injunction was obtained on a misstatement of the facts, the motion should be to discharge the order, and not to dissolve the injunction.[3]

[7] Where an injunction is granted *ex parte*, the Court will, at any time, hear a motion to dissolve for want of equity, unless for special cause. Morris Canal, &c. Co. *v.* Biddle, 3 Green Ch. 222. And such motion will be heard before answer filed. *Ibid.*; see Wing *v.* Fairhaven, 8 Cush. 363; *ante*, 1641, note. [And before service of process, Shields *v.* McClung, 6 W. Va. 79.] It is no objection to the dissolution of an injunction in New Jersey, that exceptions have been filed to the defendant's answer. Roberts *v.* Hodges, 1 C. E. Green, 299; see Doe *v.* Roe, 1 Hopk. 276; McGee *v.* Smith, 1 C. E. Green, 462. The Court in that State will hear the argument upon the exceptions to the answer, and upon the motion to dissolve the injunction at the same time. Wyckoff *v.* Cochran, 3 Green Ch. 420. Where the dissolution of an injunction has been obtained by fraud, it may be reinstated. Billingslea *v.* Gilbert, 1 Bland, 568; see Gillian *v.* Allen, 1 Rand. 414; Beal *v.* Gibson, 4 Hen. & M. 481; Radford *v.* Innes, 1 Hen. & M. 8. Where a person not a party to the cause is injuriously affected by the injunction, he may, it seems, apply by petition to set it aside. Bourbaud *v.* Bourbaud, 12 W. R. 1024, V. C. W. [Or to modify it so as to preclude all risk of violation by him in the assertion of rights acquired previous to its issuance. Speak *v.* Ransom, 2 Tenn. Ch. 210. And see, where the terms of the injunction are ambiguous, Dalglish *v.* Jarvie, 2 McN. & G. 231. No one not a party, not even an assignee of the defendant, can move to dissolve. Linn *v.* Wheeler, 6 C. E. Green, 231.] As to petitions, see *ante*, p. 1603 *et seq.*

[8] As to motions, see *ante*, p. 1591 *et seq.* In pressing cases, the Judge will appoint a special hearing at his house for the purpose. For form of notice, see Vol. III. [In Tennessee, if the motion be made in term, no notice is required. Rentfroe *v.* Dickinson, 1 Tenn. 196.]

[9] *Ante*, p. 1594. For form of notice, see Vol. III.

[10] See Seton, 867, No. 1. The Master of the Rolls always requires this undertaking. *Ib.* 870.

[1] Joseph *v.* Doubleday, 1 V. & B. 497; Lewis *v.* Smith, 7 Beav. 470; Money *v.* Jordan, 13 Beav. 229; Macgregor *v.* Cunningham, 16 Sim. 365; 12 Jur. 956; see, however, Thompson *v.* Geary, 5 Beav. 131. As a general rule, all the defendants, in order to obtain the dissolution of an injunction, must answer the equity of the bill. But the qualification of the rule is, that it is enough if those defendants answer, upon whom the gravamen of the charge rests. Adams *v.* Hudson Co. Bank, 2 Stockt. 540; Vliet *v.* Lowmason, 1 Green Ch. 404, and note; Stoutenburgh *v.* Peck, 3 Green Ch. 446; Price *v.* Clavenger, 2 Green Ch. 207; Jones *v.* Magill, 1 Bland, 190; Stewart *v.* Barry, *ib.* 172; Williams *v.* Hall, *ib.* 194; Chapline *v.* Betty, *ib.* 197; Tong *v.* Oliver, *ib.* 199; Higgins *v.* Woodward, Hopk. 342; Coleman *v.* Gage, 1 Clarke, 295; Vandervoort *v.* Williams, 1 Clarke, 377; Cape Sable Co.'s Case, 3 Bland, 606; Wakeman *v.* Gillespy, 5 Paige, 112; Noble *v.* Wilson, 1 Paige, 164; Depeyster *v.* Graves, 2 John. Ch. 168. The rule is subject to discretion and modification according to the circumstances of the case. Heck *v.* Vollmer, 29 Md. 507. [For the circumstances which will modify the rule, see Sinnett *v.* Moles, 38 Iowa, 25. See also School Comm's *v.* Putnam, 44 Ala. 506; Garrett *v.* Lynch, 44 Ala. 683. An affidavit will not supply the place of an answer, where an answer is required. Prickett *v.* Tuller, 2 Stew. Eq. 154.] The separate answer of a co-defendant not included in the injunction, cannot be regarded. Syckel *v.* Emery, 3 C. E. Green, 387.

[2] Masterman *v.* Lewis, 2 Phil. 182, 186; *ante*, p. 1568.

[3] Angier *v.* May, 3 W. R. 330; 3 Eq. Rep. 488, V. C. W. For form of notice of motion in such case, see Vol. III. [And see, where there was an abuse of the process by the party who sued it out, Haight *v.* Lucia, 36 Wis. 355.]

The application to dissolve an injunction must be supported by evidence (which is usually given by affidavit), on the part of the defendant, in answer to that upon which the injunction was obtained: and the case, thus made by the defendant, may be met by counter evidence on the part of the plaintiff.[4] The answer of the * defendant *1677

[4] As to evidence on motions, see *ante*, pp. 1598 [and 1668, n. 3]. In Poor *v.* Carleton, 3 Sumner, 75, 74, it is remarked by Mr. Justice Story, that "If the whole merits are satisfactorily denied by the answer, the injunction is ordinarily dissolved. But there are exceptions to the doctrine, and these, for the most part, are fairly resolvable into the principle of irreparable mischief; such as cases of asserted waste, or of asserted mismanagement in partnership concerns, or of asserted violation of copyrights, or of patent-rights. In cases of this sort, the Court will look into the whole circumstances, and will continue or dissolve the injunction in the exercise of a sound discretion." See also Clum *v.* Brewer, 2 Curtis, 506; Moore *v.* Hylton, Dev. Eq. 429; Bank of Munroe *v.* Schermerhorn, 1 Clarke, 303; Tong *v.* Oliver, 1 Bland, 199; Williams *v.* Hall, *ib.* 195; Hollister *v.* Barkley, 9 N. H. 230; Village of Seneca Falls *v.* Matthews, 9 Paige, 504; Hoagland *v.* Titus, 1 McC[illegible]er, 81; Camden &c. R.R. Co. *v.* Stewart, 3 C. E. Green, 489; Carr *v.* Weld, 3 C. E. Green, 41; Scotesbury *v.* Vail, 2 Beasley, 390; Chetwood *v.* Brittan, 1 Green Ch. 439; Furman *v.* Clark, 3 Stockt. 135; [Murray *v.* Elston, 8 C. E. Green, 127; Flippin *v.* Knaffle, 2 Tenn. Ch. 243]. See Orr *v.* Merrill, 1 Wood. & M. 376.

The general rule, however, is, that when the answer fully denies the facts on which the plaintiff's equity rests, the injunction will be dissolved. Reed *v.* Gilbert, 1 Hopk. 416; Gibson *v.* Tilton, 1 Bland, 355; Hollister *v.* Barkley, 9 N. H. 230-238; Chesapeake & Ohio Canal Co. *v.* Baltimore & Ohio Railroad Co., 4 Gill & J. 7; Moore *v.* Reed, 1 Ind. Ap. 418; Livingston *v.* Livingston, 4 Paige, 111; Wakeman *v.* Gillespy, 5 Paige, 112; M'Farland *v.* M'Dowell, 1 Car. Law Repos. 110; Williams *v.* Berry, 3 Stew. & P. 251; Christmas *v.* Campbell, 1 Hayw. 123; Thompson *v.* Allen, 2 Hayw. 151; Parkinson *v.* Trousdale, 3 Scam. 370; Orr *v.* Littlefield, 1 Wood. & M. 13; Alexander *v.* Markham, 25 Geo. 148; Leach *v.* Clark, 3 Stockt. 113; Scott *v.* Ames, *ib.* 251; Fowler *v.* Rose, *ib.* 337; Woodbee *v.* Wyatt, 2 Green Ch. 429; Marvin *v.* Smith, 1 Green Ch. 182; Thorp *v.* Pettit, 1 C. E. Green, 488; The Morris Canal, &c. Co. *v.* Fagan, 3 C. E. Green, 215; Suffern *v.* Barbo, 3 C. E. Green, 220; Van Kuren *v.* The Trenton, &c. Manf. Co., 2 Beasley, 302; Tatem *v.* Mayor of Morristown, 4 C. E. Green, 46; Eaton *v.* Jenkins, 3 C. E. Green, 332; Horner *v.* Jobs, 2 Beasley, 19; Kaighn *v.* Lowe, 1 McCarter, 419; [McClanahan *v.* Ware, 42 Ala. 381; Douglass *v.* Thompson, 35 Ga. 131; Check *v.* Tilley, 31 Ind. 121; Bradford *v.* Peckham, 9 R. I. 220; Kenny *v.* Cone, 11 C. E. Green, 26; Hazlett *v.* McMillan, 11 W. Va. 464; Stilt *v.* Hilton, 3 Stew. Eq. 579. And see Perry *v.* Michaux, 79 N. C. 94]. Not, however, unless the denial is positive. Ward *v.* Van Bokkelen, 1 Paige, 100; Noble *v.* Wilson, 1 Paige, 164; Orr *v.* Littlefield, 1 Wood. & M. 19; Wakeman *v.* Gillespy, 5 Paige, 112; Roberts *v.* Anderson, 2 John. Ch. 204; Hollister *v.* Barkley, *ubi supra*. A denial from information and belief is not sufficient. Apthorpe *v.* Comstock, 1 Hopk. 148; Ward *v.* Van Bokkelen, *supra*; Poor *v.* Carleton, 3 Sumner, 78; Fulton Bank *v.* New York & Sharon Canal Co., 1 Paige, 311; United States *v.* Parrott, 1 McAll. C. C. 271; Holdredge *v.* Gwynne, 3 C. E. Green, 26; Higbee *v.* Camden & Amboy R.R. Co., 4 C. E. Green, 276; Brown *v.* Fuller, 2 Beasley, 271; Homer *v.* Jobs, 2 Beasley, 19; Holmes *v.* George, 24 Geo. 636. Nor is an evasive answer sufficient. Williams *v.* Hall, 1 Bland, 195. Nor a contradictory answer. Tong *v.* Oliver, 1 Bland, 199. Nor is the answer sufficient for this purpose, if there be an extreme improbability in the defendant's statements. Moore *v.* Hylton, 1 Dev. Eq. 429. Where the equity of an injunction bill is not charged to be within the knowledge of the defendant, and the defendant merely denies all knowledge and belief of the facts alleged therein, the injunction will not be dissolved on the bill and answer alone. Rodgers *v.* Rodgers, 1 Paige, 426; Quackenbush *v.* Van Riper, 1 Saxton, 476. And it is always a good answer to an application to dissolve an injunction upon bill and answer, that the equity of the bill upon which the injunction rests, is not denied by the defendant, although no exceptions have been filed. Wakeman *v.* Gillespy, 5 Paige, 112; Yonge *v.* McCormick, 6 Florida, 646. The answer is sufficient, however, if it disprove the facts stated in the bill. M'Farland *v.* M'Dowell, 1 Car. Law Repos. 110. The defendant need only show that the evidence of the plaintiff is entitled to no credit. North *v.* Perrow, 4 Rand. 1. The answer must be sworn to if the defendant wishes to move to dissolve an injunction upon the bill and answer. Doughrey *v.* Topping, 4 Paige, 94. And this, though the oath is waived, or is otherwise unnecessary. Ibid.; Manchester *v.* Day, 6 Paige, 295; Rainey *v.* Rainey, 18 Ala. 282; [Lytton *v.* Steward, 2 Tenn. Ch. 586. And see Lockhart *v.* City of Troy, 18 Ala. 579.] But an injunction is not dissolved of course, even upon a full denial of the equity of the bill, if the Court can see in the facts disclosed good reasons for retaining it. Bank of Monroe *v.* Schermerhorn, 1 Clarke, 303; Hollister *v.* Barkley, *ubi supra*; Stockton *v.* Scott, R. M. Charlt. 380, 381; Sherrill *v.* Hazell, 1 Ind. Ap. 194; Chetwood *v.* Brittan, 1 Green Ch. 439; Orr *v.* Littlefield, 1

is, for the purpose of evidence on the motion, to be regarded *1678 merely as an affidavit, and affidavits may be received and * read in opposition thereto;[1] and at the hearing of the motion, the defendant may avail himself of any technical objection to the bill which would have been held good on demurrer.[2]

Where an interim order has been made, and simultaneous applications are made, both for an injunction and to discharge the order, the plaintiff is entitled to begin.[3]

If, upon hearing the motion, the Court is of opinion that the injunction was obtained by a suppression of material facts, or that it was improperly granted, or that the case made by the plaintiff is contradicted or not supported, it will order the injunction to be dissolved,

Wood. & M. 19, 20; Roberts *v.* Anderson, 2 John. Ch. 202; Linton *v.* Denham, 6 Florida, 1533; Allen *v.* Hawley, 6 Florida, 142; Carter *v.* Bennett, 6 Florida, 214; Hoagland *v.* Titus, 1 McCarter, 81; [Liebstein *v.* Newark, 9 C. E. Green, 209; Creger *v.* Creamer, 12 C. E. Green, 281; Simon *v.* Townsend, 12 C. E. Green, 302; McCorcle *v.* Brem, 75 N. C. 407; French *v.* Snell, 2 Stew. Eq. 95]. In Poor *v.* Carleton, 3 Sumner, 75, 76, Mr Justice Story remarks, "I confess I should be sorry to find that any such practice had been established, as that a special injunction should, at all events, be dissolved upon the mere denial by the answer of the whole merits of the bill. There are many cases in which such a practice would be most mischievous; nay, might be the cause of irreparable mischief. The true rule seems to me to be, that the question of the dissolution of a special injunction is one which, after the answer comes in, is addressed to the sound discretion of the Court." See Moredock *v.* Williams, 1 Tenn. 325; Shellman *v.* Scott, R. M. Charlt. 380, 381; Parkinson *v.* Trousdale, 3 Scam. 370. An injunction will not be dissolved, as a matter of course, on the coming in of the answer, denying the equity of the bill, if the plaintiff has adduced auxiliary evidence of his right. Orr *v.* Littlefield, 1 Wood. & M. 13; [Christie *v.* Griffing, 9 C. E. Green, 76].

Where any material allegation of an injunction bill remains unanswered, the injunction will not be dissolved. Jackson *v.* Jones, 25 Geo. 93; Wooten *v.* Smith, 27 Geo. 216; Lawrence *v.* Philpot, 27 Geo. 585; Thomas *v.* Hoen, 24 Geo. 481; Brown *v.* Stewart, 1 Md. Ch. 87; Washington University *v.* Green, 1 Md. Ch. 97; [Kuhl *v.* Martin, 11 C. E. Green, 60; or when the answer is unsatisfactory as to any matter which is an essential part of the equity of the bill: Gibby *v.* Hall, 12 C. E. Green, 282; or insufficient in important particulars: Vreeland *v.* New Jersey Stone Co., 10 C. E. Green, 140; or sets up new matter in avoidance of admitted equity: Johnson *v.* Corey, 10 C. E. Green, 311; Richardson *v.* Lightfoot, 52 Miss. 508; Judd *v.* Hatch, 31 Iowa, 491; nor unless the denial of the answer is positive: Miller *v.* McDougal, 44 Miss. 682. Where fraud is the gravamen of the bill, the injunction will usually be continued until the hearing. Brigham *v.* White, 44 Iowa, 677; Stewart *v.* Johnson, 44 Iowa, 435].

In New Jersey, on a motion to dissolve an injunction for want of equity in the bill, or because the equity is answered, affidavits cannot be read in opposition to it. Brown *v.* Winans, 3 Stockt. 267; Merwin *v.* Smith, 1 Green Ch. 182. Where the motion is based upon other grounds, they may be read. Brown *v.* Winans, *supra*. So that, where an answer has been filed, and on a motion to dissolve an injunction, the defendant relies upon any thing except the want of equity in the bill and upon his answer, he must specify, in his notice, the grounds upon which he relies for a dissolution, in order that the other party may be heard on affidavits. Brown *v.* Winans, *supra*.

By Chancery Rule 43, in New Jersey, where a motion is made to dissolve an injunction upon the answer, the defendant shall rely on his answer, and on the affidavits annexed thereto, in reply to affidavits annexed to the bill; and no affidavits, except those annexed to the bill, shall be read on such motion on behalf of the plaintiffs, except in reply to new matter set up in the answer, and upon which the defendant shall in any manner rely for a dissolution of the injunction. See Gariss *v.* Gariss, 2 Beasley, 320; Del. &c. R.R. Co. *v.* Rar. &c. R.R. Co., 1 McCarter, 445; [Mulock *v.* Mulock, 7 C. E. Green, 463. A motion to dissolve is addressed to the discretion of the Court. Brown *v.* Haskins, 45 Miss. 183; Conally *v.* Cruger, 40 Ga. 259; De Godey *v.* De Godey, 39 Cal. 157. Counter-affidavits to the answer may be read. Gillis *v.* Hall, 2 Brewst. 342; Howerton *v.* Sprague, 64 N. C. 451. On a motion to dissolve an injunction, mere technical errors or inaccuracies cannot be noticed, such as the failure to require an injunction bond; and all amendable defects of form will be considered as amended. Jones *v.* Ewing, 56 Ala. 303; Vipan *v.* Mortlock, 2 Mer. 477.]

[1] 15 & 16 Vic. c. 86, § 59.

[2] Barnsley Canal Company *v.* Twibell, 7 Beav. 31; Hudson *v.* Maddison, 12 Sim. 416.

[3] Fraser *v.* Whaley, 2 H. & M. 10.

either with or without costs, as the justice of the case may require.[4] If an undertaking as to damages has been given, the Court may give directions for the ascertainment of the amount, and order payment thereof to the defendant.[5] But if the defendant does not succeed in satisfying the Court that the injunction ought to have been refused, or that it ought not to be continued, or the Court considers that the defendant is estopped by his own *laches* or acquiescence, the application will be refused and the injunction continued.[6]

Where, in the case of a bill of discovery, an injunction until answer or further order has been obtained against several persons, who have jointly commenced an action at Law, it will not be dissolved until they have all answered.[7]

When the injunction has been granted until answer or further order, a motion to dissolve it will not be entertained until the plaintiff has had reasonable time to consider whether the answer is sufficient.[8]

The Court has refused to entertain a motion to dissolve an injunction, pending an application for the production of documents.[9]

* If the motion to dissolve is useless, the defendant will be directed to pay the costs of it, whatever may be the result of the suit.[1] *1679

Although the bill seeks merely an injunction, or an injunction with an account consequent upon the injunction, and the result of an inquiry, or the trial of a question of fact, is unfavorable to the plaintiff's right to the injunction, the defendant cannot on that ground move to dismiss the bill. Where a motion of this nature was attempted, after a case at Law had been certified against the plaintiff, Lord Eldon refused it: saying that, upon the certificate from the Court of Law, the case stood as if he had declared his own opinion to the effect that the plaintiff could not succeed in his motion for an injunction; and that the cause might still be brought to a hearing: when the Court might entertain a different opinion upon the title.[2]

Although an injunction may be granted *ex parte*, and sustained upon a motion to dissolve it, yet if, at the hearing of the cause, there be no evidence against the defendant, the bill will be dismissed.[3]

[4] *Ante*, p. 1664; Spottiswoode v. Clarke, 2 Phil. 154; 1 C. P. Coop. t. Cott. 244; 10 Jur. 1043. Cory v. Yarmouth & Norwich Railway Company, 3 Hare, 593; Dalgleish v. Jones, 2 M. N. & G. 231; Great Western Railway Company v. Oxford, Worcester, & Wolverhampton Railway Company, 5 De G. & S. 447; Kerridge Canal Company v. King, 2 Sim. N. S. 781 [Wood v. Wood, L. R. 10 Eq. 193, 201]. For form of order, see Seton, 941, No. 1, 942, No. 3.

[5] See *ante*, pp. 1681-1682; and see Newby v. Harrison, 9 W. R. 849.

[6] Pechell v. Pechell, 1 De G. 161; Attorney-General v. Burrows, 12 Ves. 485; Ames, 3 Atk. 485; Feistel v. King's College, Cambridge, 10 Beav. 491; Gaskell v. Lang, 3 M. & C. 481.

[7] Waite v. Stedmarsh, 19 Ves. 84; Joseph v. Doubleday, 1 V. & B. 497; Naylor v. Middleton, 2 Mad. 131; Nanney v. Vaughan, 8 Sim. 429; and see Glascott v. Copper Miners' Company, 11 Sim. 314.

[8] Gibson v. Chalvers, 8 Beav. 167; but see Stanley v. Bond, 5 Beav. 175; Gray v. Bevan, 7 Beav. 177, n. [But the injunction will be dissolved as soon as the answer is perfected. Henwood v. Jarvis, 12 C. E. Green, 247.]

[9] Storer v. Jackson, 12 Sim. 503.

[1] Norton v. Nicholl, 4 K. & J. 475.

[2] Brooke v. Clarke, 1 Swan. t. 509; [Colo v. Sands, 1 Edw. 183.]

[3] Barfield v. Kelly, 4 Russ. 355, 358. [A formal order to dissolve an injunction is not necessary where there is a final decree disposing of the controversy. Mangum v. Stayler, 37 Ind. 129.]

In general, a party who is entitled to an injunction is also entitled to the costs of it; but if he has asked too much by his notice of motion, he may be deprived of the costs to which he would otherwise have been entitled.[4]

An interlocutory injunction or restraining order continues in force, notwithstanding the suit has abated; and, in such case, if the party enjoined wishes to get rid of the injunction, he must move upon notice that the plaintiff, or the persons representing his interest, may revive within a given time, or else that the injunction may be dissolved.[5]

Section III. — *Continuing or granting Injunctions at the Hearing.*

An injunction, which has been granted upon an interlocutory application, is superseded by the decree made at the hearing of the cause. If, therefore, it is intended that it should still remain in force, it must be expressly continued.[6] Injunctions are continued at the hear-
*1680 ing either provisionally or permanently.[7] They * may be continued provisionally, pending inquiries or accounts which are preparatory to a final adjudication upon further consideration.[1] Injunction may be permanently continued, or made perpetual, by the decree, where the party enjoined is in possession of some instrument conferring a legal right, which it is contrary to equity that he should be permitted to exercise to the detriment of the plaintiff.[2] Therefore, where the plaintiff gave to the defendant three promissory notes for a particular purpose, on his undertaking to make no improper use of them, but afterwards the defendant, contrary to his promise, put the notes in suit

4 Moet *v.* Couston, 33 Beav. 578.

5 *Ante*, pp. 1543, 1544; Randall *v.* Mumford, 18 Ves. 427; Stuart *v.* Ancell, 1 Cox, 411; Hill *v.* Hoare, 2 Cox, 50; Wheeler *v.* Malins, 4 Mad. 171; Adamson *v.* Hall, T. & R. 258; and see Jones *v.* Massey, and Turner *v.* Cole, cited 3 Beav. 292; [Thompson *v.* Hall, 5 Yerg. 418]. As to the effect of abatement upon a perpetual injunction, see *post*, p. 1683.

6 Seton, 944.

7 See Seton Dec. 943 *et seq.* [A party dispossessed by a wrongful injunction may be restored. Waugelin *v.* Goe, 50 Ill. 459.]

1 Old *v.* Old, Seton, 105, No. 3.

2 As for example, a bond and mortgage, void by reason of the obligor and mortgagor being under age. Colcock *v.* Ferguson, 3 Desaus. 482; see Allen *v.* Minor, 2 Call, 70. So a recognizance, where bail, having become fixed at Law, are under the equity of the case, entitled to be discharged. Rathbone *v.* Warner, 10 John. 587. So a judgment, rendered on a bond obtained by fraud. Kruson *v.* Kruson, 1 Bibb, 184. So a judgment, which is satisfied. Brinckerhoff *v.* Lansing, 4 John. Ch. 69. So a void judgment, though it is obvious the party seeking the aid of Equity could obtain relief in a Court of Law. Caruthers *v.* Hartsfield, 3 Yerger, 366. An injunction will be made perpetual, to prevent the record of a deed void, as forged and fraudulent, from being used as evidence of title. Bushnell *v.* Harford, 4 John. Ch. 302. So an injunction was made perpetual where it appeared that the defendant's mill-dam injured the health of the plaintiffs, although an indictment for the same nuisance was still pending. Attorney-General *v.* Hunter, 1 Dev. Eq. 12. So, to prevent a party from shutting up an alley, who, upon the promise of keeping it open, has induced a vendee to make a purchase or to pay a higher price for property adjoining upon it. Trueheart *v.* Price, 2 Munf. 468. For other cases where a perpetual injunction will be allowed, see Armstrong *v.* Hickman, 6 Munf. 287; Willbanks *v.* Duncan, 4 Desaus. 536; Gouverneur *v.* Titus, 1 Edw. Ch. 477; Brevoort *v.* McJimsey, 1 Edw. Ch. 551; Thomas *v.* Brashear, 4 Monroe, 68; Nicoll *v.* Trustees of Huntington, 1 John. Ch. 166; Trustees of Louisville *v.* Gray, 1 Litt. 148; Newburgh Turnpike Co. *v.* Miller, 5 John. Ch. 111; Belknap *v.* Belknap, 2 John. Ch. 463.

against the plaintiff, who thereupon filed a bill praying that the notes might be delivered up to be cancelled, and that the defendant might be restrained, by injunction, from proceeding upon them, the Court, at the hearing, directed that a perpetual injunction should issue, and that it should extend to restrain the indorsing and further negotiation of the notes.[3]

The general course of the Court, where a party is in possession of a security or other instrument which it is against conscience that he should use against the defendant, is, however, to direct it to be delivered up and cancelled: a course which it will adopt even where the instrument is void in Law; although it has been sometimes doubted whether this remedy is applicable to cases of this description: as the circumstances which render the instrument void at Law might be shown or pleaded there, to any action which might be brought upon such an instrument.[4]

The practice of extending injunctions at the hearing, so as to *render them perpetual, is not confined to cases in which the *1681 party is in a position to annoy the plaintiff by proceedings which he may have a legal right to institute; but it is applied to prevent a continuation or repetition of acts for which the party has no legal authority whatever. Thus, injunctions to restrain waste, or the infringement of a patent, may be made perpetual at the hearing. So, also, may injunctions to restrain the piracy of a publication;[1] or to restrain the use by one tradesman of the trade-marks of another;[2] but to support a decree for a perpetual injunction the Court requires that there shall be nothing like a doubt in the case.[3] Thus, where the defendant had, in two numbers of a periodical publication of theatrical criticism, inserted detached extracts, to the amount of six or seven pages, from a farce, the property of the plaintiff, containing forty pages, which were interspersed with criticisms, Sir William Grant M. R. considered the question, whether the defendant had transgressed the allowed limits of fair extracts, too doubtful to warrant the Court in making a decree for a perpetual injunction, and dismissed the bill with costs.[4]

In order to entitle a plaintiff to an injunction, at the hearing, it is not absolutely necessary that he should previously have made an inter-

[3] Chesnal v. Churchman, 3 Bro. C. C. 16, n.; Macclesfield v. Jordan, *ib.* 17, n.; and see *ib.* ed. 1844, n. (2); Harrington v. Du Chatel, 1 Bro. C. C. 124; 2 Swanst. 158, n.; S. C. *nom.* Harrington v. Chatel, 2 Dick. 581.

[4] S. C. 2 Swanst. 157, n.; where the cases on this subject are collected. See also Lord Howard v. 4 M. & C. 97; 2 Stark. Ev. Jur. 4] 6 ed. 1071; Bramley v. Holland, 3 Sumner's Ves. 640, n. (2), and cases cited.

[1] Macklin v. Richardson, Amb. 694, 696; and for the order in that case, see Seton, 944, No. 2; Manby v. Owen, 4 Bligh, 2 N. S. cited 13 Ves. 592, see also Colburn v. Simms, 2 Hare, 543; Kelly v. Hooper, 1 Y. & C. C. C. 197; *ante*, pp. 1643-1648.

[2] M'Lean v. Fox, 3 M. & C. 338, 351; *ante*, pp. 1648, 1649.

[3] A perpetual injunction will not be granted to restrain the defendant from bringing suits for a continued trespass, the right not having been determined at Law. Eldridge v. Hill, 2 John. Ch. 282.

[4] Whittingham v. Wooler, 2 Swanst. 428; see also Bailey v. Taylor, 1 R. & M. 73; and as to the form of the injunction, where the defendant submits, see Attorney-General v. Boyle, 10 Jur. N. S. 309.

locutory application for one;[5] and he is at liberty then to claim an injunction, although he may have previously failed to obtain one, or to support it when obtained.[6] But where he has not previously obtained an injunction, he has the obligation of making out a clear and unexceptionable title at the hearing imposed upon him, and, if he fails in that, he will not be allowed to use the facts proved in the cause as evidence of a *primâ facie* case, giving him a right to further time, for the purpose of enabling him to establish more satisfactorily his legal title.

The principles above laid down do not, of course, apply to those injunctions which are only granted at the hearing of the cause: such as mandatory injunctions;[7] injunctions to restrain the setting up of outstanding terms; and others of that description.

*1682 * With respect to the cases in which the Court will decree perpetual injunctions at the hearing of the cause, it may be mentioned, that if a decree has been made for the performance of trusts, the defendant will be perpetually enjoined from setting up a legal estate in order to overturn it.[1] So, if a will is established against an heir, who suffers the bill to be taken *pro confesso* against him: as that, in effect, is confessing he has no claim, if he permits the decree or order, by which he is excluded, to be made absolute: which is, in effect, admitting that if he had any claim he has abandoned it: the Court will enforce the decree or order, until it is duly reversed; and it will grant, for that purpose, a perpetual injunction.[2]

Perpetual injunctions will also be decreed, where the same question has been frequently litigated in the same manner; or where it is likely to be contested in a multiplicity of suits. This is the foundation for a bill of peace, where it is necessary to quiet the rights, after repeated ejectments:[3] for such a proceeding, unless prevented, would become oppressive to the opposite party;[4] or, where there is one general right to be established against a great number of persons: as, the right of a

[5] Bacon *v.* Spottiswoode, 1 Beav. 382, 384; S. C. on appeal, *nom.* Bacon *v.* Jones, 4 M. & C. 433; Rodgers *v.* Nowill, 6 Hare, 325, 329; Cuddon *v.* Morley, 7 Hare, 202, 205; Dickenson *v.* Grand Junction Canal Company, 15 Beav. 260; Davies *v.* Marshall, 1 Dr. & Sm. 557, 560. As to the effect of *laches* or acquiescence, see Attorney-General *v.* Luton Board of Health, 2 Jur. N. S. 180, 182; Patching *v.* Dubbins, Kay, 1, 9; Johnson *v.* Wyatt, 2 De G., J. & S. 18; Turner *v.* Mirfield, 34 Beav. 390; [Hogg *v.* Scott, L. R. 18 Eq. 444.]

[6] Baily *v.* Taylor, *ubi sup.*

[7] Gale *v.* Abbot, 8 Jur. N. S. 987, V. C. K.; *ante*, p. 1503; but see Beadel *v.* Perry, L. R. 3 Eq. 465; cited *ante*, 1662, note.

[1] Askew *v.* Poulterers' Company, 2 Ves. S. 90; Buckingham *v.* Buckingham, 2 Eq. Ca. Ab. pl. 11, 526.

[2] Selby *v.* Selby, 2 Dick. 678.

[3] 2 Story Eq. Jur. §§ 852-868; Eldredge *v.* Hill, 2 John. Ch. 281, 282; Alexander *v.* Pendleton, 8 Cranch, 462, 468.

[4] *Ante*, p. 1661; Leighton *v.* Leighton, 1 P. Wms. 671; 1 Str. 404; 4 Bro. P. C. ed. Toml. 378; Devonsher *v.* Newenham, 2 Sch. & Lef. 199, 211; Earl of Bath *v.* Sherwin, 10 Mod. 1; 4 Bro. P. C. ed. Toml. 373; Hodgson *v.* Duce, 2 Jur. N. S. 1014, V. C. S.; Lowndes *v.* Bettle, 10 Jur. N. S. 226; 12 W. R. 399, V. C. K.

[To prevent a multiplicity of suits is a distinct ground of equitable jurisdiction. Biddle *v.* Ramsey, 52 Mo. 153; Richmond *v.* Dubuque R. Co., 33 Iowa, 422; Imperial Fire Ins. Co. *v.* Gunning, 81 Ill. 236. The principle was applied to a bill filed by a railroad company against a municipal corporation to enjoin 77 suits brought to recover penalties. Third Av. R. Co. *v.* Mayor, 54 N. Y. 159. And to a bill by a county to enjoin a large number of suits begun, and the institution of others, on notes of the county illegally issued. Supervisors of Saratoga County *v.* Devoe, 19 Alb. L. J. 438 (Crt. of App. N. Y.)]

parson against his parishioners for tithes; or the right of parishioners against a parson for a modus; or the rights of a lord of the manor against his tenants for encroachments; or the right of the tenants against the lord for disturbance: for, as the difficulties would be insuperable if each of the parties should attempt to determine their particular rights by separate and distinct actions, the Court will put the whole in peace by a perpetual injunction.[5] An injunction will also be granted at the hearing, whenever it is necessary for the purposes of complete justice:[6] although it is not prayed by the bill.[7]

As a general rule, an injunction can only be made perpetual at the hearing of the cause;[8] and the plaintiff has a right to proceed with his cause for that purpose, although he has obtained an interlocutory injunction which has been acquiesced in by the * defendant.[1] By *1683 consent, however, the injunction may be made perpetual, on an interlocutory application.[2]

It is not usual to issue a second writ when the injunction is made perpetual; it may, however, be issued and served.[3]

An injunction which has been made perpetual is so far final as to remain in force notwithstanding the abatement of the suit: for if it was necessary to revive upon every abatement, that would be in effect a perpetual suit.[4]

Section IV. — *Consequences of the Breach of an Injunction or Restraining Order.*

The remedy, in the event of the breach of an injunction or restraining order, is by committal; and not by attachment.[5] What will be considered as a breach, depends entirely upon the form of the injunction or order, and the nature of the act to be prohibited.[6] Any person who

[5] Lord Tenham *v.* Herbert, 2 Atk. 483; Mayor of York *v.* Pilkington, 1 Atk. 282; Conyers *v.* Lord Abergavenny, *ib.* 285; but see Lord Sefton *v.* Lord Salisbury, 7 W. R. 272. [See Lehigh &c. R. Co. *v.* McFarlan, 3 Stew. Eq. 145.]

[6] Dickenson *v.* Grand Junction Canal Company, 15 Beav. 260.

[7] Bousfield *v.* Eyre, 8 Beav. 259, 259; 9 Jur. 717; Boswell *v.* Spry, 1 De G., M. & G. 551, but see Russell *v.* London, Chatham, & Dover Railway Company, 4 Giff. 403; S. C. *nom.* Norman Scott-Russell *v.* London, Chatham, & Dover Railway, 9 Jur. N. S. 1097.

[8] Day *v.* Sims, 3 V. & B. 170; Seton, 944.

[1] Duke of Beaufort *v.* Morris, 6 Hare, 359; see S. C., 2 Phil. 634; 12 Jur. 614.

[2] Seton, 944; Morrell *v.* Pearson, 12 Beav. 284.

[3] Braithwaite's Pr. 229. For form of a perpetual injunction, see Vol. III.

[4] Askew *v.* Dawes, 2 Dick. 471; S. C. *nom.* Ascough *v.* Lowndes, cited 3 Ves. 197; [Yeomans *v.* Kilvington, 1 Dick. 351; Oldfield *v.* Cobbett, 20 Beav. 563; Justice *v.* McBroom, 1 Lea, 556]. As to the effect of abatement upon an interlocutory injunction, see *ante*, p. 1679.

[5] Braithwaite's Pr. 228; Seton, 945, 947; Angerstein *v.* Hunt, 6 Ves. 488; Gooch *v.* Marshall, 8 W. R. 410, V. C. W.; [Worcester *v.* Truman, 1 McLean, 483; Gray *v.* Chicago, &c. R. Co., 1 Woolw. 64; Fanshawe *v.* Tracy, 4 Biss. 490. But see Schoonmaker *v.* Gillett, 3 Johns. Ch. 311; Rutherford *v.* Metcalf, 5 Hayw. 58; State *v.* Cutler, 13 Kan. 131].

[6] See St. John's College *v.* Carter, 4 M. & C. 497; S. C. *nom.* St. John's College *v.* Pratt, 3 Jur. 187; Money *v.* Jordan, 14 Beav. 229; Lansing *v.* Easton, 7 Paige, 364; M'Crede *v.* Senior, 4 Paige, 378. Nothing can be deemed a breach of an injunction forbidding the disturbance of a right of way which does not interfere with its free exercise. Bosley *v.* Susquehanna Canal, 3 Bland, 63. [It is a violation of an injunction restraining a de-

acts in contravention of it will be held to have been guilty of a contempt, and may be ordered to be committed.[7]

An injunction operates from the date of the order, and not from the sealing of the writ;[8] and although it has been irregularly obtained, it is still an order of the Court, and must be discharged before it can be disobeyed.[9] Where, however, the defendant and his solicitors had been guilty of a breach of an injunction which was irregular, Lord Eldon refused to commit them; but ordered them to pay the costs occasioned by the breach, and of the motion to commit.[10]

*1684 *Before the Court will punish for a breach of an injunction or restraining order, it must be clear that the party knew that the injunction had been issued,[1] or that the order had been made. Strictly speaking, he ought to be served with the writ or order itself, in the manner already pointed out; but circumstances may justify a committal, without the actual service of the writ or order: as where the matter is pressing, and there is not time to procure it: in which case, as we have already seen,[2] the immediate service of the writ will be dispensed

fendant from disposing of property, to deliver the property in compliance with a sale made previously to the service of the injunction. Jewett *v.* Bowman, 12 C. E. Green, 171. So, where the injunction was against running a ferry between two points, and the party changed one of the points: Mayor of N. Y. *v.* N. Y. Ferry Co., 40 N. Y. Sup. Crt. 300. That the injury was done before service of the injunction, and that the subsequent acts have done the complainant no further injury, will not excuse where those acts were intended to make the injury complete. Thropp *v.* Field, 10 C. E. Green, 166. Nor will a common rumor that the injunction was dissolved. Morris *v.* Hill, 1 Stew. Eq. 33.]

[7] Harvey *v.* Mountague, 1 Vern. 57, 122; Lord Wellesley *v.* Earl of Mornington, 11 Beav. 180, 181; 12 Jur. 367. [See, as to the proper practice where an injunction has been disobeyed by a married woman. Hope *v.* Carnagie, L. R. 7 Eq. 263.] A writ of injunction was issued to restrain the defendants from removing certain machinery which was in their possession, and it was held that they would be guilty of contempt if they stood by and quietly suffered it to be removed, even though they did not actively participate in the removal. Stimpson *v.* Putnam, 41 Vt. 238. The object of the proceeding for contempt is twofold: first, to punish the guilty party; secondly, to compel restitution to the party injured. Stimpson *v.* Putnam, *supra*. The plaintiffs in the above case had a final decree for the value of the machinery removed.

[8] Hearn *v.* Tennant, 14 Ves. 136; James *v.* Downes, 18 Ves. 522; Rattray *v.* Bishop, 3 Mad. 220.

[9] Robinson *v.* Lord Byron, 2 Dick. 703; Woodward *v.* King, *ib.* 797; S. C. *nom.* Woodward *v.* Earl Lincoln, 3 Swanst. 626; Stimpson *v.* Putnam, 41 Vt. 238; see Androscoggin, &c. R.R. Co. *v.* Androscoggin R.R. Co., 49 Maine, 392; Read *v.* Dews, R. M. Charlt. 358. [Rutherford *v.* Metcalf, 5 Hayw. 58. But not where the injunction issues in a matter over which the Court could not, under any circumstances, have jurisdiction. Dickey *v.* Reed, 78 Ill. 261.]

[10] Partington *v.* Booth, 3 Mer. 148; Drewry *v.* Thacker, 3 Swanst. 546. Where an injunction is in operation, a party should respect it, although improperly issued. Moat *v.* Holbein, 2 Edw. Ch. 188. The Court will take into consideration the fact, that the injunction was erroneously granted, and without sufficient equity to sustain it, in determining the extent of the punishment to be imposed upon the party who has been guilty of a breach of it. Sullivan *v.* Judah, 4 Paige, 444.

[1] See Androscoggin & Kennebec R.R. Co. *v.* Androscoggin R.R. Co., 49 Maine, 392. On affidavits of a breach of an injunction to stay waste and of personal service of a copy of the affidavits, and notice of the motion, an attachment was ordered to bring up the defendant to answer for the contempt. Schoonmaker *v.* Gillett, 3 John. Ch. 311; see Rutherford *v.* Metcalf, 5 Hayw. 60. [Underwood's Case, 2 Humph. 46; State *v.* Cutler, 13 Kans. 131.]

For form of committal for breach of an injunction, see 2 Seton Dec. (3d Eng. ed.) 945; Stimpson *v.* Putnam, 41 Vt. 238; Howe *v.* Willard, 40 Vt. 654, 664. Since *Re* Vansandau, 1 Ph. 605, it is usual to insert in the order an express adjudication on the contempt, as held the better form in a case of special contempt; but such adjudication is not essential. S. C., 2 Seton Dec. (3d Eng. ed.) 945.

[2] *Ante*, p. 1673; Ellerton *v.* Thirsk, 1 J. & W. 376; Gooch *v.* Marshall, 8 W. R. 416, V. C. W.

with, and service of a copy of the minutes of the order, or of a notice of its having been made, will be sufficient.

In some cases, a committal may be ordered, where neither the writ nor the minutes of the order have been served, nor any personal notice given. Thus, it was held by Lord Hardwicke, that if the person was in Court at the time the order for an injunction was pronounced, that alone would be sufficient notice;[3] and if the party remains in Court, until the order is about to be made, he cannot, by leaving at that instant, avoid its consequences.[4] So, also, if he is informed that the injunction has been granted, and there will be no delay on the part of the plaintiff in endeavoring to get the order drawn up, the defendant will be committed for the breach of it: because it would be a contempt to act contrary to such an order, when he knew the order was made.[5] In these and the like cases, all the mischief might be done, and the Court might as well grant no injunction at all, unless this kind of notice was to be held sufficient. In the instance of an injunction against committing waste, the party in the interval might lay the axe to the trees; or, if it was against marrying a ward of Court, * the mar- *1685 riage might be had next morning, by a license fraudulently obtained.[1] In short, the Court will not, under such circumstances, permit a man to elude its justice, by doing that, before the injunction is sealed, which, if it was actually sealed, would be a contempt; but the plaintiff must not be guilty of any unnecessary delay, either in getting the order drawn up, or in serving it, or the writ, when obtained.[2]

The order for committal is obtained upon motion, of which notice must have been duly served personally upon the person committing the contempt.[3] The terms of the notice of motion should be that the party "may stand committed" to Whitecross Street Prison, for breach of the injunction.[4] If the breach has been committed by a person who was

[3] Anon., 3 Atk. 567; Skip v. Harwood, *ib.* 564; [Farnsworth v. Fowler, 1 Swan, 1.]

[4] Heare v. Tennant, 14 Ves. 136.

[5] See Endsor v. Mathis, 1 Stockt. 110; Newark Plank Road Co. v. Elmer, 1 Stockt. 754; Peck's v. Stuyvesant, 5 Selden, 277; Hale v. Thomas, 3 Edw. Ch. 236; Androscoggin & Kenn. R.R. Co. v. Androscoggin R.R. Co., 49 Maine, 392; Howe v. Willard, 40 Vt. 654, 662. If the injunction was properly granted, the service, though out of the State, answers all the ends for which it was intended. It apprises the party of the order of the Court. Haring v. Kaufman, 2 Beasley, 397, 399. [*Ante*, 1673, n. 5.]

[1] Per Lord Eldon, in Kimpton v. Eve, 2 V. & B. 351; Vansandau v. Rose, 2 J. & W. 264.

[2] James v. Dewes, 18 Ves. 522; Bateman v. Watt, 11 Beav. 387. A want of due diligence on the part of the plaintiff after obtaining an injunction is always a cause for dissolving it. Depeyster v. Graves, 2 John. Ch. 204; see Sadler v. Hoss, 5 Paige, 85; Higgins v. Woodward, 1 Hopk. 342, *ante*, 1675, note (2). The practice formerly was, that, upon affidavit of service of the injunction, an attachment would issue for the breach of it. If the defendant was arrested upon the attachment, and entered his appearance with the Registrar, interrogatories were filed and exhibited against him, to which he must answer upon oath. If he denied the service, the other party might examine witnesses to prove it, and, if proved, the Court made him pay all costs and charges before he could be discharged. Harr. ed. Newl. 551. No motion made after the dissolution of an injunction for an attachment, on the ground of an infringement of it while in force, can be sustained. Moat v. Holbein, 2 Edw. Ch. 188.

[3] Angerstein v. Hunt, 6 Ves. 488.

[4] Where the injunction is that he may do a particular thing, the order is, that he may do it by a particular day, or stand committed. Durant v. Moore, 2 K. & M. 33. It seems the motion to commit can only be made on a motion day. Saxby v. Saxby, 7 Sim. 149; and see *ante*, p. 1594.

not named in the writ or order, the notice of motion must be, that he may be committed for his contempt in knowingly assisting in the breach.[5] The plaintiff may also, it seems, obtain an order, *ex parte*, that the defendant may stand committed on a certain day, unless he shows cause against it: which order must be personally served upon the party to be committed.[6] But, whether it be an order *nisi*, or a notice of motion for an absolute committal, the service must be personal: unless an order for substituted service is obtained. Thus, where the defendant has absconded, an order may be obtained, on *ex parte* motion, that service on his solicitor, or at his last place of abode, shall be deemed good service; and, upon that service, under such circumstances, he may be committed.[7]

An affidavit of the personal service of the notice of motion, or of the order *nisi*, should of course be prepared and filed; and on the day named in the notice, the motion should be made, by counsel for the plaintiff, for the commitment; or, if an order *nisi* has been obtained and served, the application should be that it may be made absolute, on the Registrar's certificate of no cause shown.

*1686 * The motion must be supported by affidavits, proving the due service of the notice of motion or order *nisi*; that the party had notice of the injunction or restraining order; and that he has committed a breach of it.[1]

Lord Eldon is reported to have said,[2] that a motion to commit, for a breach of an injunction, could not be made without producing the writ; but, in a case before Lord Cottenham, he held, that if a party, having notice of an injunction, is guilty of a breach of it, he may be committed, without the production of the writ.[3]

If, on the hearing of the motion, the facts are disputed, a trial of the question of fact will, if necessary, be directed.[4]

The order for committal[5] is drawn up by the Registrar, in the usual manner,[6] and delivered by the party who has obtained it to the messenger attending the Court: who will thereupon obtain the Lord Chancellor's warrant, and proceed to execute it.

If the breach of the injunction or order was the result, rather of an

[5] Lord Wellesley *v.* Earl of Mornington, 11 Beav. 180, 181; 12 Jur. 367.

[6] Durant *v.* Moore, *ubi sup.*; Blanchard *v.* Cawthore, 6 Sim. 155. For form of motion paper, see Vol. III.

[7] Pulteney *v.* Shelton, 5 Ves. 147; Pearce *v.* Crutchfield, 14 Ves. 206; and see *Re* Boger, 3 Jur. N. S. 930, V. C. W. For form of motion paper, see Vol. III.

[1] As to the necessary evidence, see St. John's College *v.* Carter, 4 M. & C. 497; S. C. *nom.* St. John's College *v.* Pratt, 3 Jur. 187. A party alleging a contempt of Court by breach of an injunction, must make it out clearly to the satisfaction of the Court. Magennis *v.* Parkhurst, 3 Green Ch. 433. If the accused deny the contempt, or do not clearly show it by his answers to interrogatories exhibited to him, the prosecutor may examine witnesses to prove it; and on the other hand the accused party may examine witnesses to exculpate himself from the charge. Magennis *v.* Parkhurst, *supra*; [Underwood's Case, 2 Humph. 46]. For form of order, see Seton, 945; and for forms of affidavits, see Vol. III.

[2] Ellerton *v.* Thirsk, 1 J. & W. 376.

[3] M'Neil *v.* Garratt, C. & P. 98; 5 Jur. 836; *ante*, 1684, and note.

[4] Agar *v.* Regent's Canal Company, G. Coop. 77; *ante*, p. 1079.

[5] For form of order, see Seton, 945, No. 1.

[6] *Ante*, p. 1008 *et seq.*

error in judgment than of a wilful contempt, the Court will not direct a commitment; but will merely order the party to pay the costs incurred by the breach of the injunction or order, and of the application.[7]

The plaintiff may, also, by his acquiescence in the breach, waive the ordinary process: though, strictly speaking, no act of the parties can amount to a waiver of a contempt of the Court.[8]

* Peers, and others entitled to privilege of peerage, and Mem- *1687
bers of the House of Commons, are not liable to be committed for a breach of an injunction or order, but the Court will order a sequestration to issue.[1] The same course of proceeding may be adopted, in the case of a corporation aggregate.[2]

Although the injunction or order is irregular, a party acting in contravention of it will be guilty of contempt.[3] The proper course, where there is an irregularity, is to move at once, upon notice, that it may be discharged for irregularity.[4]

An order for committal will be irregular, if it does not state the affidavit of service of the restraining order, or injunction, and of the notice of motion to commit, or that the defendant has appeared by counsel on the hearing of the motion (if that was the case).[5]

[7] Bullen *v.* Ovey, 16 Ves. 141, 144; Leonard *v.* Atwell, 17 Ves. 385, 386; Drewry *v.* Thacker, 3 Swanst. 546; Partington *v.* Booth, 3 Mer. 148; Rantzen *v.* Rothschild, 14 W. R. 96, V. C. S.; and see Daugars *v.* Rivar, 1 W. N. 301, L. JJ.; Harr. ed. Newl. 552. Where the accused is discharged, because the contempt is not proved, the plaintiff is not usually required to pay costs. Magennis *v.* Parkhurst, 3 Green Ch. 433, 436. Where there has been an actual breach of an injunction, the statute of New York gives the Court no discretion, but requires the infliction of a fine sufficient to indemnify the plaintiff for the injury sustained by such breach, and the costs and expenses. And the defendant cannot in such a case be discharged from imprisonment, without the consent of the prosecutor, until the fine is actually paid. Lansing *v.* Easton, 7 Paige, 364; People *v.* Spaulding, 2 Paige, 330. There is no such statute in New Hampshire; and where there is no such statute, the plaintiff in the suit can be no further indemnified for the delay and expense which he has suffered, than the costs which he recovers in the proceeding may operate as an indemnity. Bellamy's Case, 15 N. H. 14. The fact that the defendant in violating the injunction, acted under erroneous advice of counsel, will not protect him in New York from a fine sufficient to compensate the adverse party for the injury sustained, although such advice may protect him from further punishment. Lansing *v.* Easton, 7 Paige, 364; Hawley *v.* Bennett, 4 Paige, 163; see Bellamy's Case, 15 N. H. 14. [And see McKillopp *v.* Taylor, 10 C. E. Green, 139; *Re* Chiles, 22 Wall. 157; Smith *v.* Cook, 39 Ga. 191; Myers *v.* Trimble, 3 E. D. Smith, 612; Galland *v.* Galland, 44 Cal. 475; *Ex parte* Cohen, 6 Cal. 318; State *v.* Rust, 2 Tenn. Ch. 181; Code of Tennessee, §§ 4107, 4108, 4109.]

[8] Mills *v.* Cobby, 1 Mer. 3.

[1] See Robinson *v.* Lord Byron, 2 Dick. 703.

[2] Spokes *v.* Banbury Board of Health, 14 W. R. 128, V. C. W.; L. R. 1 Eq. 42, 51; 11 Jur. N. S. 1010, V. C. W. & L. JJ. For form of order, see Seton, 945, No. 2.

[3] *Ante*, p. 1683.

[4] Robinson *v.* Lord Byron, *ubi sup.* For form of notice, see Vol. III. [Irregularity is a ground for a motion to discharge, not to dissolve an injunction. Jones *v.* Ewing, 56 Ala. 362; Judah *v.* Chiles, 3 J. J. Mar. 302.]

[5] Stephens *v.* Workman, 11 W. R. 303, V. C. K.

[Statutory, and not applicable in the United States.]

*1688 * CHAPTER XXXVII.

WRITS AND ORDERS IN THE NATURE OF INJUNCTIONS.

SECTION I. — *Restraining Orders under 5 Vic. c. 5.*

THE last chapter having been devoted to the consideration of such writs of injunction and restraining orders as the Court of Chancery issues under its original and inherent jurisdiction, it is intended, in this chapter, to investigate the practice concerning certain orders and writs, of a similar effect, issued under a jurisdiction conferred by Act of Parliament. These are: 1. An order restraining the transfer of stock or shares, or the payment of dividends, under Stat. 5 Vic. c. 5, sec. 4; and, 2. The writ of *distringas*, which the Court of Chancery is now authorized to issue by the 5th section of the same Act.

It will also be convenient to include in this chapter a statement of the practice concerning Stop Orders, which are not made under Act of Parliament. Indeed, as they apply to funds over which the Court has previous control, they only derive their authority from being orders in the causes or matters to which the funds affected by them belong.

We have before seen,[1] that, by Stat. 39 & 40 Geo. III. c. 36, the Court is enabled to make an order, either for the purpose of compelling or authorizing the Bank of England to suffer, or of restraining it from permitting, a transfer of stock standing in its books, or from paying any dividends thereon, although the Bank is not made a party to the suit in which the order is made. This statute, in many cases, prevents the necessity of making the Bank a party to a cause where part of the relief sought by the bill is to obtain a transfer of stock, or to prevent a defendant from obtaining such a transfer contrary to the rights of the plaintiff. The object of the statute, however, is only in certain circumstances to prevent the necessity of making the Bank a party to a cause. It does not provide any summary means of preventing a transfer, nor does it, when a cause has been regularly instituted, enable the

*1689 * plaintiff to apply for an injunction against the Bank, otherwise than upon notice to the defendant, or, in a case of emer-

[1] *Ante*, p. 147.

gency, upon such affidavits as would be sufficient to enable the plaintiff to obtain an *ex parte* injunction against the defendant.[1]

The privilege of obtaining orders directing or restraining the transfer of stock, without making the corporation a party to the suit, applied only to government stock, and the Bank of England. It did not extend to shares and interests in other public companies, whether incorporated or not. Moreover, it was found that, even with respect to government stock, neither the remedy given by the Act, nor that afforded by the old writ of *distringas* issued out of the Court of Exchequer, was sufficient to prevent injuries arising, from the facility with which stock was transferred from one person to another. For these reasons, by the 4th section of 5 Vic. c. 5, it is enacted, "That on and after the 15th day of October, 1841, it shall be lawful for the Court of Chancery, upon the application of any party interested, by motion or petition, in a summary way, without bill filed, to restrain the Governor and Company of the Bank of England, or any other public company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or any stock or shares in any public company, which may be standing in the name or names of any person or persons, or body politic or corporate, in the books of the Governor and Company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon; and every order of the said Court of Chancery, upon such motion or petition as aforesaid, shall specify the amount of the stock, or the particular shares to be affected thereby, and the name or names of the person or persons, body politic or corporate, in which the same shall be standing: provided always, that the said Court of Chancery shall have full power, upon the application of any party interested, to discharge or vary such order, and to award such costs, upon such application, as to the said Court shall seem fit." Under this section, a person is now enabled, without filing a bill or otherwise instituting a suit, to obtain, by motion or petition, in a summary manner, an order restraining the transfer of stock, or shares in any public company, or the payment of any dividends thereon.

An application under 5 Vic. c. 5, § 4, is made *ex parte*,[2] by motion or petition. The motion paper or petition should be marked with the name of the Judge to whose Court the matter is * to be at- *1690 tached, in the same manner as a bill;[1] and be intituled in the matter of the Act, and of the person applying; and the petition must state the circumstances on which the applicant relies, to induce the Court to make the order.[2] The motion or petition must be supported by affidavit showing the amount of the stock, or the particular shares, sought

[1] Hammond v. Maundrell, 6 Ves. 773, n.; Ross v. Shearer, 5 Mad. 458. 6 Mad. 1; and see Doolittle v. Walton, 2 Dick. 442.

[2] See *Ex parte* Field, 1 Y. & C. C. C. 1; *Re* Marquis of Hertford, 1 Hare, 584; *Ex parte* Amyot, 1 Phil. 130, n.

[1] See Ord. VI. 6; *ante*, p. 397.

[2] For forms of motion paper and petition, see Vol. III.

to be affected, and in whose name the same is or are standing; and stating facts to satisfy the Court that there is a necessity for its intervention.[3] It has been held that an affidavit of the petitioner's solicitor, to the effect that he had been informed and believed that it was the intention of a trustee, in whose name the stock was standing, to sell it out and leave the country, was not sufficient.[4]

The order, when made is drawn up by the Registrar, and passed and entered, in the usual way.[5] The order must then be served on the Chief Accountant of the Bank of England, if that corporation is restrained, or upon the Secretary or other proper officer of any other public company restrained by the order, by delivering to the person served a true copy of the order, and at the same time showing him the original order.

The effect of the order seems to be the same as that of an injunction;[6] and it continues in force until discharged by an order of the Court. But as the Act does not confer upon the Court any new and summary jurisdiction to adjudicate upon disputed rights, without a bill filed, it appears that such an order is intended only for interim purposes, and that it will be discharged if a bill is not filed within what the Court shall think a reasonable time after it is obtained.[7]

Obedience to the order will, it is presumed, be enforced in the same way as in the case of an injunction.[8]

Any person interested may apply to discharge, or vary the order.[9] The application is made by motion,[10] with notice to the person by whom the order was obtained; and should be supported by affidavit. On the hearing of the application the Court may discharge or vary the order, and award such costs as to the Court may seem fit.[11]

*1691 * Section II. — *Writ of Distringas.*[1]

This writ, the object of which is to restrain the transfer of a fund not in Court, or the payment of dividends thereon, was formerly issued out of the Court of Exchequer; but when the equitable jurisdiction of that Court was abolished, the power to issue the writ was transferred to the Court of Chancery; and the effect of the writ, and the practice under or relating to the same, are such as were in force in the Court of Exchequer at the time of such abolition; but subject to such orders and regulations

[3] *Ex parte* Field, 1 Y. & C. C. C. 1; and see *Re* Marquis of Hertford, 1 Hare, 584; 1 Phil. 129; 8 Jur. 71.

[4] *Ex parte* Field, *ubi sup.*

[5] *Ante*, p. 1008 *et seq.*

[6] See *ante*, p. 1613 *et seq.*

[7] *Re* Marquis of Hertford, *ubi sup.* On this subject, see Seton, 920.

[8] *Ante*, p. 1683.

[9] 5 Vic. c. 5, § 4; *ante*, p. 1689.

[10] *Ex parte* Amyot, 1 Phil. 130, n.; *Re* Marquis of Hertford, 1 Hare, 586.

[11] *Ibid.*; and *ante*, p. 1689.

[1] See Angell & Ames Corp. (6th ed.) 667 *et seq.*; 1 Grant Ch. Pr. 95; Jones *v.* Boston Mill Corp., 4 Pick. 511; Holland *v.* Craft, 20 Pick. 321; Grew *v.* Breed, 12 Met. 363; Orange Co. Bank *v.* Worden, 1 Wend. 309.

as have since been or may be made with reference to the proceedings and practice of the Court of Chancery.[2]

The practice of the Court of Exchequer permitted the writ to be issued not only against the Bank of England, but against the East India Company, and other corporations; and though the form of the writ as scheduled to the Act transferring the jurisdiction,[3] and the general order of the Court of Chancery by which the practice relative thereto is now regulated,[4] apply in terms to the Bank only, it is the practice to issue the writ in all cases in which a restraining order may be issued; that is, against any public company, whether incorporated or not, in whose books any stock or shares may be standing in which, or in the dividends of which, the applicant claims to be interested.[5]

In order to obtain the writ, the person[6] seeking to restrain the fund, or his solicitor, must make an affidavit that the applicant is beneficially interested in the stock in question. The affidavit must be entitled in a fictitious suit by the applicant against the Bank;[7] and must specify the amount of the stock to be affected by the writ, and in whose name it is standing.[8] The affidavit will, however, be acted on by the Record and Writ Clerk, where the applicant swears that he is "trustee for and on behalf of, &c., who are beneficially interested," or if the species of stock only, and not the amount of it, is specified.[9] The residence and the description of the applicant must be stated in the affidavit; and when he is under disability, a next friend must be named on his behalf in *the proceedings: but the written authority of such next *1692 friend to use his name is not required to be filed or produced.[1] In the latter case, the affidavit may be made either by the solicitor or the next friend.[2] The affidavit must be sworn before some person authorized to administer oaths in Chancery;[3] and it is left with the Clerk of Records and Writs, to be filed; but no office copy of it need be taken.[4]

The writ is prepared by the solicitor of the applicant:[5] and must be sealed with the seal of the Record and Writ Clerks' office; and, when sealed, has the same force and validity as the writ of *distringas* formerly issued out of the Court of Exchequer.[6] At the time the writ is sealed a *præcipe* must be left with the officer.[7]

2 5 Vic. c. 5, § 5; Ord. XXVII. 1, 2. As to the effect of a *distringas*, see *In* Marquis of Hertford, 1 Hare, 584, 591; Williams v. Sibley, 4 Ch. R. 442; 9 Jur. N. S. 888; Seton, 921.

3 5 Vic. c. 5, Sched. 1.

4 Ord. XXVII.

5 See Braithwaite's Pr. 191; and *ante*, p. 1689.

6 Where two or more persons apply, an affidavit by one of them will be sufficient. Ord. XXVII. 2. Braithwaite's Pr. 191. If the affidavit is made by the solicitor, it must be shown thereby that he is the solicitor of the applicant.

7 Or other public company.

8 Ord. XXVII. 2. For form of affidavit, see *Ibid.*; and Vol. III.

9 Braithwaite's Pr. 191.

1 Braithwaite's Pr. 191.

2 *Ibid.*

3 As to such person, see *ante*, pp. 744, 745, 891.

4 Braithwaite's Pr. 192.

5 Ord. XXVII. 1.

6 Ord. XXVII. 2; 5 Vic. c. 5, § 5.

7 The writ must be engrossed on parchment, and stamped with a 5*s.* Chancery fee-fund stamp. Regul. to Ord. Sched. 4. For form of writ, see 5 Vic. c. 5, Sched. 1; and Vol. III.; and for form of *præcipe*, see Vol. III.

The writ is made returnable on a day certain in term: which is usually, when it is issued in term time, the last day of the term; and, when issued out of term time, the first day of the next term; but there must be not less than eight clear days between the *teste* and the return.[8] The return does not, however, affect the operation of the writ; nor hinder any application to discharge it being made, before the date of the return.[9]

The writ must then be served on the Bank of England,[10] accompanied with a notice that the object of the writ is to prevent the transfer of the stock therein mentioned, and the payment of the dividends thereon, or as the case may be.[11] In practice, the service is effected by taking the writ and notice to the office of the solicitors of the Bank of England:[12] where the documents are examined; and, if found correct, the *distringas* and notice are then taken by the applicant's solicitor to the Bank, and lodged with the Chief Clerk of the office in which the account of the particular stock is kept; the restraint is thereupon placed by him on the stock.

Where the Bank has been served with a writ of *distringas*, and a notice not to permit the transfer of the stock in such notice, and in the affidavit specified, or not to pay the dividends thereon, it will not permit the stock to be transferred, or the dividends to be paid, without notice to the person who has obtained the writ; but if the Bank after-
*1693 wards receives a request from the person in whose * name such stock is standing, or some person on his behalf, or representing him, to allow such transfer, or to pay such dividends, the Bank is not, by force or in consequence of such *distringas*, authorized, without the order of the Court, to refuse to permit such transfer to be made, or to withhold payment of such dividends, for more than eight days after the date of such request.[1] The Bank, therefore, on receiving such request, serves a written notice on the solicitor by whom the *distringas* was laid on, stating that an application has been made for the stock or dividends, and that unless a bill is filed, and an injunction obtained and served, on or before a specified day (usually within the eight days above mentioned), the *distringas* will no longer be regarded.[2]

The writ of *distringas*, and all process thereunder, may at any time be discharged by an order: to be obtained, as of course, upon the petition of the person on whose behalf the writ was issued: or to be obtained upon the application by motion on notice, or by petition duly served, of any other person claiming to be interested in the stock

[8] Braithwaite's Pr. 192.
[9] *Ib.* 193.
[10] Or other public company.
[11] For form of notice, see Vol. III.
[12] Their fee is 13*s.* 4*d.* In the case of other public companies, the writ and notice are ordinarily served at the company's office, on the secretary, or other proper officer.

[1] Ord. XXVII. 4; *Ex parte* Amyot, 1 Phil. 130, n.; and see Etty *v.* Bridges, 2 Y. & C. C. C. 486; Case *v.* James, 29 Beav. 512. For form of request, see Vol. III.
[2] See *Ex parte* Amyot, *ubi sup.*; 2d Rep. Chan. Com. (1854) App. 122, Mr. Freshfield's evidence.

sought to be affected by such writ; and upon or after such application, such costs thereof and in relation thereto, and to the writ, as to the Court seems just, may, if the Court thinks fit, be awarded and ordered to be paid by the person on whose behalf the writ was issued; or, upon an application by any other person, by such person.[3]

Where, by giving a description of the stock in the notice which was not the same as that in the affidavit, the applicant procured the *distringas* to be put on stock which was not specified in the affidavit, it was discharged with costs.[4]

The fact of a person having sued out the writ of *distringas*, does not preclude him from subsequently applying for a restraining order.[5] Indeed, as we have seen, the effect of the writ of *distringas* is only temporary; and if the person who obtains it wishes to continue the restraint upon the transfer, he must either obtain a restraining order,[6] or, by filing a bill against the party interested in the fund, obtain a regular injunction against the Bank, under the 39 & 40 Geo. III. c. 36.[7]

* Section III. — *Stop Orders.* *1694

The writs and orders hitherto considered in this chapter apply to stock in the public funds, and the stock and shares of and in public companies; but they do not extend to funds or securities in Court: in which case, the Court, in its own jurisdiction, without any statutory authority, has always exercised the power of issuing what are called Stop Orders.

Any person, although not a party to the cause or proceeding in which a fund in Court is standing, who has become entitled to any such fund, or a share thereof, or to any lien or charge thereon, may apply to that branch of the Court to which the cause or proceeding is attached, for an order to prevent the fund in question being paid out, or otherwise dealt with, without notice to the applicant.[1]

A Stop Order will also be granted in favor of a judgment creditor, who has obtained a charging order at Law, on a fund in Court;[2] and

[3] Ord. XXVII. 3. For forms of notice of motion and petition, see Vol. III.

[4] *Re* Cross, 1 Dr. and Sm. 589; 8 Jur. N. S. 5.

[5] *Re* Marquis of Hertford, 1 Phil. 129; 8 Jur. 74; and see *Re* Davies, cited Seton, 921.

[6] Under 5 Vict. c. 5, § 4; *ante*, p. 1680.

[7] See *ante*, pp. 1487, 1688.

[1] Hobson *v.* Shearwood, 8 Beav. 486; Williams *v.* Symonds, 9 Beav. 524; Ewart *v.* King's College, Cambridge, 11 Beav. 254; Hoole *v.* Roberts, 12 Jur. 108, V. C. L.; *Re* Miller, 5 W. R. 258, V. C. K.; *Re* Bland, 10 W. R. 379, V. C. K.; Hawkesley *v.* Gowan, 12 W. R. 1100, V. C. K.; see also Wells *v.* Gibbs, 22 Beav. 204; Miller *v.* Pridden, 3 Jur. N. S. 78, V. C. K. Such an order has been made, on the application of the assignee of the interest of the sole next of kin of a lunatic. *Ex parte* Moore, 1 M'N. & G. 103; *Re* Pigott, 3 M'N. & G. 268.

[2] Miles *v.* Presland, 4 M. & C. 431; Hollis *v.* Day, 10 Sim. 41; 4 Jur. 1125; Winchell *v.* Prickett, 13 Sim. 259; Watts *v.* Jefferys, 3 M'N. & G. 372; 15 Jur. 784; Wells *v.* Gibbs, 22 Beav. 204; Lord Hastings *v.* Beavan, 10 W. R. 206, L. J.; Seton, 952-959; and *ante*, p. 1040; and see Warburton *v.* Hill, Kay, 470; *Re* Nowell, 9 Jur. N. S. 512, 788; 11 W. R. 688, 806, V. C. K.

even where such a charging order had not been made, but the creditor had caused a writ of *fieri facias* to issue, the Court has stopped, at the instance of the creditor, payment of funds in Court to the debtor.[3]

A Stop Order will not, in general, be made, unless the fund is actually in Court;[4] and, therefore, where a sum of money had been ordered to be paid by one party to another, the Court refused, at the instance of a person who had obtained a charging order on it, to order it to be paid into Court, for the purpose of giving him an opportunity of enforcing his right against it by means of a Stop Order.[5]

Applications for Stop Orders may be made by summons at Chambers, where the person whose fund or interest is to be affected consents, or joins in the application: in other cases, the application must be made by petition.[6]

*1695 * The petition must show the title of the person, the payment of whose fund is intended to be restrained: although it is not absolutely necessary that it should show the particular share of the fund to which he is entitled; and it must also show the title of the assignee.[1]

The Court must have proof of these facts, whether the application be made by petition or summons. The title of the assignor will usually appear from the proceedings in the cause: where this is not the case, the facts must be established by affidavit.[2] The title of the assignee is generally proved by the person whose fund is to be affected either joining in the application, or appearing and admitting the fact: when this is not the case, it must, in the case of a petition, be proved in the regular way.[3] To obviate the expense of strict proof, it is now usual, where the applicant claims as assignee, for the assignment to give him the power to use the name of the assignor as an applicant.

It was formerly necessary, upon applications for Stop Orders, that the petitioner should give notice to all the persons interested in the fund: for, as there was no provision enabling the Court to make the person applying pay the costs consequent upon the order, it was considered unjust that a person should obtain an order affecting another

[3] Robinson *v.* Wood, 5 Beav. 388; Courtoy *v.* Vincent, 15 Beav. 486; and for the order in the latter case, see Seton, 957, No. 8.

[4] A Stop Order has, however, been made to restrain the payment of funds to be thereafter paid in, to a particular account. *Re* Duke of Cleveland's Harte Estates, cited Morgan, 489.

[5] Newton *v.* Askew, 11 Beav. 446; 12 Jur. 531, 766; Wellesley *v.* Mornington, 11 W. R. 17, V. C. K.

[6] Seton, 45. Where, however, the fund has been paid into Court under the Legacy Duty Act, or the Trustee Relief Acts, it seems the jurisdiction at Chambers to make a Stop Order affecting it is confined to those cases where there is jurisdiction to deal with the fund itself, under Ord. XXXV. 1 (2, 3). For form of summons, see Vol. III.

[1] Wood *v.* Vincent, 4 Beav. 419. For form of petition, see Vol. III.

[2] Quarman *v.* Williams, 5 Beav. 133.

[3] Wood *v.* Vincent, *ubi sup.*; Winchelsea *v.* Garretty, 1 Beav. 223. For form of affidavit in support of application, see Vol. III.

party's fund, in his absence;[4] but now, where any stocks, funds, shares, securities, or moneys, are standing in the name of the Accountant-General, in trust in or to the general credit of any cause or matter, or to the account of any class of persons, and an order is made to prevent the transfer or payment of such stocks, funds, shares, securities, or moneys, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion thereof, the person by whom any such order is obtained, or the shares affected by such order, are liable, at the discretion of the Court, or the Judge at Chambers, as the case may be, to pay any costs, charges, and expenses, which, by reason of any such order having been obtained, are occasioned to any party to the cause, or any person interested in any such stocks or funds, shares, securities, or moneys.[5] It is not, therefore, necessary for any person presenting a petition, or taking out a summons, for any such order as aforesaid, to serve such petition or summons upon the parties to the cause, or upon * the *1696 persons interested in the parts of the stocks, funds, shares, securities, or moneys, not sought to be affected by any such order;[1] and the applicant must pay the costs of such other parties, if they are served with the petition or summons.[2] It is, however, still necessary to serve the person whose interest is intended to be affected, with a petition which is presented by the assignee alone.[3] The order, as now drawn up by the Registrars, is prefaced by a submission on the part of the assignee, to be bound by the twenty-sixth of the consolidated orders, rule one, above stated.[4]

The order, when duly passed and entered,[5] or an office copy, must be left at the Accountant-General's office; and, until this has been done, it does not take effect. The Accountant-General will, however, delay parting with a fund, if he has received notice of an intended application for a Stop Order.[6]

A Stop Order does not decide any thing as to the rights of the parties; it is, therefore, in general, unnecessary to state that it is made without prejudice;[7] but where the fund has been paid in under the Trustee Relief Act, the order was expressed to be made without prejudice to the trustees' lien for the costs.[8] Where a husband and wife had, previously to the 20 & 21 Vic. c. 57,[9] assigned her reversionary *chose in action*, the operation of the order was limited to the lifetime of the husband.[10]

An incumbrancer, who has obtained a Stop Order, and duly served it on the Accountant-General, thereby obtains priority over a pre-

[4] Trezevant v. Fraser, 3 Beav. 283; 4 Jur. 982; Day v. Croft, 4 Beav. 34; Hulkes v. Day, 10 Sim. 41; 4 Jur. 1125.
[5] Ord. XXVI. 1.
[1] Ord. XXVI. 2.
[2] Grazebrook v. Gillatt, 9 Beav. 612.
[3] Parsons v. Greene, 4 Beav. 521.
[4] See Seton, 952, No. 1.
[5] *Ante*, p. 1608 *et seq.* For forms of order, see Seton, 952, 953.
[6] Seton, 953.
[7] Lucas v. Peacock, 9 Beav. 177.
[8] *Re* Blunt, 10 W. R. 379, V. C. K.
[9] *Ante*, p. 119.
[10] Morgan v. Polley, 1 De G. & S. 143.

vious incumbrancer who has not done so;[11] but this priority only extends to the charge in respect of which the Stop Order was obtained.[12]

A solicitor's lien, on a fund recovered by his exertions, has priority over a Stop Order obtained by an assignee from his client.[13]

The applicant is not, in general, entitled to the costs of the Stop Order; but they may be given him, where it has been rendered necessary by the conduct of the parties;[14] or where his assignment authorizes him to apply to the Court for it; but they should be specially mentioned in the direction for taxation.[15]

*1697 *The fund to which the Stop Order applies will not be paid out, or otherwise dealt with, until it is either directly discharged, or some order is made expressly directing the fund to be dealt with, notwithstanding the Stop Order. A person who has obtained a Stop Order must, therefore, be served with notice of any application to deal with the fund; and at the hearing of the application the Court will either discharge the Stop Order,[1] or direct payment to the person who has obtained it, according to what appear to be the rights of the parties; or, if the rights of the parties cannot then be satisfactorily ascertained, it will direct the fund to be retained in Court for a limited time, to give the claimant an opportunity of taking the necessary steps for asserting his claim.[2]

Where the person who has obtained a Stop Order afterwards assigns his interest in the fund affected thereby, the assignee may obtain a Stop Order in his favor on petition, or, by consent, on summons, supported by production of the former Stop Order, and an affidavit of his title. The order, in such case, either directs that the fund be not dealt with without notice to the assignee, instead of the person named in the former order;[3] or else, that the assignee be substituted, as the person to whom such notice is to be given.[4]

An order may be obtained to stay the delivery out, without notice to

[11] Swayne *v.* Swayne, 11 Beav. 463; and see Greening *v.* Beckford, 5 Sim. 195; Hulkes *v.* Day, 10 Sim. 41; 4 Jur. 1125; Warburton *v.* Hill, Kay, 470; Elder *v.* Maclean, 3 Jur. N. S. 283; 5 W. R. 447, V. C. K.; Livesey *v.* Harding, 23 Beav. 141; Bartlett *v.* Bartlett, 1 De G. & J. 127; 3 Jur. N. S. 705; Day *v.* Day, 1 De G. & J. 144; 3 Jur. N. S. 782; Thompson *v.* Tompkins, 2 Dr. & Sm. 8; Thomas *v.* Cross, 2 Dr. & Sm. 423; 11 Jur. N. S. 384, 385; but see Grainge *v.* Warner, 13 W. R. 833, V. C. S.

[12] Macleod *v.* Buchanan, 33 Beav. 234; 9 Jur. N. S. 1266; 10 Jur. N. S. 223; 12 W. R. 514, L. JJ.

[13] Haymes *v.* Cooper, 33 Beav. 431; 10 Jur. N. S. 303.

[14] Grimsby *v.* Webster, 8 W. R. 725, V. C. K.; Hoole *v.* Roberts, 12 Jur. 108, V. C. E.

[15] Waddilove *v.* Taylor, 6 Hare, 307; Morgan & Davey, 47.

[1] By consent, an order to discharge the Stop Order may be obtained on summons at Chambers. For form of order, see Seton, 953, No. 6; and for form of summons, see Vol. III.

[2] Bethune *v.* Kennedy, 3 Beav. 462; Feistel *v.* King's College, Cambridge, 11 Beav. 254; and see Wastell *v.* Leslie, 15 Sim. 453, n.; Thorndike *v.* Hunt, 3 De G. & J. 563; 5 Jur. N. S. 879.

[3] Robertson *v.* Winch, M. R. in Chambers, 25 Feb., 1861, Reg. Lib. B. 382. The statement of this order in Seton, 957, No. 10, differs from Reg. Lib.

[4] Tench *v.* Cheese, M. R., in Chambers, 26 Jan., 1865, Reg. Lib. B. 232. For forms of petition and summons, see Vol. III.

the applicant, of documents deposited with the Record and Writ Clerk,[6] or the Accountant-General.[6]

A Stop Order will be discharged with costs, if it has been irregularly obtained.[7]

[6] Lang *v.* Griffith, cited Seton, 957.
[6] Williams *v.* Symonds, 9 Beav. 523.
[7] *Re* Nowell, 9 Jur. N. S. 788; 11 W. R 896, V. C. K.

*1698 * CHAPTER XXXVIII.

THE WRIT OF NE EXEAT REGNO.[1]

SECTION I. — *When Issued.*[2]

A *Ne exeat Regno* is a writ which issues to restrain a person from going out of the kingdom, without the Queen's license or the leave of this Court. It is a high prerogative writ: which was originally applicable to purposes of State only, but was afterwards extended to private transactions.[3]

A *ne exeat regno* issues, only, where the claim upon the party going abroad is equitable; and it will be refused upon a mere demand at Law for money: for there, it is said, "the defendant may be arrested,

[1] For the history and uses of this writ, see 2 Story, Eq. Jur. §§ 1465–1475. For form of order for writ to issue, see 2 Seton Dec. (3d Eng. ed.) 959.

[2] For cases showing under what circumstances this writ will be granted in different States, see 1 Smith Ch. Pr. (2d Am. ed.) 577, note (*a*). Virginia: Rhodes *v.* Cousins, 6 Rand. 188. Alabama: Lucas *v.* Hickman, 2 Stew. 11. North Carolina: Edwards *v.* Massey, 1 Hawks, 359. South Carolina: Nickson *v.* Richardson, 4 Desaus. 108; DeCarriere *v.* DeCalonne, 4 Sumner's Vesey, 478, note (*a*), by Mr. Sumner, and for the English cases see Mr. Hovenden's note, *ib.* 592. New York: The writ of *ne exeat* is not abolished by the New York Code of Procedure as a provisional remedy. Forrest *v.* Forrest, 10 Barb. S. C. 46. Nor is the power of the Supreme Court to issue the writ impaired or defeated by the provisions of the Code. Bushnell *v.* Bushnell, 15 Barb. 399. [See Breck *v.* Smith, 54 Barb 212. Indiana: Fitzgerald *v.* Gray, 59 Ind. 254.]

[3] *Ex parte* Brunker, 3 P. Wms. 313; Anon., 1 Atk. 521; Jackson *v.* Petrie, 10 Ves. 164; Beames on *Ne exeat*, 19; Prac. Reg. 289. This writ has now become an ordinary process of Courts of Equity; and it is as much a writ of right as any other process used in the administration of justice. It must be granted when a proper case is presented. Gleason *v.* Bisby, 1 Clarke, 551; Gibert *v.* Colt, 1 Hopk. 499; Mitchell *v.* Bunch, 2 Paige, 606; Porter *v.* Spencer, 2 John. Ch. 169; Rice *v.* Hale, 5 Cush. 242. It is resorted to merely for the purpose of obtaining equitable bail; Mitchell *v.* Bunch, *ubi supra*. Whenever the defendant intends leaving the State, the plaintiff, upon producing evidence of such intention, and of his equitable claims against the defendant, has a right to this equitable bail. *Ibid.* The only proper use of this writ is to detain the person of the defendant to respond to the decree of the Court; and when the cause of action is such, that the person of the defendant cannot be touched under the decree either by execution or attachment, the writ will not issue. Gleason *v.* Bisby, 1 Clarke, 551; see Johnson *v.* Clendenin, 5 Gill & J. 463. In Rice *v.* Hale, 5 Cush. 244, Shaw, C. J. said, "It is a mistake to suppose, that to obtain security of the debt is the only reason why the writ should issue. It cannot issue unless a debt is due, but having issued, the defendant will be held to comply with the decree of the Court and the justice of the case. Johnson *v.* Clendenin, 5 Gill & J. 463; 2 Story Eq. Jur. § 1473; Atkinson *v.* Leonard, 3 Bro. C. C. 218. He may thus be compelled to make a confession, to execute releases and discharges, and to do many things in the progress of the cause, from the benefit of which the plaintiffs will be debarred if he is discharged on this" (the poor debtor's) "oath." [See *Ex parte* Harker, 49 Cal. 465; Samuel *v.* Wiley, 50 N. H. 353; Malcolm *v.* Andrews, 68 Ill. 101; Dean *v.* Smith, 23 Wis. 483; Gresham *v.* Peterson, 25 Ark. 377; Beckwith *v.* Smith, 4 Lans. 182.]

and obliged to give bail: who will be liable, unless * they surren- *1699
der him; and he may be as easily taken by that process as on a *ne exeat regno*." [1]

It is not, however, the mere circumstance, that the defendant may be arrested and held to bail at Law, which induces the Court to refuse a *ne exeat regno* for a legal demand. It will not even grant it in cases where the defendant is not liable to arrest.[2]

The Court will issue the writ wherever one party has a claim against another, which he can only enforce in a Court of Equity. Therefore, where a man had executed a bond to the trustees of his marriage settlement, a party, beneficially interested in the money secured by it, was allowed to have a *ne exeat regno* against the obligor.[3] It is, however, to be observed, that, in a case where a bill was filed by a residuary legatee against the executor and a debtor to the estate, stating that, by collusion between them, the debt was suffered to remain unpaid, and that the debtor was about to leave the country, Lord Eldon refused the application for a *ne exeat regno*: saying, he did not know any instance where it had been done.[4] It is to be recollected, that the foundation of the equity in this case was the collusion, alleged in the bill, between the executor and the debtor: his Lordship's decision, therefore, was probably governed by the principle laid down by him in a * case, mentioned by Mr. Beames,[1] in which the plain- *1700
tiff filed his bill on the ground of fraud, stating a large balance

[1] Per Lord Hardwicke, in Pearne *v.* Lisle, Amb. 75; see also Brocker *v.* Hamilton, 1 Dick. 154; Greames *v.* Smithe, 2 Dick. 469; *In parte* Desconsle, *ib.* 503; Crosby *v.* Marriot, *ib.* 600; *In parte* Brunker, *ubi sup.*; Anon., 2 Atk. 210; S. C. *nom.* King *v.* Smith, 1 Dick. 82; Anon., 1 Bro. C. C. 276; Atkinson *v.* Leonard, 3 Bro. C. C. 218; and see 1 & 2 Vict. c. 110; Chitty's Arch. 750 *et seq.*; and Absconding Debtor's Arrest Act, 1851 (14 & 15 Vic. c. 52); Chitty's Arch. 880 *et seq.*; Mc Donough *v.* Gayner, 3 C. L. Green, 249; 2 Story Eq. Jur. § 1740 *et seq.*; Seymour *v.* Hazard, 1 John. Ch. 1; Smedberg *v.* Mark, 6 John. Ch. 148; Porter *v.* Spencer, 2 John. Ch. 169, 170; Mitchell *v.* Bunch, 2 Paige, 606; Brown *v.* Hall, 5 Paige, 253; De Rivafinoli *v.* Corsetti, 4 Paige, 264; Nixon *v.* Richardson, 4 Desaus. 108; Cox *v.* Scott, 5 Hay. & J. 81; Palmer *v.* Van Doren, 2 Dev. Ch. 425; Gleason *v.* Bixby, 1 Clarke, 501; Brooks *v.* Coombs, 6 Rand. 188; Lucas *v.* Hickman, 2 Stew. 11; Rice *v.* Hale, 5 Conn. 344. In North Carolina, the rule of granting a *ne exeat* only in cases of equitable demands, applies where money and property, to the amount in controversy, Edwards *v.* Massey, 1 Hawks, 352. The exceptions to this rule, that this writ lies only in cases of equitable demands, as stated by Mr. Justice Story, see § 1741, although 2 Story Eq. Jur. §§ 1471-1473; see Atkinson *v.* Leonard, 3 Bro. C. C. (Perkins's ed.) 223, note (*a*). In these two cases, Courts of Law and of Equity have concurrent jurisdiction. Atkinson *v.* Leonard, *ubi supra*; Rhodes *v.* Cousins, 6 Rand. 188; Mitchell *v.* Bunch, 2 Paige, 606; Nixon *v.* Richardson, 4 Desaus. 108. The act to abolish imprisonment for debt in New York has not deprived the Court of Chancery of the power to issue a writ of *ne exeat*, in cases of equitable cognizance, where such writ would have been allowed previous to the passage of that act. Brown *v.* Hall, 5 Paige, 253; see Ashworth *v.* Wrigley, 1 Paige, 301. As to the demands on which this writ is granted, see De Carriere *v.* De Calonne, 4 Sumner's Ves. 577, 592, Mr. Hovenden's notes; Atkinson *v.* Leonard, 3 Bro. C. C. (Perkins's ed.) 218–224, notes; Russell *v.* Ashby, 5 Sumner's Ves. 98, note (*a*). In New York, a writ of *ne exeat* may be granted prior to any decree in a case of alimony. Denton *v.* Denton, 1 John. Ch. 354, 441. So in New Jersey. Yule *v.* Yule, 2 Stockt. Ch. 138.

[2] Gardner *v.* ——, 15 Ves. 444.

[3] Leake *v.* Leake, I. J. & W. 605; and see Grant *v.* Grant, 3 Russ. 598.

[4] Greaves *v.* Griffith, I. J. & W. 646. To sustain this writ sufficient equity must appear on the face of the bill; mere apprehension that the defendant will misapply funds in his hands, or abuse his trust, is not sufficient. Woodward *v.* Schatzell, 3 John. Ch. 412.

[1] Beames on Ne exeat, 52; see also Jackson *v.* Petrie, 10 Ves. 164.

to be due to him from the defendant; and Lord Eldon refused the writ.

The Court has also refused to grant the writ, to assist process of contempt by which payment of costs is enforced:[2] although it has been granted for that purpose in Ireland.[3] It seems, however, that where, upon the taxation of a solicitor's bill, he appears to have been overpaid, the Court will grant a *ne exeat* to prevent his going abroad, without requiring a bill to be previously filed.[4]

Although the Court will not grant a *ne exeat regno* where the demand is at Law, it will not refuse it merely because the plaintiff might have relief at Law, if the case be one in which the Court of Chancery has a concurrent jurisdiction:[5] as in the case of a suit for an account.[6] So, also, the Court will grant the writ upon a bill to recover the amount due upon a bond which has been lost; although, by the present practice of the Courts of Law, a plaintiff may now declare upon a lost bond, which he could not do formerly: for the Court of Chancery does not consider that the circumstance of a Court of Common Law having, by an extension of its rules, acquired a concurrent jurisdiction, is sufficient to defeat the jurisdiction in Equity.[7]

The same principle will also extend to cases of specific performance; for although, in such cases, the vendor may have a right to proceed at Law for the recovery of his purchase-money, yet, as Equity has a concurrent jurisdiction in such matters, a *ne exeat* will be issued to restrain the purchaser from going abroad till he has given security for the amount of his purchase-money.[8] There appears to have been some doubt whether, in cases of this description, the Court will grant the writ before there has been some decree establishing the plaintiff's right to specific performance; and it seems that the writ should not be granted, unless the Court can make it out to be quite clear that there must be specific performance.[9]

The writ will be granted, although the defendant has other *1701 property * than that which is the subject of the suit; and it does not make any difference that, in such a case, the vendor has in Equity a lien upon the property sold for the amount of his purchase-money, which he may enforce by selling the property; and it seems that, even where the defendant has a claim for an abatement out of the

2 Goodman *v.* Sayers, 5 Mad. 471.

3 Steward *v.* Steward, 1 Ball & B. 73.

4 Loyd *v.* Cardy, Prec. in Ch. 171; but see *Ex parte* Brunker, 3 P. Wms. 312.

5 MacDonough *v.* Gaynor, 3 C. E. Green, 249; Lucas *v.* Hickman, 2 Stew. 11.

6 Jones *v.* Alephsin, 16 Ves. 470; and see Jones *v.* Sampson, 8 Ves. 593; Russell *v.* Asby, 5 Ves. 96; Amsinck *v.* Barklay, 8 Ves. 597; Hannay *v.* M'Entire, 11 Ves. 55; Howden *v.* Rogers, 1 V. & B. 129; Dick *v.* Swinton, *ib.* 371; MacDonough *v.* Gaynor, 3 C. E. Green, 249; 2 Story Eq. Jur. §§ 1471, 1472; Atkinson *v.* Leonard, 3 Bro. C. C. (Perkins's ed.) 223, note (*a*); Rhodes *v.* Cousins, 6 Rand. 188; Mitchell *v.* Bunch, 2 Paige, 606; Nixon *v.* Richardson, 4 Desaus. 108.

7 Atkinson *v.* Leonard, 3 Bro. C. C. 218, 224.

8 Boehm *v.* Wood, T. & R. 332, 336, 346; see also Raynes *v.* Wyse, 2 Mer. 472; and Goodwin *v.* Clarke, 2 Dick. 497; which, however, appears not to have been rightly decided. See T. & R. 345.

9 Morris *v.* M'Neil, 2 Russ. 604; and see Goodwin *v.* Clarke, 2 Dick. 497; Raynes *v.* Wyse, 2 Mer. 472; Boehm *v.* Wood, T. & R. 345; Gibbs *v.* Meraud, 2 Edw. Ch. 482; Cowdin *v.* Cram, 3 Edw. Ch. 231; De Rivafinoli *v.* Corsetti, 4 Paige, 264.

purchase-money, which however has not been ascertained, the writ will be granted for the whole.[1]

An attempt has been made to extend the principle, that, in the case of a suit for the specific performance of an agreement, the Court will grant the writ, to a suit for the specific performance of a covenant to indemnify; but the Court was of opinion that the right of a party, entitled, by agreement, to satisfaction by way of damages for the non-performance of the agreement, to come into Equity to enforce that satisfaction, was extremely doubtful; and held that, although, where the equity is clear, but the facts are in dispute, the writ may be sustained,[2] yet, that where the equity is matter of grave doubt, the plaintiff, however specific his allegation may be, cannot, generally speaking, have the writ.[3]

But, although the Court of Chancery will grant this writ in cases where the Court has concurrent jurisdiction with the Courts of Law, it will not permit the defendant to be harassed by a *ne exeat regno*, where he has already been held to bail in a Court of Law for the same demand; and if, under such circumstances, the writ has been issued, it will be discharged. Therefore, where the defendant had entered into a contract with the plaintiff for the purchase of an estate, and the plaintiff had arrested him at Law and held him to bail for the amount of the purchase-money, which bail was afterwards discharged in consequence of the plaintiff having discontinued the suit, a writ of *ne exeat regno*, subsequently obtained by the same plaintiff upon a bill to enforce the same contract, was discharged.[4] So, also, where a defendant had been held to bail at Law, in an action commenced against him by the plaintiff, for the balance of an account, and it was afterwards found more convenient to proceed in Equity, whereupon the defendant was discharged from his arrest at Law, and a *ne exeat* was issued against him by the Court of Chancery, Lord Eldon discharged the writ.[5]

A writ of *ne exeat* may, however, be granted against a defendant who has been arrested at Law, if his arrest has taken place in respect of another demand.[6]

* In order to authorize the issue of a *ne exeat regno*, the de- *1702
mand must not only be equitable, but it must be a pecuniary demand,[1] therefore the Court has refused to grant the writ, upon a bill to enforce an agreement by which the defendant had undertaken to give the plaintiff a bill of exchange as a security for a demand.[2]

And the demand must not only be pecuniary, but it must be actually due.[3] The writ will not be issued in respect of a claim which is merely

[1] Boehm *v.* Wood, T. & R. 338; and see Goodwin *v.* Clarke, *ubi sup.*

[2] In Hampton *v.* Peed, 28 Geo. 544, it was held, that a person, holding a covenant of warranty, pending a suit against him for the premises, may have a *ne exeat* against his warrantor.

[3] Jenkins *v.* Parkinson, 2 M. & K. 5.

[4] Baynes *v.* Wyse, *ubi sup.*

[5] Amsinck *v.* Barklay, 8 Ves. 594.

[6] Howkins *v.* Howkins, 1 Dr. & Sm. 75; 6 Jur. N. S. 490.

[1] See Gibbs *v.* Meraud, 2 Edw. Ch. 482, Cowdin *v.* Cram, 3 Edw. Ch. 251; De Rivafinoli *v.* Corsetti, 4 Paige, 264.

[2] Blaydes *v.* Calvert, 2 J. & W. 211.

[3] Whitehouse *v.* Partridge, 3 Swanst. 365, 377. The debt, for which this writ will be issued, must be certain in its nature, and actually payable and not contingent. 2 Story

contingent: therefore, where it was nothing more than the demand of a wife against her husband, by virtue of a marriage agreement, in case she survived him, Lord Hardwicke refused the application; as the contingency was one which might never happen.[4] The writ may, however, be issued in respect of an interest which is vested, although subject to be divested.[5] Where the debt's becoming due does not depend upon a contingency, but is certain, yet, if it is payable *in futuro*, the writ cannot be granted; and, therefore, a *ne exeat* to restrain the defendant from going abroad, for the purpose of evading the payment of a sum of money which he had been ordered to pay into a banking house, as the condition of the Court's granting an injunction, was refused: because the time when the party was bound by the order to pay the money, namely, a month from the date of the order, had not arrived.[6] It would seem, however, that if, between the date of an order for an injunction and the payment of the money into Court at a future time, there is a substantial threat that the party, who ought to pay, will go abroad, the practice of the Court is to order him to pay the money *instanter*, or to dissolve the injunction.[7]

To entitle the plaintiff to the writ, he must be in a situation either to swear positively that so much is actually due,[8] or in some other manner to point out to the Court the sum to be marked on the writ.[9] The only exception to the rule, which requires that the plaintiff should be *1703 in a situation to swear positively that a certain * sum of money is due, is in the case of a suit for an account: in which it will be sufficient, if the plaintiff can swear that, according to the best of his belief, any particular sum, at the least, would be found justly due to him upon a balance, if the account was taken;[1] but the writ will not be

Eq. Jur. § 1474; Sherman *v.* Sherman, 3 Bro. C. C. (Perkins's ed.) 370, notes. It will not lie therefore, where the demand is of a general unliquidated nature, or is in the nature of damages. 2 Story Eq. Jur. § 1474; Gibbs *v.* Meraud, 2 Edw. Ch. 482. There must be a debt existing at the time and so far mature, that present payment or performance can rightfully be demanded. Gleason *v.* Bisby, 1 Clarke, 551; Rhodes *v.* Cousins, 6 Rand. 188; Cox *v.* Scott, 5 Harr. & J. 384; De Rivafinoli *v.* Corsetti, 4 Paige, 264; Seymour *v.* Hazard, 1 John. Ch. 1; Brown *v.* Haff, 5 Paige, 235; 2 Story Eq. Jur. § 1474; Porter *v.* Spencer, 2 John. Ch. 169. If a party against whom a final decree is made, intends to remove beyond the jurisdiction of the Court before the decree can be enforced by execution, a *ne exeat* will be granted. Dunham *v.* Jackson, 1 Paige, 629.

[4] Anon., 1 Atk. 521.

[5] Howkins *v.* Howkins, *ubi sup.*

[6] Whitehouse *v.* Partridge, *ubi sup.*; and see Cock *v.* Ravie, 6 Ves. 283; Dawson *v.* Dawson, 7 Ves. 173; Haffey *v.* Haffey, 14 Ves. 261.

[7] Whitehouse *v.* Partridge, *ubi sup.*

[8] Rico *v.* Gualtier, 3 Atk. 501; Anon., 1 Bro. C. C. 376; Sherman *v.* Sherman, 3 Bro. C. C. 370; see also Butler *v.* Butler, cited in Beames on *Ne exeat*, 52.

[9] Boehm *v.* Wood, T. & R. 332.

[1] Rico *v.* Gualtier, and Butler *v.* Butler, *ubi sup.*; Jackson *v.* Petrie, 10 Ves. 164; but see Whitehead *v.* Bennett, 10 Jur. 3, V. C. E. The plaintiff, even in a matter of account, must swear positively to a debt or balance due to him, but he need swear only according to his belief as to the amount. Thorne *v.* Halsey, 7 John. Ch. 189; see Gernoe *v.* Boccaline, 2 Wash. C. C. 130; Gibert *v.* Colt, 1 Hopk. 600; Denton *v.* Denton, 1 John. Ch. 441; MacDonough *v.* Gaynor, 3 C. E. Green (N. J.), 249. If the plaintiff swears that so much is due upon an account, without entering into any explanation, that is sufficient; but if he swears that so much is due, and then explains how it arises, and, in making out the account, it appears that such sum is not due, he cannot have the writ. Flack *v.* Holm, 1 J. & W. 407, 408.

In Rice *v.* Hale, 5 Cush. 241, Shaw C. J. said: "We think the writ is not grantable, when the account is open and unliquidated, although the plaintiff states in his affidavit that a certain sum is due. Such an allegation, although in terms the statement of a fact, that is, of the defendant's actual indebtedness, must nevertheless be qualified by the subject-matter to which it relates; and where it relates to a long unliquidated account, or to facts which are future and contingent, it

issued if the account is contested; nor unless it appears, on the defendant's own showing, that something is due from him.[2]

This writ was originally applied only to persons domiciled in this country; but for a long course of years it has been settled, that, if a man living in Scotland,[3] or Ireland,[4] or in our colonies, or in other parts of our dominions,[5] or abroad,[6] comes here, the writ of *ne exeat regno* may issue against him: although he comes here for a particular purpose only, and intends to return immediately.[7]

Upon this principle, the writ has been issued at the instance of an inhabitant of one West India Colony against an inhabitant of another, who was only here for a casual purpose.[8] It was formerly thought, that, where the debt was contracted abroad, and might have been recovered in the Courts there, the writ should not be issued.[9] It is, however, now settled, that a writ of *ne exeat* may issue against any defendant whose residence is out of England, in respect of a debt contracted abroad and recoverable there.[10]

It seems also, that the writ will be granted where the plaintiff is an Englishman, and the defendant a foreigner;[11] but whether it *can be granted where the plaintiff and defendant are both foreigners, and the debt was contracted in their own country, appears to be doubtful:[1] although if the question is between two foreigners, but the subject-matter has arisen in this country, the writ will be granted.[2] *1704

The writ will not be issued where the plaintiff is resident abroad;[3] and where the writ had been issued at the instance of a plaintiff who

can amount to nothing more than a strong declaration of a confident expectation or belief, and is not a sufficient ground for issuing the writ, unless it is accompanied and supported by proper accounts or documents."

[2] Thompson *v.* Smith, 11 Jur. N. S. 276; 13 W. R. 422, M. R.

[3] Mackintosh *v.* Ogilvie, 1 Dick. 119; Done's Case, 1 P. Wms. 265.

[4] Howden *v.* Rogers, 1 V. & B. 129; but see Bernal *v.* The Marquis of Donegal, 11 Ves. 43, where it was refused on the ground of parliamentary privilege; the defendant being a representative in Parliament of an Irish borough.

[5] Per Lord Eldon, in Flack *v.* Holm, 1 J. & W. 405, 415.

[6] Howkins *v.* Howkins, 1 Dr. & Sm. 78; 6 Jur. N. S. 490; Anon., 4 De G. & S. 547.

[7] It is not necessary that the defendant should be actually in the State when a writ of *ne exeat* is applied for. Parker *v.* Parker, 1 Beasley (N. J.), 105.

[8] Atkinson *v.* Leonard, 3 Bro. C. C. 218.

[9] Richardson *v.* Willis, Amb. 177; 2 Dick. 786; see also Pearne *v.* Lisle, Amb. 76.

[10] Howden *v.* Rogers, *ubi sup.*; but see Vanzeller *v.* Vanzeller, 15 Jur. 115, V. C. K. B.

[11] Flack *v.* Holm, *ubi sup.*; Parker *v.* Parker, 1 Beasley (N. J.), 105; MacDonough *v.* Gaynor, 3 C. E. Green (N. J.), 249.

[1] Flack *v.* Holm, 1 J. & W. 405, 417; and see Talleyrand *v.* Boulanger, 3 Ves. 447; 4 Ves. 586; 1 J. & W. 417; Vanzeller *v.* Vanzeller, 15 Jur. 115, V. C. K. B.

[2] De Carriere *v.* De Calonne, 4 Ves. 577, 591. A writ of *ne exeat* may issue against a foreigner or citizen of another State, and on demands arising abroad. Mitchell *v.* Bunch, 2 Paige, 606; Gilbert *v.* Colt, 1 Hopk. 500. Upon a bill filed against a foreign executor or administrator, to compel him to account for trust funds which he has received abroad and brought with him into the State, if he is about to depart and go beyond the bounds of the State, he may be arrested on a *ne exeat* and held to equitable bail, as in other cases. McNamara *v.* Dwyer, 7 Paige, 239. But the writ will be discharged upon the defendant's giving security to abide the decree. Woodward *v.* Schatzell, 3 John. Ch. 412; Atkinson *v.* Leonard, 3 Bro. C. C. (Perkins's ed.) 218, 224, and notes; Roddam *v.* Hetherington, 5 Sumner's Ves. 91. As to the cases, uses, and mode of obtaining this writ of *ne exeat*, see Liches *v.* Jones, 7 Sumner's Ves. 417, note; Roddam *v.* Hetherington, 5 *id.* 91, note (*a*), and cases cited; De Carriere *v.* De Calonne, 4 *id.* 577, note (*a*); 1 Smith Ch. Pr. (2d Am. ed.) 577, note (*a*); 2 Story Eq. Jur. § 1475, and note.

[3] Hyde *v.* Whitfield, 19 Ves. 342.

was a resident in Jamaica, against a defendant who was resident in the same colony, it was discharged, on the ground that the plaintiff resided abroad, and that his visit to this country was colorable and temporary only.[4] The same rule has been acted upon in subsequent cases.[5]

The writ may be issued against a party who is going abroad in the course of his ordinary business.[6]

A writ of *ne exeat regno* will not be granted against a *feme covert* administratrix.[7] The question whether it will be granted, at the suit of a *feme covert*, against her husband, has been much discussed; and in a case before Lord Thurlow, he refused to grant the writ at the instance of a *feme covert* administratrix against her husband, on her affidavit that he had possessed the assets and was going abroad.[8] The decision proceeded upon the ground that the evidence of the wife could not be received against the husband. There seems, however, no reason why, in the cases in which the Court of Chancery recognizes the right of a wife to maintain a suit against her husband: as when she has property settled to her separate use: the Court should not allow the wife *1705 to make an affidavit in support * of an application to restrain the husband from defeating his wife's right, by removing out of the jurisdiction of the Court.[1]

The writ will be granted on the application of a lunatic by his committee: the affidavit being made by the committee;[2] and the Court may direct the writ to issue, wherever a party has made himself liable to the debt of another: even though he has not been called upon to pay the demand.[3]

In order to entitle a plaintiff to a writ of *ne exeat regno* he must, by his bill, give the defendant all the information in his power: so that he may have a reasonable opportunity of meeting it, as distinctly and rapidly as possible.[4]

It is not necessary that the writ should be prayed by the bill: although, where the application is intended to be made immediately on the filing of the bill, it is usual to do so, if, at the time of filing the bill, the plaintiff is aware of the defendant's intention to go abroad.[5] It fre-

[4] Smith *v.* Nethersole, 2 R. & M. 450.

[5] Walker *v.* Christian, and Douglas *v.* Terry, 2 R. & M. 450, n.; Walker *v.* Christian, 7 Sim. 367.

[6] Stewart *v.* Graham, 19 Ves. 313; Dick *v.* Swinton, 1 V. & B. 371; see also Tomlinson *v.* Harrison, 8 Ves. 32; Etches *v.* Lance, 7 Ves. 417; Loyd *v.* Cardy, Prec. in Ch. 171; Baker *v.* Dumaresque, 2 Atk. 66; MacDonough *v.* Gaynor, 3 C. E. Green (N. J.), 249.

[7] *Ante*, p. 180; Pannell *v.* Tayler, T. & R. 96. [Nor against a woman. Adams *v.* Whitcomb, 46 Vt. 708.]

[8] Sedgwick *v.* Watkins, 3 Bro. C. C. 11; 1 Ves. J. 49. In New York and New Jersey, the affidavit of the wife alone is sufficient to support the order for a *ne exeat*. Denton *v.* Denton, 1 John. Ch. 441; Yule *v.* Yule, 2 Stockt. Ch. (N. J.) 138.

[1] In Bagot *v.* Bagot, where real estate was settled to the separate use of a married woman, Sir Lancelot Shadwell V. C. granted a Receiver against the husband, before answer, upon notice; the facts of the case being verified by the affidavit of the wife alone. MS. December, 1838; and see Shaftoe *v.* Shaftoe, 7 Ves. 171; De Manneville *v.* De Manneville, 10 Ves. 56; and Mr. Belt's note to Sedgwick *v.* Watkins, 3 Bro. C. C. 11.

[2] Stewart *v.* Graham, *ubi sup.*

[3] Sealy *v.* Laird, 3 Swanst. 368, n.

[4] Anderson *v.* Stamp, 11 Jur. N. S. 169, V. C. W.; 2 H. & M. 576.

[5] Moore *v.* Hudson, 6 Mad. 218; Barned *v.* Laing, 13 Sim. 255; 7 Jur. 383; Whitehead *v.* Bennett, 19 Jur. 3, V. C. E.; Howkins *v.* Howkins, 8 W. R. 403, V. C. K.; but see Sharp *v.* Taylor, 11 Sim. 50, as explained in 13 Sim. 257. For form of prayer, see Vol. III.

quently happens, however, that the defendant's intention to go abroad arises, or is first discovered, in the course of the suit, and then there is no doubt that the writ would be issued, though not asked for by the bill.[6]

In general, the writ will only be issued at the instance of the plaintiff, and upon a bill filed;[7] but it has been stated, and not denied, that it can be obtained by a defendant against the plaintiff;[8] and it seems that, in matters of account, it may be obtained by a defendant against a co-defendant.[9] It has also been granted in a suit commenced by an administration summons;[10] and against a contributory, under the Winding-up Act.[11] Where, also, upon the taxation of a solicitor's bill, he was reported to have been overpaid, the client obtained a *ne exeat*, to prevent his going abroad, * though there was no bill in *1706 Court whereon to ground the writ.[1] In this last case, however, the demand was capable of being enforced by means of the authority exercised over solicitors as officers of the Court.[2]

We have already seen, that a written copy of a bill, praying a writ of *ne exeat regno*, may be filed, and a written copy served, on an undertaking to file a printed copy within fourteen days.[3]

Section II. — *How granted.*

The application for a writ of *ne exeat regno* is made by an *ex parte* motion, and may be made before service of the copy of the bill:[4] the reason of which is, that the giving notice might operate to occasion the mischief which the writ is intended to prevent, by giving the party an opportunity of removing from the jurisdiction.[5] For the same reason, notice of the motion is not required, even after the defendant has appeared;[6] but the application should be made as promptly as possible,[7] and must be supported by evidence (which is usually given by affidavit).

[6] Collinson *v.* ——, 18 Ves. 353. This writ may be applied for at any stage of the suit. Dunham *v.* Jackson, 1 Paige, 629. If the party, in the progress of the suit, threatens to leave the country, the writ may be applied for by petition, without its being prayed for in the bill, and without an amendment to insert such prayer. 1 Holt, Ch. Pr. 91; see Gilbert *v.* Coit, 1 Hopk. 498.

[7] *Ex parte* Brucker, 3 P. Wms. 312; Anon., 6 Mad. 276; see Mattocks *v.* Tremaine, 3 John. Ch. 75; The Georgia Lumber Co. *v.* Bissell, 9 Paige, 225. Under the same bill, a *ne exeat*, as well as an injunction, may be granted. Bryson *v.* Petty, 1 Bland, 182.

[8] Whitehouse *v.* Partridge, 3 Swanst. 365, 374.

[9] 2 Eq. Ca. Ab. 5, pl. 2; Done's Case, 1 P. Wms. 263; [Sobey *v.* Sobey, L. R. 15 Eq. 200].

[10] *Re* Greasby, Cleaver *v.* Younger, 27 Dec., 1852, V. C. K.; Seton, 961; Braithwaite's Pr. 232.

[11] Mawer's Case, 4 De G. & S. 349; and see "The Companies Act, 1862" (25 & 26 Vic. c. 89), §§ 118, 119.

[1] Lloyd *v.* Cardy, Prec. in Ch. 171; *ante*, p. 1700.

[2] See *post*, Chap. XLIV., *Solicitors*.

[3] *Ante*, pp. 396, 442; 15 & 16 Vic. c. 86, § 6.

[4] For form of motion paper, see Vol. III.

[5] Elliot *v.* Sinclair, Jac. 345; and see Collinson *v.* ——, 18 Ves. 353. The application may be made by petition though in practice this is very rarely done. Where the suit is commenced by administration summons, the application may be made by summons. For form of summons, see Vol. III.

[6] Elliot *v.* Sinclair, *ubi sup.*

[7] Jackson *v.* Petrie, 19 Ves. 164; Dick *v.* Swinton, 1 V. & B. 371.

of the existence of the debt, and of the intention of the party to go abroad.[8] It does not appear to be necessary that an affidavit in support should be made by the plaintiff himself: although it is usually made by him, unless he is under some legal disability: as in the case of lunacy, when, as has been already stated, it may be made by his committee.[9] A *feme covert* may also, as we have seen, in certain cases, make an affidavit in support of a motion for a *ne exeat*, to restrain her husband from going abroad.[10] The writ has been issued on the affidavit of an infant of the age of eighteen years.[11]

No rule is more strong than that the writ shall not issue without a positive affidavit; and that an affidavit as to information and belief only will not be sufficient.[12] The affidavit must be as positive *1707 * as to the equitable debt, as an affidavit of a legal debt to hold to bail;[1] and even where the affidavit is positive, yet, if it appears that, under the circumstances, the deponent could only have acquired his knowledge from the information of others, it will be insufficient. Thus, where a *ne exeat* has been obtained on the affidavit of the plaintiff, who was an infant, it was discharged, although the affidavit was positive: because it appeared, from the statement in the bill, that the plaintiff, who was eighteen years of age, could only have known some of the facts deposed to from the information of others.[2]

The only exception to the rule, that the affidavit must be positive, is, as we have seen, in the case of an account: in which the plaintiff may swear, that, to the best of his belief, such a sum will be due to him on the balance.[3]

It is also necessary that the evidence, on which the application for this writ is founded, should show that the defendant intends going abroad.[4] It seems, formerly, to have been thought, that an affidavit

[8] In Roddam *v.* Hetherington, 5 Ves. 91, 95, Lord Rosslyn said, he did not recollect any instance where a *ne exeat regno* had been applied for upon admissions in the answer; but that the admission would certainly do as well as an affidavit. An affidavit will also be dispensed with, where the demand has been established by a Chief Clerk's certificate. Collinson *v.* ——, *ubi sup.*; Moore *v.* Hudson, 6 Mad. 218; 2 C. P. Coop. t. Cott. 245.

[9] *Ante*, p. 1704.

[10] *Ibid.*; McGee *v.* McGee, 8 Geo. 295.

[11] Roddam *v.* Hetherington, *ubi sup.*

[12] *Ibid.*; Darley *v.* Nicholson, 1 Dr. & War. 66; MacDonough *v.* Gaynor, 3 C. E. Green (N. J.), 249; Yule *v.* Yule, 2 Stockt. Ch. (N. J.) 131, 138; Holliday *v.* Riodan, 2 Geo. 629; Mattocks *v.* Tremaine, 3 John. Ch. 75; Rhodes *v.* Cousins, 6 Rand. 188; Gibert *v.* Colt, 1 Hopk. 500; Gernoe *v.* Boccaline, 2 Wash. C. C. 130; Thorne *v.* Halsey, 7 John. Ch. 193; 1 Hoff. Ch. Pr. 93–95; Rice *v.* Hale, 5 Cush. 241; McGehee *v.* Polk, 24 Geo. 406. In Smedburg *v.* Mark, 6 John. Ch. 138, the Court refused an application for a *ne exeat*, because, for one reason, the application was against an executor, and there was no charge or affidavit that assets had come to the hands of the defendant. See also M'Namara *v.* Dwyer, 7 Paige, 239. The debt need not appear by affidavit. It is sufficient if established by a Master's report. Yule *v.* Yule, 2 Stockt. (N. J.) 138, 141; Collinson *v.* ——, 18 Ves. 353. Or it may be shown by or reference to accounts, or to other authorized documents, to the reasonable satisfaction of the Court, that something in the nature of the ascertainment of a debt has taken place, whereupon a debt arises. Rice *v.* Hale, 5 Cush. 241.

[1] Jackson *v.* Petrie, *ubi sup.*; and see at Law, Chitty's Arch. 740.

[2] Roddam *v.* Hetherington, 5 Ves. 91.

[3] *Ante*, p. 1703.

[4] Mattocks *v.* Tremaine, 3 John. Ch. 75. There ought to be a positive affidavit of a threat or purpose to go abroad: *ib.* 76; and that the debt would be endangered thereby: *ibid.*; Rhodes *v.* Cousins, 6 Rand. 188. The affidavit need not, however, state that the defendant is going abroad for the purpose of avoiding the payment of the debt. Russell *v.* Ashby, 5 Sumner's Ves. 96 and notes. By the Act of Congress, 2d of March, 1793, c. 22,

was, in this respect, sufficient, if it merely stated a belief of the defendant's intention to quit the kingdom, without going into the circumstances upon which that belief was founded.[5] But it is now held, that an affidavit, to obtain this writ, must be positive as to the defendant's intention to go abroad, or to his threats or declarations to that effect, or to facts evincing it;[6] and must *show the means of knowl- *1708
edge of the deponent.[1] In *Oldham* v. *Oldham*,[2] the Court observed: "it is not sufficient to swear that another person said so;" but this must be understood with some qualification: for, in a subsequent case, where the affidavit was made, "not by the plaintiff, but another, to his belief of the defendant's intention to quit the kingdom, upon information received from two persons of his family that they were about to go to the Isle of Man," the writ was granted by Lord Eldon: who, after stating that the point had frequently embarrassed him, expresses himself thus: "But there are cases in which the Court appears to have regarded, and acted upon, the nature of the information and belief. The information is, in this instance, given by persons of the defendant's family: who, therefore, could not be brought forward to make an affidavit; and the circumstance, that the party has not made the affidavit, has not been considered an objection."[3] In *Knight* v. *Watts*,[4] Lord Hardwicke granted the writ upon an affidavit which, after stating that the defendant had denied himself and kept out of the way, and had sold off his goods, and left his house uninhabited, proceeded thus: "that the plaintiff, upon inquiry after the defendant, was informed, that one Mr. Bulcock acted as an agent for him; and that, thereupon, the plaintiff and his solicitor applied to the said Mr. Bulcock; who informed the plaintiff, that, unless he would take an assignment of two houses (to which the defendant pretended he was entitled, if he arrived at the age of thirty), and give the defendant a discharge for all the moneys he had received, the defendant would immediately go abroad, and would either take with him the deeds, or would burn, or destroy the same."

The affidavit will be sufficient, if it states, that the debt will be

§ 5, it is provided that "no writ of *ne exeat* shall be granted, unless a suit in Equity be commenced, and satisfactory proof shall be made to the Court or Judge granting the same, that the defendant designs quickly to depart from the United States."

[5] Beames on *Ne exeat*, 33; Russell v. Ashley, 5 Ves. 96; see also Chapeaurouge v. Carwardine, 8 Ves. 597, n.

[6] Beames on *Ne exeat*, 34; Amos, 2 Ves. S. 480; Oldham v. Oldham, 7 Ves. 410; Leche v. Lance, *ib.* 417; Amstinck v. Barkley, 8 Ves. 597; Hanway v. McLellan, 11 Ves. 54; Jones v. Alcocken, 16 Ves. 470; see also Taylor v. Leech, 1 Dick. 380; Sherman v. Sherman, 3 Bro. C. C. 370; Heede v. Whitfield, 19 Ves. 342; Schell v. Raphael, 4 L. T. N. S. 114, V. C. W.; York v. York, 2 Stockt. (N. J.) 158; Moore v. Gleaton, 24 Geo. 142; Woods v. Symmes, 25 Geo. 69; McGee v. McGee, 8 Geo. 235. The writ of *ne exeat* will not be issued by the Court upon the application of a party, unless facts are set out on which the Court can repose its belief. The fears and apprehensions of the party are not sufficient to authorize the issuing of the writ. Forrest v. Forrest, 10 Barb. (S. C.) 46. As to the evidence required at Law, see Chitty's Arch. 738.

[1] Ord. 5 Feb., 1861, r. 23.

[2] 7 Ves. 410.

[3] Collinson v. ——, 18 Ves. 353; Beames on *Ne exeat*, 34.

[4] 2 C. P. Coop. t. Cott. 257. The defendant had been appointed by the plaintiff to collect an intestate's estate, and had the deeds in his possession for that purpose. *Ped.*; Beames, 36.

endangered by the defendant's quitting the kingdom: without stating that the object is to avoid the jurisdiction.[5]

The order for the writ states the amount for which security is to be given; and before it will be made, the applicant is almost invariably required to give his undertaking to abide by any order the Court *1709 may make as to damages.[6] Where the application is * made on behalf of infants, the undertaking is given, by their next friend signing the Registrar's book.[1]

The affidavits in support of the application must not be sworn until the bill is filed;[2] or before a commissioner who is a solicitor in the cause.[3]

Where the application is made *ex parte*, the applicant must deliver copies of the affidavits upon which the writ is granted, upon payment of the proper charges, immediately on the receipt of a written request and undertaking to pay such charges, from the party or his solicitor requiring such copies, or within such time as may be specified in such request, or may have been directed by the Court.[4]

If the application is made before the defendant has entered his appearance, the Record and Writ Clerk's certificate of the filing of the bill must be obtained, and produced to the Registrar.[5]

The writ of *ne exeat regno* is directed to the sheriff, or other officer of the county or jurisdiction in which the party against whom it is issued is likely to be found.[6] It is prepared by the solicitor of the party;[7] and is sealed with the seal of the Record and Writ Clerks' office.[8] The order for the writ must be produced, and a *præcipe* left, at the time the writ is presented for sealing.[9]

The writ must be indorsed with the name and place of business of the solicitor for the party issuing it, and of his agent, if any; or with the name and place of residence of such party, where he acts in person, and, in either case, with the address for service, if any;[10] and must be marked on the back, in words at length, with the amount of the sum

[5] Baker *v.* Haily, 2 Dick. 632; Etches *v.* Lance, 7 Ves. 417; Tomlinson *v.* Harrison, 8 Ves. 32; Stewart *v.* Graham, 19 Ves. 313; Boehm *v.* Wood, T. & R. 332; and see Vanzeller *v.* Vanzeller, 15 Jur. 115, V. C. K. B.; MacDonough *v.* Gaynor, 3 C. E. Green (N. J.), 249; Yule *v.* Yule, 2 Stockt. Ch. (N. J.) 140, 141; Atkinson *v.* Leonard, 3 Bro. C. C. 318; Mattocks *v.* Tremaine, 3 John. Ch. 75; Rhodes *v.* Cousins, 6 Rand. 188. Danger of loss may be inferred from the fact that the defendant has permanently removed out of the State. McGehee *v.* Polk, 24 Geo. 406. For form of affidavit, see Vol. III.

[6] For form of order, see Seton, 959.

[1] Jones *v.* North, cited Seton, 960. For form of undertaking, see Vol. III.

[2] Anon., 6 Mad. 276; and see Francome *v.* Francome, 11 Jur. N. S. 123; 13 W. R. 355, L. C.; *ante*, p. 891.

[3] Hopkin *v.* Hopkin, 10 Hare Ap. 27; 17 Jur. 343; *ante*, p. 891.

[4] Ord. XXXVI. 9; *ante*, p. 900.

[5] Seton, 959, No. 1.

[6] On this subject, see *ante*, p. 462 *et seq.*

[7] Ord. III. 1.

[8] Ord. I. 37. The writ must be engrossed on parchment, and stamped with a 20*s.* Chancery fee-fund stamp. Regul. to Ord. Sched. 4.

[9] Braithwaite's Pr. 232; Harr. (ed. Newl.) 537; Hinde, 611; Rice *v.* Hale, 5 Cush. 242, 243; Ap. to Hoffman's Ch. P. xli.; McGehee *v.* Polk, 24 Geo. 406. A *capias* where a *ne exeat* should have been sent, and a bond taken thereon, simply to appear in Court in the cause on the first day of the next term, are irregular, and will be set aside. MacDonough *v.* Gaynor, 3 C. E. Green (N. J.), 249. For forms of writ and *præcipe*, see Vol. III.

[10] Ord. III. 2, 5; *ante*, pp. 453, 454. For a form, see Vol. III.

for which the defendant is to give security.[11] This is done as a guide to the sheriff, to take sufficient security, by bail bond, for the defendant's yielding obedience thereto.[12]

* Where the writ is issued against a personal representative, *1710 at the instance of a legatee, or person claiming a share of the residue, it must be marked for the whole amount due from the defendant: not to the plaintiff only, but to all the other persons interested in the estate;[1] and it seems that the Court will sometimes extend the amount of the security required, beyond that of the debt sworn to, for the purpose of covering the costs of proceedings at Law.[2] In *Boehm* v. *Wood*[3] also, the writ was marked for the full amount of the purchase-money, though the defendant was entitled to an abatement: the amount of which, however, had not been ascertained.

Where the writ has been indorsed for a larger sum than is really due, there is no doubt that the Court will make an order that the security shall be given for so much only as is really due, without quashing the writ; and that, too, upon the hearing of a motion to quash it.[4]

Section III. — *How executed.*

To carry this process into effect, the writ must be delivered to the proper sheriff,[5] or other officer, with instructions for executing it. By the terms of the writ, the sheriff is to cause the party, personally, to come before him, and give sufficient bail or security in the sum indorsed on the writ, that he will not go, or attempt to go into parts beyond the seas, without leave of the Court; and, on his refusal, he is to commit him to the next prison.[6] It is said, that it is an abuse of this process to break open the doors, and to take the party in bed: however, where this had been done, the Court refused to set him at liberty.[7]

When a caption is made, the defendant, to obtain his discharge out

[11] Beames on *Ne exeat*, 93: and see form, of order, Seton, 950, No. 1. The Court, allowing the writ, directs a sum, in which the defendant is to be held to bail upon it, sufficient to cover, not only the existing debt, but a reasonable amount of future interest; having regard to the probable duration of the suit. And the sheriff must take a bond in the sum directed by the Court, without any addition. Gilbert *v.* Colt, 1 Hopk. 500; see M'Namara *v.* Dwyer, 7 Paige, 239; Gleason *v.* Clesby, 1 Clarke, 551. If the writ is actually marked by the clerk, it will be presumed to have been done so in pursuance of the order of the Court. Gleason *v.* Clesby, 1 Clarke, 551.

[12] Hinde, 611.

[1] Pannell *v.* Taylor, T. & R. 100; see Beavey *v.* Sutcliffe, 2 Eq. Rep. 706, V. C. W.

[2] Bonner *v.* Worthington, Reg. Lib. 1819, A. 12, cited Beames on *Ne exeat*, 94.

[3] T. & R. 332, *ante*, p. 1700.

[4] Pannell *v.* Taylor, *ubi sup.*

[5] As to the delivery of writs, see *ante*, p. 466.

[6] See form of writ, Vol. III.

[7] Wyatt's P. R. 290; Curs. Canc. 455; see Gile *v.* Devens, 11 Cush. 59; Percival *v.* Stamp, 9 Exch. 167. But see, in reference to acts done through an abuse of process, Ilsley *v.* Nichols, 12 Pick. 270; where an attachment was held unlawful and invalid, when made by an officer who had broken open a dwelling-house by forcing an outer door, against the prohibition of the owner, with the direct and avowed purpose of making such attachment of the owner's goods in the dwelling-house. See also the authorities cited and commented on by the Court, in Ilsley *v.* Nichols, *ubi supra*. As to the mode of executing writs, see *ante*, p. 466.

of custody, must execute a bond, with two sufficient sureties, to the sheriff, in double the sum marked on the writ,[8] conditioned
*1711 * not to go or attempt to go into parts beyond the seas, or into Scotland, without the leave of the Court.[1]

As the sheriff is directed by the writ, to cause the defendant to give sufficient bail or security, he is not bound to take any security but what he may be satisfied is likely to prove effective. Thus, where the writ was marked in the sum of 36,000*l.*, and the defendant, after he was taken into custody, tendered to the sheriff, as a security, the bond of himself and two sureties, in the sum of 36,000*l.*, and a deposit of that sum in the Bank of England, in the joint names of the sheriff and sureties, which the sheriff refused to accept, and, although he afterwards proposed to release the defendant out of custody, upon his finding four sureties, in 36,000*l.* each, yet he ultimately insisted that the 36,000*l.* should be paid into his hands before the defendant was discharged, Lord Eldon held, that the sheriff was right in the course he had pursued: for whatever the sheriff does, under a writ of *ne exeat*, is upon his own responsibility;[2] and what he had done, was merely to require a sufficient security for his having the defendant to produce.[3]

From this it appears that, instead of bail, the sheriff may take a deposit of the amount indorsed upon the writ.[4]

The sheriff, after he has executed the writ, ought to return it: indorsing upon it a proper return of what he has done. If he has taken bail, it may be in the following form: "I have caused the within named A. B. personally to come before me, and he found bail in the penalty of £——, according to the command of this writ."[5] If, instead of taking security according to the direction of the writ, the sheriff takes a deposit of the amount indorsed on the writ, he should make a return to that effect; and where the sheriff omitted to do so, the Lord Chancellor ordered him to make his return within a given time.[6]

[8] In Gibert *v.* Colt, 1 Hopk. 500, the Court held, that the sheriff is not to double the sum marked, but is to take the bond in the sum directed by the Court, without any addition. See *ante*, 1709, note. See the form of a bond to be executed by the defendant, on a writ of *ne exeat* being served on him, set out in Cox *v.* Scott, 5 Harr. & J. 334.

[1] 1 Turn. & Ven. 990; see McGee *v.* McGee, 8 Geo. 295. In Massachusetts, the Supreme Court may discharge the defendant from imprisonment on a writ of *ne exeat*, upon an application by him to the Court for that purpose, and an examination of the defendant by a Master in Chancery, in the same manner as if he was a poor prisoner committed in execution, or arrested on mesne process for debt. Rice *v.* Hale, 5 Cush. 238.

[2] See Brayton *v.* Smith, 6 Paige, 489. The obligations devolved upon sureties entering into a bond conditioned to obey such a writ, bear a close resemblance to the duties and responsibilities of bail at Common Law. They undertake that the defendant shall be responsible for the performance of the orders and decrees of the Court. Johnson *v.* Clendenin, 5 Gill & J. 463. And where the defendant in a writ of *ne exeat* has been proceeded against and committed to jail for not complying with a final decree of the Court, in the cause, and afterwards escapes from custody, his sureties upon the *ne exeat* bond are not responsible, and the Court, as respects them, may order the bond to be cancelled. *Ibid.*

[3] Boehm *v.* Wood, T. & R. 332, 340.

[4] See Bonner *v.* Worthington, Reg. Lib. 1819, A. 233.

[5] Impey, Off. Sheriff, p. 411.

[6] Bonner *v.* Worthington, Reg. Lib. 1819, A. 233. As to compelling the sheriff to return a writ, see *ante*, p. 470.

* Section IV. — *How discharged.* *1712

After the party has been taken upon the writ, and given security, he must be careful not to go abroad, without previously applying to the Court to discharge it: otherwise, the Court, it seems, will order the sureties to pay the money into Court within a certain time, although the defendant's going abroad was the consequence of a mistake as to the effect of the bond.[1]

The party may apply by motion, with notice, to discharge the writ,[2] on the ground of irregularity, or upon the merits, supported, if necessary, by evidence: which is usually given on affidavit.[3] The defendant may also, by analogy, if he has not been interrogated, put in a voluntary answer: which he will be entitled to read in opposition to the plaintiff's affidavits.[4] If security has been given, the notice of motion should state that application will be made, as well for the discharge of the writ, as that the bond may be given up to be cancelled.[5]

If, upon an application to discharge or quash the writ on the ground of irregularity, the Court thinks that it has been improperly issued, it will at once order it to be discharged. It will not, however, discharge the writ, merely because it appears to have issued for a sum exceeding that for which it can be sustained; but, in such cases, the amount for which it has been marked will be reduced.[6] Nor will the Court discharge a writ of this nature, obtained upon affidavits substantiating declarations and acts of the defendant as evidence of his intention to go abroad, upon a counter affidavit by the defendant denying the intention.[7] The Court has also refused to quash the writ, upon the defendant's affidavit that no debt was due, and that the plaintiff had made admission to that effect: the plaintiff having, by his affidavit, sworn positively to there being a debt.[8]

The Court will discharge the writ upon the merits, whenever it * appears either that the plaintiff has no case, or that the defend- *1713 ant is not going out of the jurisdiction;[1] and this it will do either

[1] Musgrave *v.* Medex, 1 Mer. 49; Utten *v.* Utten, *ib.* 51.

[2] See Macdonough *v.* Gaynor, 3 C. E. Green [N. J.], 249.

[3] Grant *v.* Grant, 3 Russ. 598, 602; and see Hyde *v.* Whitfield, 19 Ves. 342; Flack *v.* Holm, 1 J. & W. 405, 418; Sichell *v.* Raphael, 4 L. T. N. S. 114; Seton, 959.

[4] Anderson *v.* Stamp, 2 H. & M. 576.

[5] For form of notice of motion, see Vol. III. The giving the usual security to the sheriff upon a *ne exeat* does not preclude the defendant from applying upon the bill only, or upon the coming in of the answer, to have the writ discharged and the bond to the sheriff given up and cancelled. Jessop *v.* Hill, 7 Paige, 95. The motion should be made without unreasonable delay. And accordingly, where an application to discharge a *ne exeat* was not made until after the cause had been noticed for a final hearing, it was refused. Miller *v.* Miller, 1 Saxton Ch. 386. For form of order for discharge upon giving security, see 2 Seton, Dec. (3d Eng. ed.) 959.

[6] Grant *v.* Grant, 3 Russ. 598, 611.

[7] Whitehouse *v.* Partridge, 3 Swanst. 365, 375; Amsinck *v.* Barklay, 8 Ves. 594, 597.

[8] Jones *v.* Alephsin, 16 Ves. 470. [And a motion to discharge the writ will be refused if the answer and affidavits are unsatisfactory or insufficient. Meyer *v.* Meyer, 10 C. E. Green, 28. See also Hemsworth *v.* Hendrickson, 12 C. E. Green, 60.]

[1] Lee *v.* Lambert, 3 Russ. 417. Sichell *v.* Raphael, 4 L. T. N. S. 114. V. C. W. For the order in the latter case, see Seton, 959. As to the supporting an application to discharge the writ by affidavits, see Russell *v.* Ashby,

absolutely, or conditionally: that is, upon the defendant's giving security with two sureties to answer such sum as may be found due from him in the cause.[2]

The Court will also discharge the writ, upon the defendant's paying into Court the sum for which the writ is marked.[3]

Where the writ is directed to issue, until answer and further order, the Court will not discharge the writ merely upon the coming in of the answer, if it appears, upon the merits of the case, that there will be necessarily decreed things for the defendant to do at the hearing.[4]

It has also been decided, that a surety on a writ of *ne exeat regno* will not be discharged upon the principal being, by a subsequent process of the Court, committed to prison: as the surety is then in no danger.[5] Where the sureties applied to be discharged, on the ground that the defendant was in custody for want of an answer, Lord Eldon refused to discharge them: observing, that there was no instance of it; and that, on the contrary, there was a case in which the Court had refused to discharge them.[6] These last-mentioned applications were previous to the decree; but where, after a decree against the defendant for the same matter as that for which the writ of *ne exeat* issued, the defendant was in contempt, and in custody for not performing the decree,

*1714 an * order was made, on the application of the sureties, that they should be discharged, and the bond as to them cancelled.[1]

If the defendant pays to the plaintiff the sum for which the defendant has given security on a writ of *ne exeat*, the writ and security will be discharged, as to the principal as well as sureties, notwithstanding that it may appear from the proceedings in the cause that a much larger sum is due from the defendant to the plaintiff.[2] Where, subsequently to the

5 Ves. 98; Boehm *v.* Wood, T. & R. 332; Fitch *v.* Richardson, 1 Morris, 245. Affidavits may be read both in support of and against the motion to discharge the writ. Flack *v.* Holm, 1 J. & W. 414; 1 Hoff. Ch. Pr. 363. And it is open to the defendant by affidavit to deny the allegations on which it was granted. O'Connor *v.* Debraine, 3 Edw. Ch. 220; Cowdin *v.* Cram, 3 Edw. Ch. 231.

[2] Roddam *v.* Hetherington, 5 Ves. 91, 95; Boon *v.* Collingwood, 1 Dick. 115; Atkinson *v.* Leonard, 3 Bro. C. C. 218, 223. In cases where the Court feels constrained to discharge the writ, it will often require security to abide the decree. MacDonough *v.* Gaynor, 3 C. E. Green (N. J.), 249; see Parker *v.* Parker, 1 Beasley (N. J.), 105. In New York, it is a matter of course to discharge a *ne exeat* upon the defendant's giving security to answer the plaintiff's bill, where a discovery is necessary, and to render himself amenable to the process of the Court pending the litigation, and to such process as may be issued to compel a performance of the final decree. M'Namara *v.* Dwyer, 7 Paige, 239; Mitchell *v.* Bunch, 2 Paige, 606; Gleason *v.* Bisby, 1 Clarke, 551; see Brayton *v.* Smith, 6 Paige, 489. For form of such an order, see Seton, 959, No. 2.

[3] Evans *v.* Evans, 1 Ves. J. 96; Stewart *v.* Graham, 19 Ves. 313, 314; Dick *v.* Swinton, 1 V. & B. 373. In Gibert *v.* Colt, 1 Hopk. 501, the defendant brought the amount for which the writ was marked into Court, and the writ and bond were discharged by consent.

[4] Atkinson *v.* Bedel, 1 Dick. 98.

[5] Le Clea *v.* Trott, Prec. in Ch. 230. "A bail in this Court, or in the Civil Law, is not discharged upon bringing in the principal, as he is at Common Law. Archepoole *contra* Burrell, Michas. 23 & 24 Eliz.;" MS. of Sir Geo. Carey, cited Beames on *Ne exeat*, 84, n. (14). Tothill's note of Archbold *v.* Barrell, which seems to be the same case, is, however, simply in these words: "A bail in this Court, or in the Civil Law, is discharged upon bringing in the principal, as he may at the Common Law." Tothill, 17; and see Griffith *v.* Griffith, 2 Ves. S. 400.

[6] Stapylton *v.* Peill, 19 Ves. 615; cited Beames on *Ne exeat*, 84.

[1] Debazin *v.* Debazin, 1 Dick. 95; Reg. Lib. 1743, A. 64. [See, also, as to the liability of sureties, Wauters *v.* Van Vorst, 1 Stew. Eq. 103.]

[2] Baker *v.* Jefferies, 2 Cox, 226; Beames on *Ne exeat*, 86.

issue of the writ against a defendant, he took the benefit of the Insolvent Debtor's Acts, the writ was discharged upon his paying the costs of the application to discharge the writ, and relieving the plaintiff from all liability on his undertaking as to damages, and from any action or other proceeding with respect to the writ.[3]

When an application to discharge the writ is granted, the discharging order ought also to restrain the person against whom the writ has issued from bringing an action for false imprisonment: otherwise, in the event of such an action being brought, although probably in all cases the Court would stop the action, yet the costs of the application for that purpose would be at the expense of the person by whom the writ had been obtained.[4]

Where the usual undertaking as to damages has been given, the Court will, if it considers that the writ has been improperly obtained, direct an inquiry as to the damages sustained by the defendant, and order payment of the amount certified in respect thereof.[5]

The Court will not, after the writ has been discharged in Equity, interfere to direct the party to be discharged from a subsequent arrest at Law for the same demand; but will leave it to the Court of Law to determine whether, under the circumstances, the Common Law process ought to be made available.[6]

A writ of *ne exeat* will not be discharged on the mere ground that, since it was ordered, the plaintiff has amended his bill: unless it can be shown that the amendments have varied the case, as originally stated. The Court, therefore, will not make a special order, giving the plaintiff liberty to amend, "without prejudice to the *ne exeat*;" but will leave it to him to obtain the common order, if he thinks he can do so with safety.[7]

[3] James *v.* North, 5 Jur. N. S. 84; 7 W. R. 150, V. C. K.
[4] Darley *v.* Nicholson, 2 Dr. & War. 86.
[5] Sichell *v.* Raphael, 4 L. T. N. S. 114, V. C. W. For the order in that case, see Seton, 960, No. 3.
[6] Walker *v.* Christian, 7 Sim. 367.
[7] Grant *v.* Grant, 5 Russ. 189.

*1715

*CHAPTER XXXIX.

Receivers.

Section I. — *In what Cases appointed.*

A Receiver is an indifferent person, between the parties, appointed by the Court to receive the rents and profits of real estate, or to get in and collect personal estate, or other things in question, pending the suit, where it does not seem reasonable to the Court that either party should do it;[1] or where a party is incompetent to do so: as in the case of an infant. A Receiver is bound to account for and pay what he receives or gets in, as the Court shall direct; and, to secure his doing so, he is commonly ordered to enter into a recognizance, with sureties.[2]

The appointment of a Receiver is a matter resting in the discretion of the Court;[3] and the Receiver, when appointed, is treated as virtually an officer and representative of the Court, and subject to its or-
*1716 ders.[4] Lord Hardwicke considered this power of appointment * to

[1] H. K. Chase's Case, 1 Bland, 213; [Blandheir *v.* Moore, 11 Md. 364].

[2] Ord. XXIV. 1; Wyatt's P. R. 355, 356; Harr. by Newl. 499. As to Receivers, see Adams on Eq. 447; Fisher, 227–290; Jeremy on Eq. 248–253; Lewin on Trusts, 660–662; Macpherson on Infants, 266–268; Seton, 1002–1039; Story Eq. Jur. §§ 827–838.

[3] Skip *v.* Harwood, 3 Atk. 564; and see Owen *v.* Homan, 3 M'N. & G. 378, 412; 15 Jur. 339; 4 H. L. Ca. 997; 17 Jur. 861; Nichols *v.* Perry Patent Arm Co., 3 Stockt. 126; Oakley *v.* Patterson Bank, 1 Green Ch. 173; Milwaukee, &c. R. R. Co. *v.* Soutter, 2 Wallace U. S. 510; Rawnsley *v.* Trenton Mut. Ins. Co., 1 Stockt. 347; Lottimer *v.* Lord, 4 E. D. Smith, 183; see Verplank *v.* Caines, 1 John. Ch. 57. In Orphan Asylum *v.* M'Cartee, 1 Hopk. 435, the Court remark: "It is said, that the appointing of a Receiver rests in discretion. This proposition does not teach much. A Receiver is proper if the fund is in danger; and this principle reconciles the cases found in the books. There is no case in which the Court appoints a Receiver, merely because the measure can do no harm." See Parkhurst *v.* Kinsman, 2 Blatch. C. C. 78; Voshell *v.* Hynson, 26 Md. 392.

[A Receiver will not be appointed of property in possession of a person not a party to the suit: Searles *v.* Jacksonville, &c. R. Co., 2 Woods, 261; Mays *v.* Wherry, 3 Tenn. Ch. 34; nor at the instance of a stranger to the suit, and if such stranger procure himself to to be appointed, he will be considered a trespasser, and held to the strictest responsibility: O'Mahoney *v.* Belmont, 62 N. Y. 133.]

As a general thing, under the law in New Jersey, where a corporation is legally declared insolvent, Receivers are appointed. Nichols *v.* Perry Patent Arm Co., 3 Stockt. 126. Where it lies out of the power of the sheriff to levy on, or take possession of certain ornaments, usually worn on the person, for a debt, a Receiver will be appointed and an order made for their delivery to him. Frazier *v.* Barnum, 4 C. E. Green, 316.

[4] Angel *v.* Smith, 9 Ves. 335; Hutchinson *v.* Massarene, 2 Ball & B. 55; Jeremy on Eq. 248, 249; Hewett *v.* Adams, 54 Maine, 214; Tillinghast *v.* Champlin, 4 R. I. 173; Lottimer *v.* Lord, 4 E. D. Smith (N. Y.), 183; *In re* Colvin, 3 Md. Ch. Dec. 278; see Williamson *v.* Wilson, 1 Bland, 421; Field *v.* Jones, 11 Geo. 413.

He is at all times entitled to and must receive the advice and protection of the Court. Cammack *v.* Johnson, 1 Green Ch. 173; see *In re* Receivers of the Globe Ins.

be of great importance, and of most beneficial tendency: saying, "It is a discretionary power exercised by this Court, with as great utility to the subject, as any sort of authority that belongs to it; and is provisional only, for the more speedy getting in of a party's estate, and securing it for the benefit of such person who shall appear to be entitled; and does not at all affect the right."[1]

The most ordinary cases in which Receivers are granted by the Court, are those in which the suit arises out of claims by parties having equitable interests in the property, the subject of litigation. In such cases, the Court will appoint a Receiver for the purpose of protecting the property, till the question between the parties shall have been determined.[2] And, in general, it may be taken as a rule, that where the legal estate is vested in a person claiming an interest paramount to that of the litigant parties, so that the litigant parties can only have equitable interests, the Court will grant a Receiver: although, in doing so, it will always take care not to interfere with the rights of the party having the prior estate. Therefore, where a man has an equitable mortgage, "that is, if there is a prior mortgagee: then, if the prior mortgagee is not in possession, the other may have a Receiver, without prejudice to

Co., 6 Paige, 102; Hooper *v.* Winston, 24 Ill. 353; *In re* Van Allen, 37 Barb. 225. He acts under the supervision of the Court, the property in his hands being in the custody of the law. Hooper *v.* Winston, 24 Ill. 353. He is but a minister, and therefore has not the discretionary power of a person acting in a fiduciary character. Hooper *v.* Winston, *supra*.

[1] Skip *v.* Harwood, *ubi sup.*; and see Story Eq. Jur. § 831.

[2] Chesver *v.* Rut. & Burl. R. R. Co., 39 Vt. 653. The power to appoint a Receiver is most usually called into action either to prevent fraud, save the subject of litigation from material injury, or rescue it from probable destruction; and there is no necessity to appoint a Receiver, except for one of these purposes. Baker *v.* Backus, 32 Ill. 79; see Haight *v.* Burr, 19 Md. 130; Voshell *v.* Hynson, 26 Md. 83, 92.

[A Receiver may be granted in behalf of a vendor where the purchaser has been put into possession without payment, has gone into bankruptcy, and is permitting the property to deteriorate. Tufts *v.* Little, 56 Ga. 139; Gunby *v.* Thompson, 56 Ga. 316. So where a vendor by bond files a bill for specific performance: Phillips *v.* Eiland, 52 Miss. 721; if it be shown that the land is not a sufficient security, and that the purchaser is insolvent: Hughes *v.* Hatchett, 55 Ala. 541. So upon bill filed to foreclose a trust-deed for the benefit of creditors. Bidwell *v.* Paul, Sup. Crt. Tenn., cited 2 Tenn. Ch. 516, note. So upon bill to foreclose a mortgage where the party in possession fails to pay the taxes. Stockman *v.* Wallis, 3 Stew. Eq. 440; Chetwood *v.* Coffin, 3 Stew. Eq. 450. So in a creditor's suit. Gage *v.* Smith, 79 Ill. 219. So at the instance of a judgment creditor whose judgment is for the purchase-money of the land: Worrill *v.* Coker, 56 Ga. 666; or has exhausted his legal remedy: Farnham *v.* Campbell, 10 Paige, 598; Johnson *v.* Tucker, 2 Tenn. Ch. 398. But not in favor of a creditor without judgment or lien. Johnson *v.* Farnum, 56 Ga. 144; nor in favor of the vendor who has parted with the title: Morford *v.* Hamner, 3 Baxt. 391. And the appointment, when proper, will be made at any stage of the cause, without a prayer in the bill for the purpose, and at the instance of a defendant against a co-defendant. Henshaw *v.* Wells, 9 Hum. 568; see *infra*, 1734, n. 1. After decree. Moran *v.* Johnston, 26 Gratt. 108; Merrill *v.* Elam, 2 Tenn. Ch. 515. And by the Appellate Court. West *v.* Weaver, 3 Heisk. 589; Birdwell *v.* Paul, *ubi supra*; see Pacific Railroad *v.* Ketchum, 95 U. S. 1.]

The appointment of a Receiver alters no right, not even so as to prevent the running of the Statute of Limitations. Williamson *v.* Wilson, 1 Bland, 421. But though the appointment of a Receiver does not involve a decision upon any right, still it can only be made at the instance of a party who has an acknowledged interest or a strong presumption of title, in himself alone, or in common with others; and where the property itself, or its rents and profits, are in danger of being materially injured, or totally lost. H. K. Chase's Case, 1 Bland, 213; Williamson *v.* Wilson, 1 Bland, 421; see State *v.* Northern Central Railway Co., 18 Md. 193.

Generally, a Receiver will only be appointed on bill filed for that purpose, and rarely before answer, except under provisions by particular statutes. [Crowder *v.* Moore, 52 Ala. 220.] He will be appointed on petition, only in cases of infants, whose positions

his taking possession."[3] In *Berney* v. *Sewell*,[4] Lord Eldon said: "I remember a case, where it was much discussed whether the Court would appoint a Receiver, when it appeared by the bill that there was a prior mortgagee who was not in possession. I have a note of that case: there, Lord Thurlow made the appointment, without prejudice to the first mortgagee's taking possession, and that was afterwards followed by Lord Kenyon."[5]

*1717 * The same principle is applied to other equitable creditors;[1] and, indeed, to all other persons having mere equitable estates. The rule, with respect to equitable creditors, is thus laid down by Lord Eldon, in *Davis* v. *The Duke of Marlborough:*[2] "The rule I take to be, that the Court will, on motion, appoint a Receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons who have prior estates: in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceeding to obtain possession, if they think proper;[3] and with regard to persons having prior equitable estates, the Court takes care, in appointing a Receiver, not to disturb equities; and, for that purpose, directs inquiries, to determine priorities among equitable incumbrancers: permitting legal creditors to act against the estates at Law, and settling the priorities of equitable creditors. Provided it is satisfied, in that stage of the cause, that the relief prayed by the bill will be given when a decree is pronounced, the Court will not expose parties claiming that relief to the danger of losing the rents, by not appointing a Receiver of an estate on which it is admitted that they cannot enter."[4] And here it may be

as wards of the Court gives them the right to apply by petition, or in cases similarly situated. A Receiver will not be appointed, as against a plaintiff, upon the application of the defendant. Leddel *v.* Starr, 4 C. E. Green, 159.

[3] Per Lord Eldon, 1 J. & W. 648. [See Perry *v.* Oriental Hotel Co., L. R. 5 Ch. App. 420.]

[4] 1 J. & W. 647.

[5] *Ib.* 649. In Phipps *v.* Bishop of Bath and Wells, as reported in 2 Dick. 608, Lord Thurlow refused the appointment of a Receiver at the instance of a second mortgagee: the first not being in possession; but in Bryan *v.* Cormick, 1 Cox, 422, he came to the determination mentioned in the text. A similar order was also made in Dalmer *v.* Dashwood, 2 Cox, 378. In Norway *v.* Rowe, 19 Ves. 144, 153, Lord Eldon states it to be the practice, on motions for Receivers, not to look at mortgagees further than to take care that they are not prejudiced. See Price *v.* Williams, G. Coop. 31; Brooks *v.* Greathed, 1 J. & W. 176. The first mortgagee has a legal right to the rents and profits, and has his remedy at Law by ejectment. A subsequent mortgagee is better entitled to the remedy of a Receiver, because he has no right to the possession at Law as against his prior mortgagee, and, if the first mortgagee refuses to exercise his legal rights, there seems a propriety in an interposition of a Court of Chancery.

The rule in New York, that where premises are an inadequate security, and the mortgagor is insolvent, a Receiver will be appointed, has not been adopted by the Court of Chancery in New Jersey, no distinction being made between a first and a subsequent mortgagee, whose rights are entirely different. Cortelyeu *v.* Hathaway, [3 Stockt. 42; Frisbie *v.* Bateman, 9 C. E. Green, 28. But see Brasted *v.* Sutton, 3 Stew. Eq. 462;] see Warner *v.* Gouverneur, 1 Barb. (S. C.) 38; Bank of Ogdensburg *v.* Arnold, 5 Paige, 39; Shotwell *v.* Smith, 3 Edw. Ch. 588; Sea Ins. Co. *v.* Stebbins, 8 Paige, 566.

[1] See Curling *v.* Marquis Townshend, 19 Ves. 628.

[2] 2 Swanst. 137.

[3] See Dalmer *v.* Dashwood, 2 Cox, 378, 382; but they must first obtain leave of the Court. Bryan *v.* Cormick, *ubi sup.*; Anon., 6 Ves. 287; Angel *v.* Smith, 9 Ves. 335; Brooks *v.* Greathed, *ubi sup.*; Gresley *v.* Adderley, 1 Swanst. 579; Rhodes *v.* Lord Mostyn, 17 Jur. 1007, V. C. W.; and see *post*, p. 1718; Cortelyeu *v.* Hathaway, 3 Stockt. 41.

[4] The granting, however, of a Receiver is a matter of discretion, to be governed by the whole circumstances of the case: one most

remarked, that although, where there is a prior mortgagee in existence having the legal estate, the Court will not, by the appointment * of a Receiver, deprive him of his right to possession, it will *1718 not permit him to object to the appointment of a Receiver by any act short of a personal assertion of his legal right, and taking possession himself.[1] And if, after a receiver has been appointed, he does not think proper to avail himself of his legal right (which he may do by applying to be examined *pro interesse suo*), he will not be permitted to have the benefit of the Receiver:[2] the appointment of a Receiver being for the benefit of incumbrancers, so far, only, as expressed to be for their benefit, and as they choose to avail themselves of it.[3]

The Court will grant a Receiver at the instance of a second incumbrancer, in all cases in which the first incumbrancer is not in possession of the property; and the circumstance of the party creating the incumbrance being abroad, and refusing to appear to the suit, will not deprive the second incumbrancer of his right to a Receiver.[4] In *Holmes* v. *Bell*,[5] however, Lord Langdale M. R. appears to have entertained some doubt as to his power to appoint a Receiver, where one of two mortgagors, who were tenants in common, was abroad: at least, so far as regarded the moiety of the absent party: although he thought the objection removed, by the circumstance of the mortgagor, who was in England, being in the possession of the whole rents. His Lordship's difficulty appears to have arisen from *Browne* v. *Blount*,[6] in which Sir John Leach M. R. refused to appoint a Receiver, in the absence of the owner of the estate. The decision in that case, however, was not come to upon an interlocutory application, but upon the hearing of the cause: on which occasion, it having been held that the Court could not proceed to make a decree in the absence of the party beneficially interested, it was urged that, although it could not grant the relief prayed, it would go the length of appointing a Receiver. It appears now to be settled that a Receiver may be granted against a defendant who is out of the jurisdiction of the Court;[7] and where the defendant has absconded to avoid service.[8]

material of such circumstances being, the probability of the plaintiff being ultimately entitled to a decree. Owen *v.* Homan, 3 M. N. & G. 378, 412; 15 Jur. 339, 346; Affd., 4 H. L. Ca. 997; 17 Jur. 861; and see Coope *v.* Cresswell, 12 W. R. 299, V. C. K. Where, upon the application of a subsequent mortgagee, a Receiver is appointed, it is without prejudice to any prior mortgage or other incumbrance, and the Receiver will be directed to keep down the interest upon prior incumbrances. Cortelyou *v.* Hathaway, 3 Stockt. 39. In this case the grounds are stated on which a Receiver may be appointed on the application of a junior incumbrancer.

[Where the mortgage pledges the income, rents, or profits to the payment of the mortgage debt, the creditor is entitled to a receiver upon showing a probable right, and danger to that right. Des Moines Gas Co. *v.* West, 44 Iowa, 23.]

[1] Silver *v.* Bishop of Norwich, 3 Swanst. 112, n. *(a)*; Rhodes *v.* Lord Mostyn, 17 Jur. 1007, V. C. W.; [Johnson *v.* Tucker, 2 Tenn. Ch. 398].

[2] See Anon., 6 Ves. 287; Angel *v.* Smith, 9 Ves. 335, 338; Brooks *v.* Greathed, 1 J. & W. 178; Hunt *v.* Priest, 2 Dick. 540.

[3] Gresley *v.* Adderley, 1 Swanst. 579.

[4] Tanfield *v.* Irvine, 2 Russ. 149; but see Coward *v.* Chadwick, *ib.* 150, n.

[5] 2 Beav. 298.

[6] 2 R. & M. 83.

[7] Gibbins *v.* Mainwaring, 9 Sim. 77; Smith *v.* Smith, 10 Hare Ap. 71; and see Stratton *v.* Davidson, 1 R. & M. 484.

[8] Pitcher *v.* Hellier, 2 Dick. 580; Maguire *v.* Allen, 1 B. & B. 75; Dowling *v.* Hudson, 14 Beav. 423.

The Court will not, unless under very particular circumstances, appoint a Receiver, where the party having the legal estate is in actual possession of the property.[9] Thus, although a second mortgagee *1719 *may have a Receiver, where the first is not in possession, yet, if the first mortgagee is in actual possession of the estate, a Receiver will not be appointed: unless it is shown that the first mortgagee has been paid off: in which case, a Receiver may be appointed, on the application of a subsequent incumbrancer.[1]

In order to defeat an equitable mortgagee of his right to a Receiver, the possession of the party must be such a possession as invests him with a title to receive the rents and profits: a mere possession as tenant will not be sufficient; and where one of the defendants was in the occupation of part of the estate as tenant, and had purchased of the plaintiff a part of his mortgage, the interest of which was about equal to the rent of his occupation, the Court of Exchequer held, that he could not unite his two characters of mortgagee and tenant; and that his possession, being as tenant, could not be set up against the other mortgagee.[2]

And here it may be remarked, that as between mortgagees in possession and persons having subsequent interests, the Court will not appoint a Receiver against a mortgagee's own oath that something is due to him,[3] unless the party making the application will offer to pay him off,

[9] It seems that this rule will not apply, where the party in possession is merely so upon execution, under a judgment; and that, in such cases, a creditor having taken out execution, cannot hold property against an estate created prior to his debt. Upon this principle, Lord Eldon made an order for the appointment of a Receiver of the rents and profits of a rectory, at the instance of a second incumbrancer: although a third incumbrancer was in possession, under a sequestration from the Bishop, which his Lordship considered, in contemplation of this Court, as equal to a judgment. White *v.* Bishop of Peterborough, 3 Swanst. 109, 116, 117; but see Bates *v.* Brothers, 2 Sm. & G. 509. As between equitable creditors and judgment creditors, having possession under writs of *elegit*, it is competent to the Court to appoint a Receiver in favor of the equitable creditors, not disturbing the rights of any of the judgment creditors in possession. Davis *v.* Duke of Marlborough, 1 Swanst. 74, 84.

[1] See Quarrell *v.* Beckford, 13 Ves. 377; Codrington *v.* Parker, 16 Ves. 469; Berney *v.* Sewell, 1 J. & W. 657. [See, as to Receivers in mortgage cases under Judicature Act of 1873, Pease *v.* Fletcher, 1 Ch. Div. 273. Before service of writ, *Re* H.'s Estate, 1 Ch. Div. 276.]

[2] Archdeacon *v.* Bowes, 3 Anst. 752; see Sea Ins. Co. *v.* Stebbins, 8 Paige, 565; Bank of Ogdensburg *v.* Arnold, 5 Paige, 38; Frelinghuysen *v.* Colden, 4 Paige, 204.

[3] Rowe *v.* Wood, 2 J. & W. 553, 557; see Bank of Ogdensburg *v.* Arnold, 5 Paige, 38; Frelinghuysen *v.* Colden, 4 Paige, 204; Quinn *v.* Britham, 2 Edw. Ch. 314; Leahy *v.* Arthur, 1 Hogan, 92. Receivers in mortgage cases are allowed with great caution; and will be appointed only where there is a clear inadequacy of security, or the rents have been expressly pledged for the debt. The best criterion of adequacy or inadequacy of the security in such cases, is the rental. Shortwell *v.* Smith, 3 Edw. Ch. 588. [A mortgagee is entitled to a Receiver, where the condition of the mortgage has not been performed, and the security is inadequate: Newport, &c. Bridge Co. *v.* Douglass, 12 Bush, 673; Mahon *v.* Crothers, 1 Stew. Eq. 567; unless the defendant in possession will give security to account for the rents as the Court may require: Sea Ins. Co. *v.* Stebbins, 8 Paige, 565; Johnson *v.* Tucker, 2 Tenn. Ch. 398; or to have personalty forthcoming to answer the decree: Williams *v.* Nolan, 2 Tenn. Ch. 151. There are instances of such practice in New Jersey. Dickinson's Forms of Pl. 432 note. The Court may, where the security is inadequate and the mortgagor unable to pay the deficiency, appoint a Receiver in a foreclosure suit, if there be fraud or bad faith on the part of the mortgagor, or other facts which would render the denial inequitable, although the rents are not expressly pledged by the mortgage. Haas *v.* Chicago Building Society, 8 Cent. L. J. 456, Sup. Crt. Ill., reviewing the authorities. After sale. Astor *v.* Turner, 11 Paige, 436.]

according to his demand, as he states it himself: in which case, if the party will bring the mortgagee's own confession, that he has been paid off, or that he has refused to accept what is due to him, the Receiver will be appointed;[4] but, for this purpose, the Court will require the mortgagee to state upon his oath what he believes to be due; and, in taking the possession from him upon payment of what he swears to be due, it will make him give security to refund, if it shall appear, upon the account, that so much is not due; and where he will not swear that any thing is due, the Court will appoint a Receiver.[5]

The disinclination of the Court to appoint a Receiver, where the property is in possession of a party having the legal estate, is *felt in those cases only in which the estate of the party in pos- *1720 session is prior to that of the parties to the litigation. Where the right to the possession is the subject of dispute, and the plaintiff having an equitable interest claims the legal estate from the defendant in possession, the Court will, if it sees clearly that the plaintiff has the right, and that the ultimate decree will be in his favor, appoint a Receiver pending the suit.[1] Thus, a Receiver may be appointed at the instance of a purchaser *pendente lite*, if the Court is satisfied that the contract is one which it can enforce.[2] So, also, where the defendant, on an advance of money by the plaintiff, agreed to execute a mortgage of certain lands, but did not perform the agreement, and there was an arrear of interest due on the money advanced, upon which the plaintiff filed a bill for specific performance, a Receiver was appointed.[3] In like manner, where a tenant in tail in remainder, upon an advance of money to him by the plaintiff, had agreed to pay it after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and a covenant to levy a fine and suffer a recovery to give effect to the mortgage, but, on coming into possession of the estate, refused to perform his covenant, the Court appointed a Receiver of the rents.[4]

Upon the same principle, where a bill was filed by creditors, claiming satisfaction out of real and personal assets, and it appeared, by the answer of the person in possession of the real estate, that the real estate must eventually be responsible, as there was no personal estate to be applied to discharge debts, the Court appointed a Receiver in the first instance.[5]

[4] Berney v. Sewell, 1 J. & W. 647; [Hay v. Cornelius, 3 Tenn. Ch. 461].

[1] Chambers v. Goldwin, cited 13 Ves. 377; Quarrell v. Beckford, *ibid.*

[1] See Whatworth v. Gaugain, 1 Phil. 728; 3 Hare, 416.

[2] Metcalfe v. Pulvertoft, 1 V. & B. 180; and see Dawson v. Yates, 1 Beav. 301; 2 Jur. 960.

[3] Shakel v. Duke of Marlborough, 4 Mad. 463.

[4] Free v. Hinde, 2 Sim. 7.

[5] Jones v. Pugh, 8 Ves. 71; Earl of Fingal v. Blake, 2 Moll. 50; Chalk v. Raine, 7 Hare, 393; 13 Jur. 981; and see Coope v. Cresswell, 12 W. R. 299, V. C. K. As to Receivers in creditors' suits, see further Bloodgood v. Clark, 4 Paige, 573; Browning v. Bates, 8 Paige, 568; Lansing v. Eyringham, 6 Paige, 29; Osborn v. Hoyer, 2 Paige, 342; Haggerty v. Putman, 1 Paige, 298; Parker v. Moore, 3 Edw. Ch. 304; Hart v. Tims, 3 Edw. Ch. 226.

The Court, sometimes, will appoint a Receiver against a party having possession under a legal title. Thus, where fraud can be clearly proved, and immediate danger is likely to result if the intermediate possession should not be taken under the care of the Court, a Receiver will be appointed.[6] This rule was recognized by Lord Eldon, in *Lloyd* v. *Passingham*:[7] where his Lordship observed: "The Court interposes, by appointing a Receiver, against the legal title, with reluctance: compelled by judicial necessity, the effect of fraud clearly proved, and imminent danger if the intermediate possession should not be taken *1721 under the care of the * Court." In order, however, to induce the Court thus to interfere, it is, according to his Lordship's subsequent remarks, not only necessary that the Court should be satisfied of the existence of fraud, but it must be morally sure that, upon the hearing of the cause, the party would, upon the circumstances, be turned out of possession; and not only that, but it must see some danger to the intermediate rents and profits.[1] His Lordship, in that case, did not conceive that the circumstances disclosed formed that extreme case in which the possession was to be taken from those who had the legal right; but, in a later case of *Stilwell* v. *Wilkins*,[2] where a bill was filed for the purpose of setting aside a purchase, and the answer of the defendants, who were the devisees of the purchaser, admitted the great inadequacy of the price, but stated their ignorance of the other circumstances of fraud alleged, his Lordship granted the Receiver: because, if the case stated was true, the inadequacy was so monstrous, and the situation of the young man and the state of his intellect were such, that it was hardly possible to suppose that the transaction could stand. He thought, therefore, that it was a case in which such an order might be made: though it was not the general habit of the Court.

Upon the same principle, the Court interfered in *Podmore* v. *Gunning*.[3] In that case, a testator, by his will, bequeathed the residue of his real and personal estate to his wife, "having perfect confidence that she will act up to those views which I have communicated to her, in the ultimate disposal of my property after her decease;" and, upon the wife's dying without a will, the Court appointed a Receiver, upon an allegation in the bill (supported by affidavit), of a promise by the wife to her husband, on the faith of which he had made his will, that she would

[6] Lloyd *v.* Passingham, 16 Ves. 59; Hugonin *v.* Baseley, 13 Ves. 105.

[7] 16 Ves. 70. [But a Receiver will not be appointed in the case of disputed heirship of real estate: *In re* Ferrior, L. R. 3 Ch. Ap. 175; Carrow *v.* Ferrior, L. R. 3 Ch. Ap. 719; Hitchen *v.* Birks, L. R. 10 Eq. 471; nor upon appeal from the probate of a will, the devisees being in possession: Schlecht's Appeal, 60 Pa. St. 172; nor where the title is in dispute, and the claimant by resulting trust in possession: Richmond *v.* Yates, 3 Baxt. 204; nor where the contest is simply a question of disputed title, the plaintiff asserting a legal title in himself against a defendant in possession: Rollins *v.* Henry, 77 N. C. 467; nor, it seems, under a bill enforcing a vendor's lien: Morford *v.* Hamner, 3 Baxt. 391.]

[1] Lloyd *v.* Passingham, 16 Ves. 59, 70; and see Hugonin *v.* Baseley, *ubi sup.*

[2] Jac. 280, 283; S. C. *nom.* Stitwell *v.* Williams, 6 Mad. 49.

[3] 5 Sim. 485; see also Landon *v.* Morris, 5 Sim. 247.

bequeath the residue of his property, after her decease, to the plaintiffs, who were his natural children.

In the above cases, there were circumstances of either actual or constructive fraud, as well as of actual title, to induce the Court to interfere. Where these circumstances are absent, and there is no case of spoliation, the Court will not appoint a Receiver upon mere ground of title in the plaintiff.[4]

Although the Court will not interfere upon the mere ground of title, it will appoint a Receiver at the instance of parties beneficially interested even where there is no fraud or spoliation, provided it can be satisfactorily established that there is danger to *the estate *1722 or fund, unless such a step is taken.[1] Thus, in the case of executors, if the executor has wasted the effects, or in other respects misconducted himself, the Court will interfere, by the appointment of a Receiver.[2] Upon this ground, also, where an executor has not done what he can to get in the personal estate,[3] or is out of the jurisdiction,[4] the Court will order a Receiver to be appointed.

Although a Receiver will be appointed as against an executor, where it is shown that there is a probability of danger to the property, it must be such danger as arises from the misconduct or neglect of the party: mere poverty will not, of itself, constitute a sufficient ground for such an appointment.[5] Where, however, an executrix, who had been appointed guardian, by her husband, of her three children, married a second husband in necessitous circumstances, the House of Lords directed a Receiver to be appointed to get in the outstanding personal estate.[6] And where the husband of an executrix was in the West Indies, and was sworn to be in indifferent circumstances, a Receiver was appointed.[7] It appears, however, from the report of that case, as

[4] Clark v. Dew, 1 R. & M. 103; Tollervy v. Colt, 1 Y. & C. Ex. 621; Middleton v. Sherburne, 4 *Id.* 358; Lancashire v. Lancashire, 9 Beav. 120; 9 Jur. 956; Earl Talbot v. Hope Scott [No. 1], 4 K. & J. 96; 4 Jur. N. S. 1172.

[1] Barkley v. Lord Reay, 2 Hare, 308; Bainbrigge v. Baddeley, 13 Beav. 356; 3 M'N. & G. 413; Parkhurst v. Kinsman, 2 Blatch. C. C. 78; Baker v. Backus, 32 Ill. 79. A Receiver may be appointed, in such a case, although there is no personal representative. Steer v. Steer, 13 W. R. 225, V. C. K.; Overington v. Ward, 34 Beav. 175.

[2] Anon., 12 Ves. 4; Middleton v. Dodsworth, 13 Ves. 266; Havers v. Havers, Barnard. 22; Lord v. Parchas, 17 Beav. 171, 173; Hervey v. Fitzpatrick, Kay, 421; Boyd v. Murry, 3 John. Ch. 4, 8. Wherever the appointment of a Receiver is sought against an executor or administrator, it is necessary to establish by suitable proofs, that there is some positive loss, or danger of loss of the funds; as, for instance, some waste or misapplication of the funds, or some apprehended danger from the bankruptcy, insolvency, or personal fraud, misconduct, or negligence of the executor or administrator. 2 Story Eq. Jur. § 836; Mandeville v. Mandeville, 8 Paige, 475; Orphan Asylum v. M'Cartee, 1 Hopk. 435. The fact that a trustee mixes the trust fund with his own, is not a sufficient ground for the appointment of a Receiver. Orphan Asylum v. M'Cartee, 1 Hopk. 435.

[3] Richards v. Perkins, 3 Y. & C. Ex. 299, 307; 3 Jur. 168.

[4] Smith v. Smith, 10 Hare Ap. 71; Dickins v. Harris, 1 W. N. 93, V. C. S.

[5] Hathcoatkwaite v. Russel, 2 Atk. 126; Anon., 12 Ves. 4; Howard v. Papera, 1 Mad. 142; Manners v. Furze, 11 Beav. 30, 31; 12 Jur. 120. [A Receiver will be appointed in the case of a testamentary trust, where the trustee is a man of limited means, and has, since the death of the testator, embarked in a large and hazardous business. Bowling v. Scales, 2 Tenn. Ch. 63. So where the conduct of the administrator is such as to hinder and embarrass the collection of the debts of the estate. Du Val v. Marshall, 20 Ark. 230; Gray v. Gaither, 74 N. C. 237.]

[6] Dillon v. Lady Mount Cashell, 4 Bro. P. C. ed. Toml. 306, 312.

[7] Taylor v. Allen, 2 Atk. 213.

if a principal ground for granting the Receiver had been the fact of the husband being in the West Indies, and not amenable to the process of the Court; but, in another case of a similar nature, the order was made upon the proof of the husband's insolvency: though the affidavit positively denied the fact of his being abroad.[8] It seems, also, that a Receiver will be appointed if the husband of the executrix is of unsound mind.[9] And, in general, where a personal representative is insolvent, a Receiver will be appointed;[10] and if it should be necessary to *1723 bring actions at Law to recover part of the effects, * since that must be in the name of the executor, the Court will compel him to allow his name to be used.[1] It seems, however, that if a person known by a testator to be a bankrupt or to be insolvent, is appointed an executor by his will, such person will not, in general, be controlled by the appointment of a Receiver;[2] but it is not to be inferred, from the circumstances of the will having been made some time before the bankruptcy, and not altered afterwards, that the testator had a deliberate intention to intrust the management of his estate to an insolvent executor.[3] The circumstance, that the party who had the administration of the testator's effects was an uncertificated bankrupt, and was not appointed to the office by the testator, has been held not to be a sufficient ground for the appointment of a Receiver, where several of the parties interested had refused to join in the application.[4]

The same grounds which will induce the Court to take away from an executor the possession, or the right to the possession, of the testator's property, by the appointment of a Receiver, in case of his misconduct or of his bankruptcy or insolvency, will induce the Court to interfere, in the case of any party clothed with the character of a trustee: whether he is a mere trustee, or a trustee having an interest in the estate or fund.[5] Thus, where a trustee refuses to act, the Court will, on the application of the persons beneficially interested, appoint a Receiver;[6] and where several trustees under a settlement, in consequence of disputes amongst themselves, permitted the rents of the trust estate to fall in arrear, the Court not only appointed a Receiver to collect the

[8] Scott *v.* Becher, 4 Pri. 346.

[9] Yetts *v.* Palmer, 9 Jur. N. S. 954, M. R.

[10] Where an executor has removed from the State, leaving his *cestui que trust* and the trust estate, the Court will, on the application of the *cestui que trust*, appoint a Receiver. *Ex parte* Galluchat, 1 Hill Ch. 150. But the Court has no power to substitute one executor in the place of another.

[1] Utterson *v.* Mair, 2 Ves. J. 95, 98; 4 Bro. C. C. 269, 277; Scott *v.* Becher, *ubi sup.*

[2] Stainton *v.* Carron Company, 18 Beav. 146, 161; 18 Jur. 137.

[3] Gladdon *v.* Stoneman, 1 Mad. 143, n.; Langley *v.* Hawk, 5 Mad. 46; Williams on Exors 206.

[4] Smith *v.* Smith, 2 Y. & C. Ex. 353.

[5] If an assignee becomes insolvent, the assignor may apply for the appointment of a Receiver to execute the trust declared in the assignment. Keys *v.* Bush, 2 Paige, 211. So where a debtor in failing circumstances, assigns his property to a person, who is insolvent, in trust for his creditors, a Receiver will be appointed, upon the application of such creditors, to take charge of such property so assigned. Haggarty *v.* Pittman, 1 Paige, 298. [And a Receiver may be appointed in advance of the time fixed by the trust deed for the trustee to take possession. Hamilton *v.* Wynne, 7 Rep. 635, Sup. Crt. Tenn.; S. C. 2 Tenn. Leg. Rep. 287.]

[6] Palmer *v.* Wright, 10 Beav. 234; and see Brodie *v.* Barry, 3 Mer. 695.

rents, but ordered the costs of the suit to be paid by the trustees.[7] So, also, a Receiver was appointed, where, in consequence of disagreement among the trustees, two out of three trustees acted without the third, and took the trust property in their names only;[8] where the trustees accepted new trusts, which conflicted with the former trusts on which they held the property;[9] and where, by the *laches* of the trustee, infant *cestui que trusts* were deprived of maintenance.[10]

* Upon very special circumstances, the appointment of a Re- *1724
ceiver has been ordered, in the absence of the trustee.[1] Where, also, the trust property has been applied, without complaint, for a series of years, according to a uniform course of management which has been sanctioned by the parties beneficially interested, the Court will not appoint a Receiver, by interlocutory order, on the ground that such application of property is a breach of trust: unless it is perfectly clear that the party in whom the property is vested is a mere naked trustee, and has not, even to a limited extent, any of the rights and interests of an owner. Upon this ground, a motion for the appointment of a Receiver of the estates vested in the Irish Society, at the instance of one of the London Companies, who claimed a beneficial interest in the income of the estates, was refused.[2]

In cases of misconduct by trustees, the Court will appoint a Receiver: as well where the trust arises by implication, as where it is expressed. Upon this principle, the Court has held, that where a man takes a conveyance of a legal estate subject to equitable interests, he must satisfy those interests or submit to a Receiver:[3] therefore, where a man purchased lands subject to two equitable annuities, which he refused to pay, Lord Eldon expressed his determination to appoint a Receiver, unless the defendant would enter into an undertaking to pay the annuities.[4]

Upon the same principle, if a tenant for life of leaseholds is bound to renew, he is, in such case, clothed with the character of trustee; and if, by his threats or acts, he manifests an intention to suffer the lease to expire, the Court will appoint a Receiver, in order to provide a fund for renewal.[5] A similar order for the appointment of a Receiver of the rents and profits of an estate, for the purpose of accumulating a fund, was made where the tenant for life had fraudulently obtained a sum of stock, to which the trustees of her settlement were entitled.[6]

[7] Wilson *v.* Wilson, 2 Keen. 249.

[8] Swale *v.* Swale, 22 Beav. 584; see also Tait *v.* Jenkins, 1 Y. & C. C. C. 492; Braswell *v.* Reed, 1 Hare, 434; 6 Jur. 530.

[9] Earl Talbot *v.* Hope Scott (No. 2), 4 K. & J. 139; 4 Jur. N. S. 1172, 1180.

[10] Richards *v.* Perkins, 3 Y. & C. Ex. 299, 307; 3 Jur. 168.

[1] Hughes *v.* Wheeler, 11 Beav. 178, 179.

[2] Skinners' Company *v.* Irish Society, 1 M. & C. 162; and see Gray *v.* Chaplin, 2 Russ. 126.

[3] Where land is charged with the payment of an annual sum, a Receiver may be put upon it as a means of enforcing payment: Owing's Case, 1 Bland, 297; see Cairnes *v.* Chabert, 3 Edw. Ch. 312; Rogers *v.* Ross, 4 John. Ch. 388.

[4] Pritchard *v.* Fleetwood, 1 Mer. 54; [see Sollory *v.* Leaver, L. R. 9 Eq. 22.]

[5] See Bennett *v.* Colley, 2 M. & K. 225, 233.

[6] Woodyatt *v.* Gresley, 8 Sim. 180.

As the object of appointing a Receiver is, usually, the preservation and protection of the property in dispute pending litigation, the Court will not appoint a Receiver on the application of a party who possesses the power of protecting the property without it: consequently, a Receiver will not be appointed on behalf of a mortgagee who has the legal estate, as he has nothing to do but to take possession.[7] So, *1725 also, where one of the plaintiffs was a *trustee of the estate, with a power of entry and distress, Lord Eldon discharged an order appointing a Receiver.[1]

Wherever there is a dispute respecting an estate, which depends upon a mere legal title, the Court will not, in general, grant a Receiver: because the plaintiff has his remedy by asserting his title in a Court of Law.[2] Thus, where an heir-at-law disputes a will against the devisees in possession, the Court will refuse a Receiver: because he may, if he is entitled as heir, bring his ejectment against the devisees.[3] This rule, however, is departed from where there are peculiar circumstances in the case: as where the Court sees that it is clear, from the evidence produced, that it is important that the Court should interfere, for the protection of the estate or of the rents and profits. But a strong case of danger to the property, and a strong ground of title in the plaintiff, must be made out.[4]

A Receiver will also be appointed, at the instance of a person who has the legal estate, where the property is in the nature of a trade;[5] or where, from conflicting legal rights, it is impossible to obtain tenants for the property.[6]

The Court will likewise extend the application of the principle, of providing for the safety of property pending litigation, to cases where the litigation is in another Court. Thus, during litigation in the Court of Probate, a Court of Equity will entertain a bill for the mere preservation of the property of the deceased; and, if necessary, to take it out of the possession of the person claiming to be the executor, till the litigation is determined, and appoint a Receiver: although the Court of Probate, by granting an administration *pendente lite*, might provide

[7] Berney *v.* Sewell, 1 J. & W. 647; Sturch *v.* Young, 5 Beav, 557; see Cheever *v.* Rut. & Burl. R. R. Co., 39 Vt. 653; and see now 23 & 24 Vic. c. 145, §§ 11, 17–24, under which a mortgagee may appoint a Receiver; but see §§ 32, 34.

[1] Buxton *v.* Monkhouse, G. Coop. 41.

[2] See Mordaunt *v.* Hooper, Amb. 311; [Rollins *v.* Henry, 77 N. C. 467].

[3] Knight *v.* Duplessis, 1 Ves. S. 325; Earl of Fingal *v.* Blake, 1 Moll. 158; 2 Moll. 50; see also Lloyd *v.* Trimleston, *ib.* 81; Bonser *v.* Bradshaw, 4 Jur. N. S. 1011; 5 Jur. N. S. 86, V. C. S.; see also Wright *v.* Wilkin, 7 W. R. 337, V. C. K.; Yetts *v.* Palmer, 9 Jur. N. S. 954, M. R.

[4] Mordaunt *v.* Hooper, *ubi sup.*; Clark *v.* Dew, 1 R. & M. 103, 109; Toldervy *v.* Colt, 1 Y. & C. Ex. 621; Middleton *v.* Sherburne, 4 *id.* 358; Lancashire *v.* Lancashire, 9 Beav. 120; 9 Jur. 956; Bainbrigge *v.* Baddeley, 13 Beav. 355; 3 M'N. & G. 413; Earl Talbot *v.* Hope Scott (No. 1), 4 K. & J. 96; 4 Jur. N. S. 1172; Wright *v.* Wilkin, 7 W. R. 337, V. C. K.; see also Yetts *v.* Palmer, 9 Jur. N. S. 954, M. R.; and Acland *v.* Gravener, 1 N. R. 119, M. R.; [Peay *v.* Schenck, 1 Woolw. 176, 185].

[5] Fripp *v.* Chard Railway Company, 11 Hare, 241; 17 Jur. 887; and see Story *v.* Lord Windsor, 2 Atk. 630.

[6] White *v.* Smale, 22 Beav. 72.

for the collection of the effects;[7] *and a Receiver may be *1726
appointed, as well where the litigation in the Court of Probate is
to recall administration or probate already granted, as in a case where no administration has been granted before the application to the Court of Chancery;[1] but the mere circumstance that there has been a suit instituted in the Court of Probate to recall a probate already granted, does not give the Court of Chancery jurisdiction to interfere: for if that were so, it is evident that, in order to obtain a Receiver, it would be only necessary to institute a suit in the Court of Probate.[2] The Court of Chancery, therefore, will look into the case, to see whether, on the whole, such a case is made as justifies its interference; and it seems, that if it appears, from all the circumstances, that there is substantially a *lis pendens* in the Court of Probate, a Receiver may be appointed: notwithstanding there is no ground laid for the interference of the Court, in respect of any improper conduct of the parties.[3] The Court may also grant a Receiver, pending an appeal from a decision of the Court of Probate.[4]

A Receiver may also be granted, pending litigation in a foreign Court.[5] [So, in a divorce suit.[6]]

The Court will refuse to interfere against a joint-tenant or tenant in common in possession, at the suit of another joint-tenant or tenant in common: unless the defendant, being in possession, receives the whole rent, and excludes his companion from the share due to him.[7] It seems, however, that, in the absence of exclusion, a Receiver of the

[7] Ld. Red. 135, 136; King *v.* King, 6 Ves. 172; Richards *v.* Chave, 12 Ves. 462; Edmunds *v.* Bird, 1 V. & B. 542; Atkinson *v.* Henshaw, 2 V. & B. 85; Ball *v.* Oliver, *ib.* 96; Watkins *v.* Brent, 1 M. & C. 97, 102; Wood *v.* Hitchings, 2 Beav. 289; 4 Jur. 858; Jones *v.* Goodrich, 10 Sim. 327; Rendall *v.* Rendall, 1 Hare, 152; Anderson *v.* Guichard, 9 Hare, 275; Whitworth *v.* Whyddon, 2 M. N. & G. 52; 14 Jur. 142; Williams *v.* Attorney-General, Seton, 1003; Speedlove *v.* Speedlove, Cam. & Nor. 36. For the bill in that case, see Vol. III. As to the costs of such a suit, see *ante*, pp. 810, 811. The Court of Probate has now power to appoint a Receiver, and grant administration *pendente lite*. See 20 & 21 Vic. c. 77, §§ 70-75; 21 & 22 Vic. c. 95, § 22; Dodd & Brook, 454-461.

[1] Rutherford *v.* Douglas, 1 S. & S. 111, n.; Ball *v.* Oliver, and Rendall *v.* Rendall, *ubi sup.*

[2] Watkins *v.* Brent, *ubi sup.*; and see Marr *v.* Littlewood, 2 M. & C. 454; Dew *v.* Clarke, 1 S. & S. 114; Connor *v.* Connor, 15 Sim. 508; 11 Jur. 662, n.; Newton *v.* Ricketts, 10 Beav. 525; 11 Jur. 662; [Verrè *v.* Dupraz, L. R. 6 Eq. 324; Tichborne *v.* Tichborne, L. R. 1 P. & M. 730].

[3] Williams on Exors. 436; Watkins *v.* Brent, 1 M. & C. 97, 102; and see Jones *v.* Brent, 3 Mad. 1; Affd. on Appeal, Jac. 406.

[4] Liddell *v.* Liddell, cited 12 Ves. 464; Blake *v.* Blake, 2 Beav. 285, n. (*c*); Day *v.* Croft, *ib.* n. (*d*); Wood *v.* Hitchings, *ib.* 289; Affd., *ib.* 398, n. (*a*). By 20 & 21 Vic. c. 77, §§ 70-75, and 21 & 22 Vic. c. 95, § 22, the Court of Probate may grant a Receiver, pending an appeal from its decision. A suit to appoint a Receiver *pendente lite* not usually brought to a hearing. Anderson *v.* Guichard, 9 Hare, 275; Barton *v.* Rock, 27 Beav. 376.

[5] Transatlantic Company *v.* Pietroni, Johns. 604.

[6] Sydney *v.* Sydney, W. N. (1867) 248, where the husband was ordered to pay an annuity to the wife. So where the husband, a non-resident, fails to pay taxes and interest on incumbrances of realty. Holmes *v.* Holmes, 2 Stew. Eq. 9.]

[7] Street *v.* Anderton, 4 Bro. C. C. 413; see Milbank *v.* Revett, 2 Mer. 405; Holmes *v.* Bell, 2 Beav. 298; Hargrave *v.* Hargrave, 9 Beav. 549; Scurrah *v.* Scurrah, 14 Jur. 874, M. R.; Sandford *v.* Ballard, 33 Beav. 401; see S. C., 30 Beav. 109; Seton, 1003; and see *contra*, Willoughby *v.* Willoughby, cited 2 Dick. 478; Tyson *v.* Fairclough, 2 S. & S. 142, 144; but see Williams *v.* Jenkins, 11 Geo. 395, cited *post*, 1728, 1729, in note. In Massachusetts, receivers of rents and profits may be appointed in suits in Equity between corporations, joint-tenants, and tenants in common and their legal representatives. Genl. Sts. c. 113, § 2.

applicant's share of the rents and profits may be appointed.[8] A similar rule is acted upon where the applicant is an equitable joint-tenant or tenant in common; and in that case, in the absence of exclusion, a Receiver of only the applicant's share will be granted.[9]

Where the property is in the nature of a trade, a Receiver of *1727 *the whole may be ordered; although the person applying has a legal interest in it. Thus, a Receiver will be appointed of the tolls of a canal company, at the instance of a mortgagee;[1] and of a mine, at the instance of one of several persons who are working it together.[2]

In cases of partnership, the Court frequently appoints a Receiver of the partnership estate;[3] but it seems that the Court will not, in general, appoint a Receiver of partnership effects, unless the plaintiff appears to be entitled to a dissolution.[4] If the Court can see that a dissolution must take place, it follows very much of course that a Receiver will be appointed.[5] Upon these principles, a Receiver will not be ordered, where the fact of the dissolution of the partnership is disputed.[6]

Where the object of the suit is to continue, and not to dissolve, the partnership, the general rule is not to appoint a Receiver;[7] but where a suit has been instituted to compel partners to act according to the provisions of instruments into which they have entered, the Court will

[8] Calvert *v.* Adams, 2 Dick. 478; Fall *v.* Elkins, 9 W. R. 861, M. R.; Murray *v.* Cockerell, 1 W. N. 223, V. C. W.

[9] Sandford *v.* Ballard, *ubi sup.*; and see Street *v.* Anderton, *ubi sup.*

[1] Fripp *v.* Chard Railway Company, 11 Hare, 241; 17 Jur. 887; and for the order, see Seton, 1034.

[2] Jeffervs *v.* Smith, 1 J. & W. 298; Story *v.* Lord Windsor, 2 Atk. 630; Lees *v.* Jones, 3 Jur. N. S. 954, V. C. W.; and see Norway *v.* Rowe, 19 Ves. 144; Roberts *v.* Eberhardt, Kay, 148, 156, 159. [Or at the instance of debenture holders. Peck *v.* Trinsmaran Iron Co., 2 Ch. Div. 115.]

[3] Tibbitts *v.* Phillips, 10 Hare, 358; Innes *v.* Lansing, 7 Paige, 583. Upon a bill filed by one of the partners to close up a partnership concern, it is a matter of course to appoint a Receiver, if the parties cannot agree among themselves as to the disposition and control of the property. Martin *v.* Van Schaick, 4 Paige, 479. So a Receiver will be appointed, as a matter of course, where either partner has a right to dissolve the partnership, and the articles of co-partnership do not provide for the settlement of the concern, upon a bill filed for that purpose. Law *v.* Ford, 2 Paige, 310. A Receiver may be appointed at the instance of a partner, alleging that the firm is insolvent, and that his co-partners are wasting the effects. Williamson *v.* Wilson, 1 Bland, 423. A Receiver will not be appointed merely because partners quarrel. Henn *v.* Walsh, 2 Edw. Ch. 128. There can be no ground for a Receiver in a case of partnership, when the partner applying to the Court has the property in his own possession, and the other does not object to such possession. Smith *v.* Lowe, 1 Edw. Ch. 33. Where a partnership is alleged on the one side, and denied on the other, and a motion is made for a Receiver, the Court, if it directs an issue as to partnership or no partnership, usually declines to appoint a Receiver until that question is determined. Peacock *v.* Peacock, 16 Ves. 49; Chapman *v.* Beach, J. & W. 549; Fairburn *v.* Pearson, 2 Mac. & G. 144; see Cox *v.* Peters, 2 Beasley, 39; Renton *v.* Chaplin, 1 Stockt. 22; Birdsall *v.* Colie, 2 Stockt. 63. For forms of orders, see Seton, 1030 *et seq.*

[As to appointment of a Receiver and manager of a newspaper, see Kelly *v.* Hutton, 17 W. R. 425; Tinkler *v.* Hindmarsh, 2 Beav. 350. And see Bard *v.* Bingham, 54 Ala. 463.]

[4] Const *v.* Harris, T. & R. 517; Smith *v.* Jeyes, 4 Beav. 503; Baxter *v.* West, 28 L. J. Ch. 169, V. C. K.; Roberts *v.* Eberhardt, Kay, 148; and see Wilson *v.* Greenwood, 1 Swanst. 481; Chapman *v.* Beach, 1 J. & W. 594; Tibbitts *v.* Phillips, 10 Hare, 355; [Seighortner *v.* Weissenborn, 5 C. E. Green, 172. But see S. C., 6 C. E. Green, 483.]

[5] Goodman *v.* Whitcomb, 1 J. & W., 589; see also Oliver *v.* Hamilton, 2 Anst. 453. As to the question whether bills can be sustained for partnership accounts, without seeking a dissolution of partnership, see *ante*, p. 332 *et seq.*

[6] Fairburn *v.* Pearson, 2 M'N. & G. 144; and see Peacock *v.* Peacock, 16 Ves. 49.

[7] Hall *v.* Hall, 3 M'N. & G. 79, 88; 12 Beav. 419, n.; and cases cited, *ibid.*; Roberts *v.* Eberhardt, Kay, 148.

take care that the decree shall not be defeated by any thing to be done in the mean time; and will appoint a Receiver to protect the property;[5] and Receivers have * been appointed at the suit of *1728 a shareholder of a company, where, through the conduct of its officers, the property of the company is in danger of being lost.[1]

The rules with regard to the appointment of a Receiver, in the case of partnerships, has been thus stated.[2] "If any one of the partners seeks to exclude another from taking that part in the concern which he is entitled to take, the Court will grant a Receiver;[3] but, generally, in thus interposing between the parties, the Court looks to a dissolution and general winding up of the affairs.[4] Where a dissolution is intended, or has already taken place, a Court of Equity will appoint a Receiver, provided there has been some breach of the duty of a partner, or of the contract of partnership.[5] Thus if, in breach of moral obligation, one partner unjustly takes possession, and refuses to give security to his copartner for his share of the stock, moneys, and securities;[6] or if he, in any respect, behaves unrighteously against the interest of the other partner, a Receiver will be appointed.[7] So, also, if in breach of the contract of partnership, he carries on the trade with the partnership effects on his separate account, after the dissolution,[8] and thus, or in any other manner, excludes his copartner from that share to which he is entitled in winding up the concern, a Receiver will be appointed."[9]

[5] Const *v.* Harris, T. & R. 496; Morris *v.* Colman, 18 Ves. 437; and see Waters *v.* Taylor, 15 Ves. 10; Hall *v.* Hall, 3 M'N. & G. 79, 91; 12 Beav. 414, 419, n. But Courts of Equity are by no means anxious to take upon themselves the management of a partnership business, and they will, it is said, never do so save with a view to a dissolution or final winding up of the affairs of a concern. Hall *v.* Hall, 3 Mac. & G. 79; Roberts *v.* Eberhardt, Kay, 148; Goodman *v.* Whitcombe, 1 Jac. & W. 589; Harrison *v.* Armitage, 4 Mad. 143; Smith *v.* Jeyes, 4 Beav. 503; Waters *v.* Taylor, 15 Ves. 10; Evans *v.* Coventry, 5 De G., M. & G. 911; Garretson *v.* Weaver, 3 Edw. Ch. 385. To authorize the appointment of a Receiver, in a copartnership suit, it must be such a case as would authorize a decree for a dissolution. Where a dissolution has already taken place or it is apparent that it will be decreed, on the ground of some breach of duty or contract, a Receiver will be appointed. Henn *v.* Walsh, 2 Edw. Ch. 129; Story Partn. §§ 228, 229, 230, 231, and notes; Law *v.* Ford, 2 Paige, 310. Williamson *v.* Wilson, 1 Bland, 418. Where it is necessary to preserve the good-will of the business, the Receiver may be directed to carry it on under the direction of the Court, until a sale can be effected. Martin *v.* Van Schaick, 4 Paige, 479. Collyer on Partn. § 353 *et seq.* It is not necessary, in order to induce the Court to interfere, that the plaintiff should, by his bill, expressly pray for a dissolution. See Sheppard *v.* Oxenford, 1 K. & J. 491; 2 Lindley Partn. (Eng. ed.) 849, 859.

[1] Sheppard *v.* Oxenford, 1 K. & J. 491; Evans *v.* Coventry, 5 De G., M. & G. 911, overruling S. C., 3 Drew. 75.

[2] Collyer on Partnership, § 354; and see Lindley on Partnership, 849 *et seq.*

[3] Wilson *v.* Greenwood, 1 Swanst. 481; Peacock *v.* Peacock, 16 Ves. 49; Milbank *v.* Revett, 2 Mer. 405; Goodman *v.* Whitcomb, 1 J. & W. 589; Blakeney *v.* Dufaur, 15 Beav. 40; Clegg *v.* Fishwick, 1 M'N. & G. 294, 298.

[4] Waters *v.* Taylor, *ubi sup.*; see Harrison *v.* Armitage, 4 Mad. 143; Oliver *v.* Hamilton, 2 Anst. 453.

[5] Harding *v.* Glover, 18 Ves. 281; Estwick *v.* Conningsby, 1 Vern. 118; Smith *v.* Jeyes, 4 Beav. 503; Henn *v.* Walsh, 2 Edw. Ch. 129; Gowan *v.* Jefferies, 2 Ashmead, 296; Story Partn. §§ 228-231; Law *v.* Ford, 2 Paige, 310. In Skip *v.* Harwood, Reg. Lib. 1748, B. 517, a Receiver was appointed of a brewery.

[6] Peacock *v.* Peacock, and Milbank *v.* Revett, *ubi sup.*

[7] "If partners quarrel, and one of them behaves unrighteously against the interest of the other, a Receiver will be appointed; but if partners quarrel, a Receiver will not merely on that account be appointed." Per Lord Eldon, in Texeire *v.* Da Costa, in Chancery, Nov. 1815, Cooke's MSS.; see Hale *v.* Hale, 4 Beav. 639.

[8] Harding *v.* Glover, 18 Ves. 281.

[9] Blakeney *v.* Dufaur, 15 Beav. 40; and see Wilson *v.* Greenwood, 1 Swanst. 481. The dissolution which takes place on the refusal of an appointee under a will to be-

*1729 * The same rules which prevail respecting the appointment of a Receiver in a suit between partners, are applicable in a suit between the representative of a deceased partner and the surviving partner.[1]

Where all the partners are dead, and a suit is instituted between their representatives, a Receiver will be appointed as a matter of course;[2] and so, where one of the partners became bankrupt, a Receiver was appointed at the suit of the solvent partner, against the assignees.[3]

The Court will also appoint a Receiver, pending an investigation into the title to an estate, in a suit for the specific performance of an agreement. The consideration of the question at whose expense the appointment should be made will be reserved.[4]

A Receiver of the rents and profits of an infant's estate may, also, as we have seen, be appointed; and where no suit is pending, this may be done upon summons at Chambers: though the more usual course, in the latter case, is, to appoint a guardian of the person and estate, without a Receiver.[5]

Section II. — *Of what appointed.*

A Receiver may be appointed of the rents and profits of real estate, and also of all personal estate which is capable of being reduced into possession. In *Davis* v. *The Duke of Marlborough*,[6] it was held that, in favor of equitable creditors, the Court will appoint a Receiver *1730 of all property against which a legal creditor * might obtain execution. Upon this ground, a Receiver has been appointed of the profits of a rectory,[1] under an *elegit*. The appointment is not, however, confined to such property as is liable to be taken under an

come a partner, is clearly not a dissolution arising from the exclusion of the appointee by the surviving partners, and will therefore be no foundation for a Receiver. Kershaw *v.* Matthews, 2 Russ. 62. A Court of Equity has authority to appoint a Receiver, at the instance of one tenant in common against his co-tenants, who are in possession of undivided valuable property, receiving all the rents and profits, and excluding such tenant from the receipt of any portion thereof, when such co-tenants are insolvent. Williams *v.* Jenkins, 11 Geo. 595.

[1] De Tastet *v.* Bordieu, 2 Bro. C. C. ed. Belt, 272, n.; and see Madgwick *v.* Wimble, 6 Beav. 495; Clegg *v.* Fishwick, 1 M'N. & G. 294, 298; Davis *v.* Amer, 3 Drew. 64; but see Hartz *v.* Schrader, 8 Ves. 317; 2 Hov. Sup. 106; Collyer on Part. § 357. If the surviving copartner wastes the funds, the Court would, on a proper application, protect the estate of his deceased copartner, by obliging him to give security, or will appoint a Receiver. Higginson *v.* Adir, 1 Desaus. 429.

[2] Philips *v.* Atkinson, 2 Bro. C. C. 272.

[3] Freeland *v.* Stansfield, 2 Sm. & G. 479; 1 Jur. N. S. 8; and see Wilson *v.* Greenwood, 1 Swanst. 471, 482; Fraser *v.* Kershaw, 2 K. & J. 496.

[4] Boehm *v.* Wood, 2 J. & W. 236; and see Hall *v.* Jenkinson, 2 V. & B. 125; Stratton *v.* Davidson, 1 R. & M. 484; Osborne *v.* Harvey, 1 Y. & C. C. C. 116; Dawson *v.* Yates, 1 Beav. 301; 2 Jur. 960.

[5] *Ante*, p. 1354. In Baker *v.* Backus, 32 Ill. 79, it was held that the Court has no jurisdiction to appoint a Receiver unless a cause is depending, save in peculiar cases, such as infancy or lunacy. As to lunacy, see *ante*, p. 1361.

[6] 2 Swanst. 132.

[1] Silver *v.* Bishop of Norwich, 3 Swanst. 112, n. (*b*); White *v.* Bishop of Peterborough, *ib.* 109. A registered judgment against a clergyman does not create a charge upon his benefice entitling the judgment creditor to the appointment of a Receiver, under 1 & 2 Vic. c. 110; Hawkins *v.* Gathercole, 6 De G., M. & G. 1; 1 Jur. N. S. 481; reversing S. C., 1 Sim. N. S. 63; and see Bates *v.* Brothers, 2 Sm. & G. 509.

execution at Law, but has been extended to whatever is considered in Equity as assets; and, therefore, in *Blanchard* v. *Cawthorne*,[2] a Receiver was appointed, at the instance of a judgment creditor, of the office of master forester of a royal forest. So, also, in *Palmer* v. *Vaughan*,[3] the profits of the office of Clerk of the Peace for a county having been assigned for the payment of creditors, a Receiver was appointed, pending the discussion of a question as to the validity of the assignment: but in *Cooper* v. *Reilly*,[4] a Receiver was refused, pending such a discussion, of the salary of Assistant Parliamentary Counsel to the Treasury: the Court being of opinion that, upon grounds of public policy, the salary of such an office was not assignable. A Receiver has been appointed of a canonry;[5] and may, it seems, be appointed of a college fellowship.[6]

A pension granted by the Crown is capable of being taken under a sequestration for want of an answer;[7] and such a pension may, it seems, be the subject of a Receiver.[8] The rule, however, will not extend to the pension for past services,[9] or to the half-pay[10] of an officer in the Army or Navy: which is, upon grounds of public policy, also exempt from the operation of a sequestration.[11] So, also, it has been held, that a pension granted by the 5 Anne, c. 4, for the more honorable support of the dignities of the Duke of Marlborough, to the persons, severally and successively, to whom the same should come by virtue of that Act, with a proviso that the acquittance of every such person should be a sufficient discharge, was, upon grounds of public policy, inalienable, and therefore not the subject of a Receiver: although the estates which, by the 5 Anne, c. 3, were limited to the then Duke for life, with remainder in tail, in such manner that they might always go along and be enjoyed with the titles and dignities, with a proviso, that they should not be aliened to the injury of the persons in remainder, * were held to be alienable during the *1731 life of the person in possession, and to be, therefore, the subject of a Receiver during his life.[1] A Receiver will also be appointed of heirlooms,[2] or of the tolls of a turnpike,[3] canal,[4] rail-

[2] 4 Sim. 566.

[3] 3 Swanst. 173.

[4] 2 Sim. 560; Affd., 1 R. & M. 560. [The Court will not enjoin a public officer from receiving the fees of office, and appoint a Receiver to take and hold the same pending a controversy over the right to the office. Stone *v.* Wetmore, 42 Ga. 601; *ante*, 1650, n. 1.]

[5] Grenfell *v.* Dean of Windsor, 2 Beav. 544.

[6] Feilde *v.* King's College, Cambridge, 10 Beav. 491, 500; 11 Jur. 596; but see Berkeley *v.* King's College, Cambridge, *ib.* 602.

[7] *Ante*, p. 1053.

[8] Noad *v.* Backhouse, 2 Y. & C. C. C. 529; and see Tunstall *v.* Boothby, 10 Sim. 542.

[9] Lloyd *v.* Cheetham, 3 Giff. 171; 7 Jur. N. S. 1272; but see Carew *v.* Cooper, 4 Giff. 619; 10 Jur. N. S. 11; *ib.* 429; 12 W. R. 585, 767, L. C.

[10] M'Carthy *v.* Gould, 1 Ball & B. 387; Stone *v.* Liddendale, 2 Anst. 533, 539; Collyer *v.* Fallon, T. & R. 459, 467.

[11] *Ante*, p. 1053.

[1] Davis *v.* Duke of Marlborough, 1 Swanst. 74, 84; and see S. C., 2 Swanst. 108, 126.

[2] Earl of Shaftesbury *v.* Duke of Marlborough, Seton, 1025.

[3] Knapp *v.* Williams, 4 Ves. 430, n. (a); Dumville *v.* Ashbrooke, 3 Russ. 98, n.; Lord Crewe *v.* Edleston, 1 De G. & J. 93; 3 Jur. N. S. 1061; Seton, 1034.

[4] Tripp *v.* Chard Railway Co., 11 Hare, 241; 17 Jur. 887; Seton, 1034; Potts *v.* Warwick, &c. Canal Co., Kay, 142, 143; Seton, 1034.

way,[5] market,[6] or dock;[7] but the Court will not appoint a Receiver of parochial rates which are to be assessed and collected at a future period.[8]

It is not necessary, in order to authorize the Court to appoint a Receiver, that the property in respect of which he is to be appointed should be in England,[9] or, indeed, in any of her Majesty's dominions. Thus, persons have been appointed to manage landed property, receive the rents and profits, and convert, get in, and remit the proceeds of property and assets, where such property has been situated in British India,[10] Canada,[11] China,[12] Ireland,[13] Italy,[14] New South Wales,[15] the West Indies,[16] Demerara,[17] and other places. In these cases, a person resident in England is sometimes appointed Receiver or manager, with authority to appoint an agent abroad;[18] and sometimes a person abroad is appointed Receiver or manager, with directions to consign or remit to

[5] Russell *v.* East Anglian Railway Co., 3 M'N. & G. 104, 105; Furness *v.* Caterham Railway Co., 25 Beav. 614, 619; 4 Jur. N. S. 1213. [But only in an extreme and clear case: Union Trust Co. *v.* St. Louis R. Co., 4 Dill. 114; Vermont R. Co. *v.* Vermont, &c. R. Co., 50 Vt. 500; or after judgment: Pell *v.* Northampton Ry. Co., L. R. 2 Ch. App. 100; Latimer *v.* Aylesbury, &c. Ry. Co., 9 Ch. Div. 385.

The Court has no power to appoint a manager of a railway: Gardner *v.* London, &c. R. Co., L. R. 2 Ch. App. 201; but, by 31 & 32 Vic. c. 79, the Court was authorized to make the appointment at the instance of a judgment creditor. The English ruling was followed in Port Huron R. Co. *v.* Judge, &c., 31 Mich. 456. But in the United States generally, the Courts, while recognizing the delicacy of the task, have not hesitated to appoint a Receiver and manager of a railroad in a proper case: Milwaukee R. Co. *v.* Soutter, 2 Wall. 510; Stevens *v.* Davison, 26 Gratt. 519; Delaware, &c. R. Co. *v.* Erie R. Co., 6 C. E. Green, 298; Kennedy *v.* St. Paul R. Co., 2 Dill. 448; and it is no objection to the exercise of the power that the road extends into more States than one: Wilmer *v.* Atlanta R. Co., 2 Woods, 409; and the Courts have clothed such Receivers with power to raise money, making the same a primary charge on the road: Stanton *v.* Alabama, &c. R. Co., 2 Woods, 506; Meyer *v.* Johnston, 4 Cent. L. J. 111; S. C. 53 Ala. 237, 346; Cowdrey *v.* Galveston R. Co., 93 U. S. 352; S. C., 1 Woods, 330; Hoover *v.* Montclair, &c. R. Co., 2 Stew. Eq. 4; Jerome *v.* McCarter, 94 U. S. 738. "The power of a Court of Equity," says Mr. Justice Bradley, speaking for the Supreme Court of the United States, "to appoint managing Receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such Receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day be seriously disputed. It is a part of that jurisdiction always exercised by the Court, by which it is its duty to protect and preserve the trust fund in its hands. It is, undoubtedly, a power to be exercised with great caution, and, if possible, with the consent and acquiescence of the parties interested in the fund. In the present case, it appears that the parties most materially interested either expressly consented to the order, or offered no objection to it." Wallace *v.* Loomis, 97 U. S. 146, 162. And the Court may require, as the condition of the appointment of a Receiver and manager, the payment out of earnings of current expenses, taxes, and liabilities for injuries to property; and if the earnings have been applied to the permanent improvement of the road, may equitably adjust the rights of parties in the disbursement of the proceeds of sale. Fosdick *v.* Schall, 99 U. S. 235; S. C. 7 Rep. 449.]

[6] De Winton *v.* Mayor of Brecon, 26 Beav. 533; 5 Jur. N. S. 882.

[7] Ames *v.* Trustees of the Birkenhead Docks, 20 Beav. 332; 1 Jur. N. S. 529. As to Receivers of the property of companies, see Seton, 1034.

[8] Drewry *v.* Barnes, 3 Russ. 94.

[9] Houlditch *v.* Marquis of Donegal, 8 Bl. N. S. 301, 343; Barkley *v.* Lord Reay, 2 Hare, 308; Faulkner *v.* Daniel, 3 Hare, 204, n.; Seton, 1038.

[10] Logan *v.* Princess of Coorg, Seton, 1038, No. 1; Keys *v.* Keys, *ibid.*; 1 Beav. 425.

[11] Tylee *v.* Tylee, Seton, 1039.

[12] Hodson *v.* Watson, Seton, 1038.

[13] Houlditch *v.* Marquis of Donegal, *ubi sup.*; Seton, 1007; but see *Re* Trant, and *Re* Warner, cited *ib.* 1008.

[14] Hinton *v.* Galli, 24 L. J. 121; 2 Eq. Rep. 479, M. R.; Seton, 1039, No. 3.

[15] Underwood *v.* Frost, Seton, 1038, No. 2.

[16] Seton, 1036, 1037.

[17] Porter *v.* Porter, Seton, 1036, No. 2; Bunbury *v.* Bunbury, 1 Beav. 318; Seton, 877, 1036.

[18] See —— *v.* Lindsey, 15 Ves. 91; Cockburn *v.* Raphael, 2 S. & S. 453; Seton, 1036–1039.

some person resident in England.[19] The Receiver, manager, or consignee in England, unless he is the trustee or other legal representative of the property, is required to give the usual security to account for what he may receive;[20] and, ordinarily, the person appointed to act abroad as Receiver or manager must give the like security as persons resident in this country.[21]

* Section III. — *Who may be appointed.* *1732

Generally speaking, a Receiver should be a person wholly disinterested in the subject-matter of the suit,[1] but, in some cases, a person mixed up with the suit may be appointed.[2] In a suit to dissolve a partnership, one of the partners, who was willing to act without salary, has been appointed Receiver;[3] and a retired partner, who had advanced all the capital, and was liable to the partnership debts, has been appointed Receiver: he being willing to act without salary.[4] But in no case will a party to the cause be appointed: unless he is appointed by the Court at the hearing; or a direction, giving him leave to propose himself, has been given by the Court. This leave, if granted, is usually embodied in the order[5] directing the appointment of a Receiver; but if it has not been refused, a subsequent order to that effect can be obtained, on summons at Chambers.[6]

A trustee, who is a party to the cause, will not, however, be appointed a Receiver with emolument, if any one else can be procured who will act with the same benefit to the estate;[7] and even were he disposed to act without emolument, the Court will not appoint a trustee to be a Receiver, if he is the person who ought to watch and check the Receiver for the benefit of the parties interested;[8] but where a testator appointed as trustee a person who for many years had been the paid Receiver and manager of his estate, the tenant for life being an

[19] See Seton, 1036–1039. Where the property consists of a plantation or other landed possessions abroad, or of a trade or business, the person appointed is ordinarily termed "manager," or "receiver and manager;" and the word "receiver," as used in Cons. Ord., includes consignee and manager. Prel. Ord. 10 (7). As to managers and consignees, see *post*, p. 1767 *et seq.*

[20] Ord. XXIV. 1.

[21] *Ibid.*; Cockburn *v.* Raphael, *ubi sup.*; Seton, 1038. For the principles on which a Court acts in appointing a party Receiver, see Cookes *v.* Cookes, 2 De G., J. & S. 526. As to the security of Receivers, see *post*, p. 1636.

[1] See Hewett *v.* Adams, 59 Maine, 271; Wiswell *v.* Starr, 48 Maine, 401; [Beemson *v.* Bill, 62 Ill. 408].

[2] Fingal *v.* Blake, 2 Moll. 50.

[3] Wilson *v.* Greenwood, 1 Swanst. 471, 483; Blakeney *v.* Dufaur, 15 Beav. 40, 44. [See Berry *v.* Jones, 11 Heisk. 207; Todd *v.* Rich, 2 Tenn. Ch. 107; Brien *v.* Harriman, 1 Tenn. Ch. 467; Sargant *v.* Read, 1 Ch. Div. 600.] A partner who is appointed Receiver becomes an officer of the Court, and must act and be respected accordingly. 2 Lindley Partn. (Eng. ed.) 856, 857.

[4] Hoffman *v.* Duncan, 18 Jur. 69, V. C. W.

[5] See form, Seton, 1003, Nos. 4, 5.

[6] Seton, 1006; and see Banks *v.* Banks, 14 Jur. 659, M. R. For form of summons, see Vol. III.

[7] Fingal *v.* Blake, *ubi sup.*; Sykes *v.* Hastings, 11 Ves. 363, 364; but see ——— *v.* Jolland, 8 Ves. 72; and also Powys *v.* Blagrave, 18 Jur. 462, V. C. W., where a tenant for life was appointed Receiver on his undertaking to act without salary.

[8] Anon., 3 Ves. 515; Sykes *v.* Hastings, 11 Ves. 363, 364; Sutton *v.* Jones, 15 Ves. 584.

infant, the Court continued the trustee as Receiver at a salary.[9] The rule, that the Court will not sanction the appointment, as Receiver, of a person whose duty it is to check and control the individual appointed, is extended to other persons besides trustees. Thus, it has been held, that, as it is the duty of the next friend of an infant to watch the accounts and conduct of a Receiver of the infant's estate, the two characters are incompatible with each other;[10] and, in *Taylor* v. *Oldham*,[11] Lord Eldon held that the son of a next friend ought not to be the Receiver.

*1733 * Upon similar grounds it has been held, that a solicitor in the cause cannot be appointed Receiver[1] because it is his duty to control the Receiver's accounts.[2] It is no objection, however, to a person proposed, that he is a practising barrister;[3] and although, in *Wynne* v. *Lord Newborough*,[4] Lord Eldon appears to have considered that the circumstance of the gentleman who was appointed being a barrister, practising at a distance from the estate, was one which deserved consideration, yet many instances have since occurred in which barristers practising in London have been appointed Receivers of estates at a distance.

The appointment of a Member of Parliament,[5] or a Peer,[6] as Receiver, is, it seems, objectionable, if any person possessed of equal fortune can be found who is willing to act.

It has also been held, that the Receiver-General for a county should not be appointed a Receiver: for having given security to the Crown, if he were to become indebted to the Crown and to the estate, the Crown might, by its prerogative process, sweep away all his property.[7] Upon the same ground it might be held, that any person who is in the situation of an accountant to the Crown would be objectionable.[8]

9 Bury *v.* Newport, 23 Beav. 30.

10 Stone *v.* Wishart, 2 Mad. 64.

11 Jac. 527, 529.

1 Baker *v.* Backus, 32 Ill. 79. A Receiver cannot, in any way, employ counsel engaged in the suit in which he is Receiver. Adams *v.* Woods, 8 Cal. 306; Rychman *v.* Parkins, 5 Paige, 543.

2 Garland *v.* Garland, 2 Ves. J. 137. In Bagot *v.* Bagot, 2 Jur. 1063, Sir Lancelot Shadwell V. C., on the application of a married woman for a Receiver of her separate estate, appointed her solicitor to that office, on her nomination in Court; although a strong affidavit was made by the husband showing the unfitness of the solicitor for the office. The party appointed undertook to act as Receiver without salary.

3 Garland *v.* Garland, *ubi sup.*

4 15 Ves. 283.

5 Wynne *v.* Lord Newborough, 15 Ves. 283.

6 Attorney-General *v.* Gee, 2 V. & B. 208.

7 Attorney-General *v.* Day, 2 Mad. 246, 253. See now, however, as to Crown debts, 2 & 3 Vic. c. 11, §§ 8–11; 22 & 23 Vic. c. 35, § 22; 28 & 29 Vic. c. 104, §§ 48–50.

8 In the case of the Franklin Bank, as referred to in The Attorney-General *v.* Bank of Columbia, 1 Paige, 417, Chancellor Walworth decided, that it was improper for an officer of an insolvent corporation to be the Receiver of its property. This case arose before the passage of the Revised Statutes in New York. But under the New York Act of voluntary dissolution of corporations, an officer of a corporation can be appointed a Receiver. 2 Rev. Stat. N. Y. 468, § 66. Still it does not appear that it is obligatory on the Court to appoint the officers Receivers, under this Statute. Edwards, Receivers, 57, 58. In the Matter of the Eagle Iron Works, 8 Paige, 385; S. C., 3 Edw. Ch. 385, it was held, that the president and bookkeeper of an insolvent manufacturing corporation can be appointed Receivers. See Hewett *v.* Adams, 50 Maine, 271; Wiswell *v.* Starr, 48 Maine, 401; Commonwealth *v.* Eagle Fire Ins. Co., 4 Allen, 344. [The officer of a corporation, under whose management it has become insolvent, is not a proper person to be appointed Receiver. McCullough *v.* Merchants' Loan & Tr. Co., 2 Stew. Eq. 217; Freeholders *v.* State Bank, 1 Stew. Eq. 166; Richards *v.* Chesapeake & Ohio R. Co., 1 Hughes, 28; Williamson *v.* New Albany R. Co., 1 Biss. 198.]

Section IV. — *Mode and effect of appointment.*

Except in the cases of infants,[9] the Court has no jurisdiction to appoint a Receiver, unless a suit is pending,[10] and if the application * for the Receiver is made before decree, it will not be *1734 granted unless a bill has been filed containing a specific prayer that a Receiver may be appointed.[1]

At the hearing,[2] however, or after the decree,[3] a Receiver may be appointed, although not prayed by the bill, if the circumstances of the case require it,[4] and the application may be granted after decree, although it has been previously refused, if a state of facts entitling the party to a Receiver appears upon the proceedings in the cause.[5]

A Receiver may be appointed, after an administration decree, in a suit commenced by summons.[6]

Where the original bill has been answered, it was held that the pendency of a plea to the amended bill did not prevent a motion for a Receiver.[7] A Receiver may be appointed although the suit has become defective through the bankruptcy of a defendant.[8]

After decree, the application for a Receiver may be made by one defendant against a co-defendant;[9] but before decree, the application must, except under very special circumstances, be made by the plaintiff;[10] and where made at the hearing of a redemption suit, the application was refused.[11]

Originally, a Receiver could only be appointed after answer; but this rule was broken through by Lord Bathurst, in the case of *Compton* v. *Bearcroft*;[12] and since that case, the appointment has been made before answer, wherever the justice of the case required it;[13] and, in a case of urgency, even before appearance.[14]

[9] *Ante*, p. 1354; and see as to lunatics, *ante*, p. 1361.

[10] See Baker *v.* Backus, 32 Ill. 79, cited *ante*, 1729 in note.

[1] Pare *v.* Clegg, 7 Jur. N. S. 1136; 9 W. R. 216, M. R.; but see Malcolm *v.* Montgomery, 2 Moll. 500. [See also, Henshaw *v.* Wells, 9 Humph. 568; *ante*, 1716, n. 2.]

[2] Osborne *v.* Harvey, 1 Y. & C. C. C. 116.

[3] Bowman *v.* Bell, 14 Sim. 392; Wright *v.* Vernon, 3 Drew. 112; Thomas *v.* Davies, 11 Beav. 29; [Shee *v.* Harris, 1 J. & La. T. 91; Moran *v.* Johnston, 26 Gratt. 108; Merrill *v.* Elam, 2 Tenn. Ch. 515; *ante*, 1716, n. 2]. Where the plaintiff seeks to have the control of property from those having the legal right of possession, delay on his part in advancing his cause, or in making his application, is an objection to the appointment of a Receiver. Tibbals *v.* Sargeant, 1 McCarter, 449.

[4] The bill must lay the foundation for the appointment of a Receiver by stating the facts which show the necessity and propriety of it. Tomlinson *v.* Ward, 2 Conn. 396.

[5] Attorney-General *v.* Mayor of Galway, 1 Moll. 95–104.

[6] *Re* Bywaters, Sargent *v.* Johnson, 1 Jur. N. S. 227; Brooker *v.* Brooker, 3 Sm. & G. 475; 3 Jur. N. S. 381; [Steele *v.* Cobham, L. R. 1 Ch. App. 325; Hamp *v.* Robinson, 3 De G., J. & S. 97, 109].

[7] Thompson *v.* Selby, 12 Sim. 100.

[8] *Re* Johnson, Steele *v.* Cobham, L. R. 1 Ch. Ap. 225, L. JJ.

[9] Hiles *v.* Moore, 15 Beav. 175. [See Henshaw *v.* Wells, 9 Humph. 568; *ante*, 1618, n. 6.]

[10] Robinson *v.* Hadley, 11 Beav. 614.

[11] Barlow *v.* Gains, 8 Beav. 379.

[12] 2 Bro. C. C. 138, n.

[13] Pitcher *v.* Helliar, 2 Dick. 580; Vann *v.* Barnett, 2 Bro. C. C. 158; Middleton *v.* Dodswell, 13 Ves. 266; Duckworth *v.* Trafford, 18 Ves. 283; Metcalfe *v.* Pulvertoft, 1 V. & B. 180, 183; Davis *v.* Duke of Marlborough,

[14] Tanfield *v.* Irvine, *ubi sup.*; Hart *v.* Tulk, 6 Hare, 611; Meaden *v.* Sealey, *ib.* 629; 13 Jur. 297; see Johns *v.* Johns, 23 Geo. 31; Voshell *v.* Hynson, 26 Md. 83.

The application for a Receiver is usually made by motion;[15] *1735 and, * except in a suit commenced by summons, or by consent, it cannot be made at Chambers in the first instance: although any vacancy which may occur in the office, by death or otherwise, may be filled up by an order made there.[1]

Notice of the motion, or summons, as the case may be,[2] must be served on the opposite party: the general rule of the Court being, that an application for a Receiver cannot, like a motion for an injunction, be made without notice.[3] If, therefore, a Receiver is to be applied for before the expiration of the time for appearance, notice of the motion must be served upon the defendant personally: to authorize which, there must be a previous application to the Court for leave to make such service;[4] and the fact of such leave having been obtained must be mentioned in the notice of motion.[5] The rule, however, which requires previous notice to be served upon a defendant who has not appeared, is subject to exception where the defendant has absconded to avoid service, and, therefore, cannot be served;[6] and the plaintiff is, without special leave of the Court, at liberty to serve any notice of motion of summons, personally, or at the dwelling-house or office, of any defendant who,

1 Swanst. 74; 2 *id.* 115; Tanfield *v.* Irvine, 2 Russ. 149; Aberdeen *v.* Chitty, 3 Y. & C. Ex. 379; Woodyatt *v.* Gresley, 8 Sim. 180, 183, 189; and see Middleton *v.* Sherburne, 4 Y. & C. Ex. 358. It must be a strong, special ground to induce the Court to appoint a Receiver before answer. Edwards, Receivers, 10; Bloodgood *v.* Clark, 5 Paige, 574; Osborn *v.* Heyer, 2 Paige, 342, 343; West *v.* Swan, 2 Edw. Ch. 420; Willis *v.* Corlies, 2 Edw. Ch. 281; Williams *v.* Jenkins, 11 Geo. 595; Voshell *v.* Hynson, 26 Md. 83; Parker *v* Backus, 32 Ill. 79.

[15] Hungerford *v.* Cushing, 8 Wis. 320; Nusbaum *v.* Stein, 12 Md. 315; Johns *v.* Johns, 23 Geo. 31; Tibbals *v.* Sargeant, 1 McCarter, 449. A Receiver will not be appointed over the possession of another Receiver; but the proper motion is, that the Receiver already appointed shall be extended to the cause in which it is sought to appoint one. Vialle *v.* O'Reilly, 1 Hogan, 199; Osborn *v.* Heyer, 2 Paige, 342; Downshire *v.* Tyrrell, Hayes, 354. A petition has been made use of, where the application was by the defendant. Hiles *v.* Moore, 15 Beav. 175; and see Barlow *v.* Gains, 8 Beav. 329, 331.

[1] Blackborough *v.* Ravenhill, 16 Jur. 1085, V. C. S.; Grote *v.* Bing, 9 Hare Ap. 50. If one of three Receivers is removed, or resigns, it is discretionary with the Court, to appoint another person in his stead, or allow the two remaining to act without the appointment of another. Wiswell *v.* Starr, 50 Maine, 381.

[2] For forms of notice of motion, petition, and summons, see Vol. III.

[3] Per Leach, Arg. 1 V. & B. 183; Caillard *v.* Caillard, 25 Beav. 512. A motion for the appointment of a Receiver is a special motion, of which the opposite party is entitled to notice. Tibbals *v.* Sargeant, 1 McCarter, 449. This is the general rule, but it is subject to exceptions. People *v.* Norton, 1 Paige, 17; as, where irreparable injury would be sustained by the delay: People *v.* Norton, *supra;* Gibson *v.* Martin, 8 Paige, 481; Johns *v.* Johns, 23 Geo. 31; Treibart *v.* Burgess, 11 Md. 452; so, where the property to which the receivership relates, would be likely to perish before the defendant could have notice and be heard on the application for a Receiver. Gibson *v.* Martin, 8 Paige, 481.

But in cases where it is proper to appoint a Receiver *ex parte*, the particular circumstances which render such summary proceedings necessary should be distinctly stated in the bill or petition, on which the application is grounded. Verplanck *v.* Merc. Ins. Co., 2 Paige, 438.

[4] Hill *v.* Rimell, 2 M. & C. 641; Ramsbottom *v.* Freeman, 4 Beav. 145; Meaden *v.* Sealey, *ubi sup.*

[5] See *ante*, p. 1443.

[6] Dowling *v.* Hudson, 14 Beav. 423, 424, n.; and see Pitcher *v.* Helliar, 2 Dick 580; Gibbins *v.* Mainwaring, 9 Sim. 77; *ante*, p. 456; and see Verplanck *v.* Merc. Ins. Co., 2 Paige, 438. A Receiver ought not to be appointed on an *ex parte* application, where an advertisement for the defendant, a non-resident, is running for his appearance, unless special circumstances are shown. Sanford *v.* Sinclair, 8 Paige, 373; S. C., 3 Edw. Ch. 393. But such an appointment may be made *ex parte*, where it is necessary to prevent the property from being wasted or removed beyond the jurisdiction of the Court. *Ibid.*

having been duly served with a copy of the bill, has not caused an appearance to be entered within the time limited for that purpose.[7]

The application must be supported by evidence of the facts relied upon, as rendering the appointment proper; and must, if * the *1736 application is made before decree, be founded on the allegations of the bill.[1]

Formerly, if the application was made after answer, the plaintiff could only rely on the admissions contained therein; and could not enter into evidence in opposition thereto;[2] but now, upon any application for a Receiver, or to discharge an order appointing a Receiver, the answer of the defendant is, for the purpose of evidence on such application, to be regarded merely as an affidavit of the defendant; and affidavits may be received and read in opposition thereto.[8]

A person to be appointed Receiver must, unless otherwise ordered, first give security, to be allowed by the Judge to whose Court the cause is attached, duly to account for what he shall receive, on account of the rents and profits for the receipt of which he is appointed, at such periods as the Judge shall appoint, and to account for and pay the same as the Court shall direct; or, as the case may be, to be answerable for what he shall receive in respect to the personal estate, for the getting in and collection of which he is appointed, and to account for and pay the same as the Court shall direct.[4]

The security usually required is the recognizance of the Receiver,[5] with two sureties.[6] The recognizance is given to the Master of the Rolls, and the senior Vice-Chancellor for the time being;[7] and must be taken before a person authorized to administer oaths in Chancery.[8] It is generally required to be for double the annual rental,[9] or value of the property likely to be got in by the Receiver during the currency of his periodical account. The sureties may be bound in unequal sums; and the number of sureties may be increased, so as to diminish the amount for which each is to be liable;[10] but it is not regular to take, as

[7] Ord. III. 8; *ante*, p. 456. As to appearance, see *ante*, p. 536 *et seq.*

[1] Dawson *v.* Yates, 1 Beav. 301, 306; 2 Jur. 960.

[2] See Goodman *v.* Whitcomb, 1 J. & W. 589; Glassington *v.* Thwaites, 1 S. & S. 134; Kershaw *v.* Mathews, 1 Russ. 361.

[8] 15 & 16 Vic. c. 86, § 59; see Cheever *v.* Rut. & Burl. R. R. Co., 39 Vt. 653, 666. Where the plaintiff uses affidavits, the defendant may also read depositions. Edwards, Receiver, 66.

[4] Ord. XXIV. 1; Tomlinson *v.* Ward 2 Conn. 396; Neaves *v.* Rich, 52 Maine, 115. As to security by Receivers, managers, and consignees of property abroad, see *ante*, p. 1731, and *post*, p. 1768. For forms of orders, for Receivers, see Seton, 1002 *et seq.*; 1023 *et seq.*

[5] Where the Receiver had been improperly omitted to be joined with his sureties in the recognizance, the solicitor was made personally liable for a loss occasioned thereby. *Re* Ward, Simmons *v.* Rose, 31 Beav. 1.

[6] Mead *v.* Lord Orrery, 3 Atk. 237; Seton, 1007. Where a person resident in Ireland is appointed Receiver by this Court, the security taken is a judgment confessed by him and his sureties, in the Court of Queen's Bench there, in favor of the Master of the Rolls here, and senior Vice-Chancellor; and such judgment is duly docketed and registered there, so as to give a lien on the real estates of the Receiver and sureties. Seton, 1007. As to the security, where the Receiver is appointed by the Irish Court of Chancery, see the Orders of May, 1857; Blackham's Pr. Ir. Chan. 423 *et seq.*

[7] Ord. XLII. 13.

[8] Ord. XXIV. 1. As to such persons, see *ante*, 744 *et seq.*

[9] Seton, 1007.

[10] *Ibid.*

*1737 * security for a Receiver, an assignment of a mortgage belonging to him,[1] or (even by consent) the bond of an incorporated guarantee association:[2] instead of the usual recognizance. A recognizance of the Receiver only, has, however, under special circumstances, been considered sufficient. Thus, where the parties in the cause name the Receiver, the Court will, by consent, appoint him upon his own recognizance only;[3] and where the appointment of a person to be Receiver was made by the testator, and confirmed by the Court, the personal recognizance of such Receiver was held sufficient;[4] but it seems the Court will not dispense with the usual security, unless all the parties are *sui juris* and consent.[5]

The sureties must be resident within the jurisdiction;[6] and upon any event, such as death or bankruptcy, happening, which would prevent the recognizance being effectually put in force against them, an order will be made at Chambers, on summons, directing the Receiver to give a new security.[7] Where, also, the property of which a Receiver has been appointed has increased in value during the receivership, additional security has been required to be given by him.[8]

The order appointing the Receiver ought to state distinctly, on the face of it, over what property the Receiver is appointed;[9] or else refer to the pleadings, or some document in the cause, which describes the property.[10] It usually directs the Receiver to pass his accounts from time to time, and to pay the balances found due from him into Court, to the credit of the cause: to be there invested and accumulated, or otherwise, as may be directed.[11]

If the appointment is of rents and profits of real or leasehold estates, the order directs the tenants of such estates to attorn and pay their rents in arrear and growing rents to the Receiver; but this direction should be omitted where the estates are out of England.[12]

If the appointment is of outstanding personal estate, or of partnership property, the order generally directs the executors, or *1738 * other parties, to deliver over to the Receiver all securities in their hands for such estate or property, and also the stock-in-trade and effects of the partnership, together with all the books and papers relating thereto.[1]

[1] Mead *v.* Lord Orrery, 3 Atk. 237.

[2] Manners *v.* Furze, 11 Beav. 30; 12 Jur. 129. Such a bond has been held sufficient as security for costs. Plestow *v.* Johnson, 1 Sm. & G. Ap. 20; 2 W. R. 3; and see, as to official liquidators, Ord. 11 Nov., 1862, r. 10; 8 Jur. N. S. Pt. II., 515.

[3] Countess of Carlisle *v.* Lord Berkley, Amb. 599; Ridout *v.* Earl of Plymouth, 1 Dick. 68; Countess Carlisle *v.* Earl Carlisle, cited *ibid.*; Wilson *v.* Wilson, 11 Jur. 793, V. C. K. B.

[4] Hibbert *v.* Hibbert, 3 Mer. 681, 683.

[5] Tylee *v.* Tylee, 17 Beav. 583; and see Bainbrigge *v.* Blair, 3 Beav. 421, 424; Manners *v.* Furze, *ubi sup.*

[6] See Cockburn *v.* Raphael, 2 S. & S. 453.

[7] Seton, 1019. For form of order, see *ib.*, No. 4; and for form of summons, see Vol. III.

[8] Spence *v.* Handford, M. R. in Chambers, 17 Feb., 1865.

[9] Crow *v.* Wood, 13 Beav. 271. As a general rule a Receiver has no powers except those conferred on him by the order for his appointment. Grant *v.* Davenport, 18 Iowa, 179.

[10] Seton, 1005.

[11] For forms of orders directing Receivers to be appointed, see Seton, 1002 *et seq.*

[12] Seton, 1007, 1039.

[1] For forms of orders, see Seton, 1002, 1030.

If the Receiver is appointed on behalf of one of several incumbrancers, the order generally contains a declaration that the appointment of the Receiver is to be without prejudice to the rights of, or is not to affect, the prior incumbrancers upon the estate who may think proper to take possession of the estates and premises, by virtue of their respective securities; and usually directs an inquiry what incumbrances there are affecting the estate, and the priorities thereof respectively; and orders that the Receiver do, out of the rents and profits to be received by him, keep down the interest and payments in respect of such incumbrances, according to their priorities; and be allowed the same in passing his accounts.[2]

Unless the person to be appointed Receiver is named in the order, the appointment is made in Chambers.[3] For this purpose, a copy of the order is left there, and a summons to proceed thereon is issued and served on all parties interested, in the usual manner.[4] On the return of the summons, or at an adjournment thereof, the party having the conduct of the proceedings[5] brings into Chambers evidence showing the nature and value of the property over which the receivership is to extend, and the fitness of the person proposed by him as Receiver. Sometimes, he is also required to bring in a short proposal.[6] Any party to the proceedings may propose a person to be appointed Receiver: although a stranger cannot do so.[7] The most fit person should be appointed, without regard to the party by whom he has been proposed;[8] and, other things being equal, the person proposed by the party having the conduct of the proceedings is usually preferred.

Where the Judge has exercised his discretion in the selection of the person appointed, it will not be interfered with on appeal;[9] *unless there is some objection in point of principle to the *1739 person appointed.[1]

[2] *Ib.* 1025, 1027; see Lewis *v.* Lord Zouche, 2 Sim. 388, 393; and Smith *v.* Effingham, 2 Beav. 232, as to the remedies of incumbrancers; see also *ante*, p. 1716.

[3] See Attorney-General *v.* Bank of Columbia, 1 Paige, 511.

[4] Ord. XXXV. 15, 16. For form of summons, see Vol. III.

[5] Where a Receiver had been ordered in two administration suits, the carriage of the appointment was given to the plaintiff who first gave notice of motion. Hart *v.* Tulk, 6 Hare, 611.

[6] For forms of affidavits and proposal, see Vol. III.

[7] Attorney-General *v.* Day, 2 Mad. 246.

[8] Lowndes *v.* Bell, 2 J. & W. 436.

[9] Ley *v.* Ley, 27 L. T. 267, L. JJ.; and see *In* Argentine Cattle Company, 7 Jur. N. S. 330; 9 W. R. 682, L. JJ.; 3 De G., F. & J. 194; see also Cruize *v.* Bishop of London, 2 Bro. C. C. 253; Thomas *v.* Dawkins, 3 Bro. C. C. 508; 1 Ves. J. 162; Garland *v.* Garland, 2 *ib.* 137; Bowersbank *v.* Collasseau, 3 *ib.* 164; Wilkins *v.* Williams, *ib.* 188; Tharpe *v.* Tharpe, 12 Ves. 317, 320; Wynne *v.* Lord Newborough, 15 Ves. 284; Attorney-General *v.* Day, 2 Mad. 246, 353, and the cases cited *ib.* 252, 253, as to the extent of the control exercised by the Court over the appointment of Receivers by the Masters under the former practice. Where the appointment of a Receiver is left to the determination of a Master, it seems that the proper way to bring before the Court the propriety of his selection, is by excepting to his report of approval. Cruize *v.* Bishop of London, 2 Dick. 687; S. C., 2 Bro. C. C. (Perkins's ed.) 253, note (1); Tharpe *v.* Tharpe, 12 Ves. 317. It may, however, be done by petition. Wynne *v.* Lord Newborough, 15 Ves. 283; Matter of Eagle Iron Works, 8 Paige, 385. The judgment of the Master, however, in the selection of a Receiver, is never disturbed by the Court, unless it is shown that the person appointed is improper. Garland *v.* Garland, 2 Ves. J. 137; Thomas *v.* Dawkins, 3 Bro.

[1] Cookes *v.* Cookes, 2 De G., J. & S. 526. [As to the right of appeal from the order appointing a Receiver, see *ante*, 1163, note 1.]

When the person to be appointed Receiver has been chosen, the amount of his security will be fixed, and the persons proposed to be his sureties approved;[2] and the proceeding will be adjourned for the draft recognizance to be brought in and settled in the presence of the parties. The party conducting the proceedings[3] then brings into the Chambers the draft recognizance: which is settled by the Chief Clerk.[4] The recognizance is then engrossed on parchment,[5] and must be taken before some person authorized to administer oaths in Chancery;[6] and each surety must also make an affidavit that he is worth the amount for which he has become bound, after payment of all his just debts.[7]

The recognizance and an office copy of the sureties' affidavit having been left at the Chambers, a memorandum of the allowance of the recognizance is written in the margin of the recognizance, and signed by the Chief Clerk.[8]

The recognizance is then sent from the Chambers to the Enrolment Office in Chancery; and a receipt taken for it from the Clerk of the Enrolments.[9] No recognizance will be enrolled after six months from the acknowledgment thereof, except under special circumstances, and by an order made by the Court upon motion for the enrolment thereof,[10]

*1740 This order directs the enrolment to * be made *nunc pro tunc*;[1] but it will be made without prejudice to intervening incumbrances.[2]

After the recognizance has been enrolled, a further order will be made at Chambers, appointing the person chosen Receiver, and fixing the periods at which he is to pass his accounts, and pay the balances due from him thereon.[3] To obtain this order, a further summons, which is issued

C. C. 508; Matter of Eagle Iron Works, 8 Paige, 385; Wilkins *v.* Williams, 3 Ves. 588. The Court will not, in such a discussion, enter into comparisons as to the eligibility of the different persons proposed. Bowersbank *v.* Cassidaer, 3 Ves. 164; Tharpe *v.* Tharpe, 12 Ves. 317; Matter of Eagle Iron Works, 8 Paige, 385. But where a strong case is made of objection to the individual appointed, the Court will refer it back to the Master to review his report. Creuze *v.* Bishop of London, 2 Bro. C. C. 253; Wynne *v.* Lord Newborough, 15 Ves. 283.

[2] In Wynne *v.* Lord Newborough, 15 Ves. 283, 284, *ante*, p. 1733, Lord Eldon observed, "It is not an insuperable objection that the sureties are Members of Parliament; but would any man select three Members of Parliament, as sureties to him, in preference to three men, of equal fortune, who were not in Parliament?" The partner in trade of the Receiver, persons in partnership together, and the solicitor in the cause, are usually rejected, as sureties for a Receiver.

[3] According to the scale of costs in Regul. 8 Aug., 1857, Sched. No. 15, it is the business of the Receiver's solicitor to conduct the proceedings from this stage, to the completion of the appointment

[4] For forms of recognizance, see Regul. 8 Aug., 1857, Sched. No. 13; and Vol. III.

[5] The recognizance must bear a 35*s.* deed stamp.

[6] Ord. XXIV. 1. As to such persons, see *ante*, p. 744 *et seq.*

[7] The affidavit is usually sworn at the time the recognizance is taken, and before the same officer. For form of affidavit, see Vol. III.

[8] For form of memorandum, see Vol. III.

[9] A fee is payable by the solicitor conducting the proceeding to the clerk of Enrolments, for enrolling the recognizance. The amount is usually 7*s.* 6*d.*

[10] Ord. XLII. 12. For such order, see Marchant *v.* Marchant, cited Seton, 1007.

[1] Seton, 1007; Bothomly *v.* Lord Fairfax, 1 P. Wms. 334, 340; Vaughan *v.* Vaughan, 1 Dick. 90.

[2] Bothomly *v.* Fairfax, *ubi sup.*; 2 Vern. 751; Fothergill *v.* Kendrick, 2 Vern. 234. A recognizance to constitute a debt of record, must be enrolled. Glynn *v.* Thorpe, 1 B. & Ald. 153. As to the order of payment of recognizances out of assets, see Williams on Executors, 905, 909, 919; and see Engleheart *v.* Ordell, cited Seton, 1007.

[3] Ord. XXIV. 2; Seton, 1004. For form of order, see *ib.* 1003, No. 7.

and served in the ordinary manner, is usually necessary.[4] The order is drawn up by the Registrar.

Where the Receiver is named in the order made on the application to appoint a Receiver, his appointment is usually made conditional upon his giving security. A further order is not then necessary; but a copy of the order is left at Chambers, and a summons to settle the security is issued and served upon the parties interested;[5] and thereupon the amount of the security to be given will be settled upon the like evidence, and the recognizance will be approved, completed, and enrolled, in the manner before described.[6] The Chief Clerk will then make a certificate of the completion of the security, and of the periods fixed for the passing of the accounts and payment over of the balances; and such certificate is completed in the usual way.[7]

On an application at Chambers to appoint a Receiver, the expense of a certificate, in addition to an order, may be saved, by the recognizance being completed and enrolled before an order is drawn up. In such case, the recognizance should recite that the Judge has approved the proposed Receiver subject to his giving security, instead of reciting the order directing a Receiver to be appointed; and the order should, after reciting that the recognizance has been enrolled, appoint the Receiver, and fix the days for him to bring in his accounts, and pay the balances.[8]

The costs incurred with reference to the completion of the Receiver's security, and subsequent thereto, are, in the first instance, paid by the Receiver, and will be allowed him in passing his first account.[9]

A Receiver appointed by the Court is appointed on behalf of all * parties; and not of the plaintiff, or of one defendant only:[1] *1741 therefore, if any loss arises from deficiency in his accounts, the estate must bear it, as between the parties to the suit.[2] The effect of the appointment, however, is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the

[4] For form of summons, see Vol. III.

[5] Ord. XXXV. 15, 16. For form of summons, see Vol. III.

[6] Ante, p. 1739. The proceeding is conducted by the Receiver's solicitor. See scale of costs, Regul. 8 Aug., 1857, Sched. No. 15.

[7] Ord. XXIV. 2; Seton, 1004. For form of certificate, see Seton, 1004, No. 8; and Vol. III.

[8] See Sanmarez v. Sanmarez, M. R., in Chambers, 6 Jur., 1862 Reg. Lib. B. 194. For forms of recognizance and order in such cases, see Vol. III.

[9] For a scale of such costs see Regul. 8 Aug., 1857, Sched. No. 15.

[1] Davis v. Duke of Marlborough, 2 Swanst. 118; Bainbrigge v. Blair, 3 Beav. 421, 424, and see Neale v. Parr, 3 M. N. & G. 476; *In re* Colvin, 3 Mad. Ch. Dec. 278. [If the Receiver make a profit by the use of the funds which come to his hands, he is responsible to the Court, and not to the parties by an independent suit. Whitesides v. Lafferty, 3 Humph. 150. Where the receiver is authorized to carry on a business, as the working of a colliery, the person applying must supply the means, the loss, if any, to be borne by the unsuccessful party, and the profit to belong to the owner of the mine. Gibbs v. David, L. R. 20 Eq. 373. But see Wheatley v. Westminster Brymbo Coal Co., L. R. 9 Eq. 552; see also *ante*, 1731, note 5. A mortgagee at whose instance a receiver is appointed is usually entitled to the rents and profits thereafter accruing. Ellis v. Boston, &c. R. Co., 107 Mass. 1; Donaldson v. Chicago, &c. R. Co., 4 Biss. 414; but see Douglass v. Clay, 12 Bush, 608; Deacon v. Chesapeake, &c. R. Co., 9 Am. Ry. Rep. 386.]

[2] Lord Hutchinson v. Lord Massareene, 2 Ball & B. 55.

party who may ultimately appear to be entitled to it,[3] and when the party entitled to the estate has been ascertained, the Receiver will be considered as his Receiver.[4] Where, however, a Receiver had been appointed in consequence of the inability of the vendor of an estate sold under a decree to make out his title, the Court thought that the expenses of the Receiver ought not to be borne by the purchaser, and directed that they should be repaid to him out of the fund in Court, together with the costs of the application.[5]

It has been already stated, that where sequestrators, upon *mesne* process, are in possession of the lands and tenements in question in the cause, the appointment of a Receiver of the rents and profits will have the effect of discharging the sequestration.[6]

Where a Receiver has been appointed of real or leasehold estates, the parties to the record are usually directed by the order to deliver up to him the possession of such parts of the property as are in their holding;[7] and the tenants of such other parts as are let are ordered to attorn to the Receiver, and to pay to him their rents in arrear, as well as the growing rents.[8] The Receiver, therefore, as soon as his appointment is complete, should apply to the parties and tenants to deliver possession and attorn accordingly;[9] and if they refuse, he should report their refusal to the solicitor of the party on whose application the order was made: to the intent that he may take the necessary steps to enforce the order of the Court.[10]

*1742 * Any party to the proceedings who is in the possession of

[3] See Tillinghast *v.* Champlin, 4 R. I. 173; *In re* Colvin, 3 Md. Ch. Dec. 278. The appointment of a Receiver determines no right, and in no way effects the title to the property; his holding is the holding of the Court for him from whom the possession is taken, and he has no right to ask for a revision of an order removing him, any more than a stranger to the cause. *In re* Colvin, *supra*; Ellicott *v.* Warford, 4 Md. 80; Field *v.* Jones, 11 Geo. 413; [Fosdick *v.* Schall, 99 U. S. 235; S. C. 7 Rep. 449. The appointment of a Receiver of a National Bank does not dissolve the corporate franchise, nor prevent the bringing of a suit against the Bank. Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 383;] see Artisan's Bank *v.* Treadwell, 34 Barb. 553.

[4] Sharp *v.* Carter, 3 P. Wms. 379; Boehm *v.* Wood, T. & R. 345; Ellicott *v.* Warford, 4 Md. 80; *In re* Colvin, 3 Md. Ch. Dec. 278.

[5] M'Leod *v.* Phelps, 2 Jur. 962, V. C. E.

[6] *Ante*, p. 1059; Shaw *v.* Wright, 3 Ves. 22, 24; Atlas Bank *v.* Nahant Bank, 23 Pick. 480, 488–490.

[7] See Seton, 1015; and see form of order, *ib.* 1023. In Davis *v.* Duke of Marlborough, 2 Swanst. 108, 116, the order appointing the Receiver directed the Duke to deliver up possession to him.

[8] See form of order, Seton, 1002, No. 1.

[9] For form of attornment, see Vol. III.

[10] See Griffith *v.* Griffith, 2 Ves. S. 401; Ireland *v.* Eade, 7 Beav. 55; Parker *v.* Dunn, 8 Beav. 497; Herman *v.* Dunbar, 23 Beav. 312. As to the course to be adopted, where the Receiver finds another Receiver in possession of the property, see Ward *v.* Swift, 6 Hare, 312; 12 Jur. 173; and as to obtaining the previous leave of the Court, where the Receiver is appointed under a decree *pro confesso*, see *ante*, p. 527. In a suit in Equity, in its nature *in rem*, when a Receiver is appointed, the right to the custody of the property in controversy, vests in him immediately upon the filing of his bond. Albany Bank *v.* Schermerhorn, 1 Clarke Ch. 297. And he may, by the order of the Court, bring a suit for it in his own name. Green *v.* Bostwick, 1 Sandf. Ch. 185. But this right of custody extends only to the property which is the subject-matter of the litigation. Under a general creditor's bill, to recover the entire property of a debtor, the Receiver is entitled to the whole of such property. Chipman *v.* Sabbaton, 7 Paige, 47; Noyes *v.* Rich, 52 Maine, 115. [A Receiver appointed by virtue of the statute providing for the subjection of the property of a judgment debtor on the return of an execution unsatisfied, may maintain a suit to set aside an assignment in fraud of creditors. Miller *v.* Mackenzie, 2 Stew. Eq. 291; Bostwick *v.* Menck, 40 N. Y. 383; Kennedy *v.* Thorp, 51 N. Y. 174; Hamlin *v.* Wright, 23 Wis. 491. So of the receiver of an insolvent corporation. Freeholder *v.* State Bank, 3 Stew. Eq. 311; Natl. Tr. Co. *v.*

property ordered to be delivered to the Receiver, and who neglects to deliver accordingly, should be served personally with the order directing such possession to be delivered:[1] and if possession is still withheld from the receiver, an application should be made by motion *ex parte*, for a writ of assistance, directed to the sheriff of the county wherein the property is situate, to put the Receiver into possession, pursuant to the order.[2] The application should be supported by an affidavit of service of the order, and of non-compliance.[3] The writ is prepared, issued, and executed in the manner before explained.[4]

If a party to the proceedings is not directed to deliver up possession to the Receiver, he is not bound to do so; but he will be charged with an occupation rent, for the premises in his possession.[5]

Where any tenant of the property refuses to attorn to the Receiver, or to pay him any arrears of rent,[6] he should be served with a copy of the order directing the appointment of a Receiver, and of the order or certificate completing the appointment,[7] and with a notice in writing, signed by the Receiver, requiring him to attorn and pay;[8] and on refusal, the tenant should be served with a notice of motion to attorn and pay within a limited time after the service of the order to be made on the motion.[9]

The person served may appear on the motion, and inform the Court whether he is in possession as tenant or not.[10] If he does not appear, the order will be made upon an affidavit of service of the notice of motion, orders, certificate, and notice to attorn, and on proof by affidavit of the refusal to attorn.[11] The order will * be made *1743 without costs.[1] A copy of the order indorsed in the usual manner,[2] must then be served personally upon the person thereby directed to attorn:[3] and upon production to the Record and Writ Clerk of an

Murphy, 3 Stew. Eq. 408.] Property in the possession of a Receiver appointed by a Federal Court, is in possession of such Court, and cannot be taken therefrom by subsequent process from a State Court. Ohio, &c. R. R. Co. *v.* Fitch, 20 Ind. 498; see Hooper *v.* Winston, 24 Ill. 353. [A Receiver in one State cannot sue in another State where the suit would interfere with the rights of creditors or the policy of the laws of the latter State. Booth *v.* Clark, 17 How. 322. *Alter*, where he is merely asserting title to property acquired as Receiver. Hunt *v.* City of Elizabeth, 8 Cent. L. J. 493, Sup. Crt. N. J. See *ante*, 1751, note; and see State *v.* Jackson, &c. R. Co., 15 Fla. 201, where the right of a Receiver, appointed by a Court having jurisdiction of a limited judicial district within a State, to take possession of property in another district, is denied. See also Chandler *v.* Siddle, 3 Dill. 477.]

[1] For the mode of serving orders, see *ante*, p. 1043. The copy served need not be indorsed with the notice referred to in Ord. XXIII. 10, *ante*, p. 1043; Seton, 1229. Where no time for delivering possession is named in the order, a further order limiting such time must be obtained and served; as to which, see *ante*, p. 1043.

[2] See form of order in Seton, 1228. For form of motion paper, see Vol. III.

[3] For form of affidavit, see Vol. III.

[4] *Ante*, p. 1063.

[5] Randfield *v.* Randfield, 7 W. R. 651, V. C. K. The party will not be ordered, before the hearing, to pay an occupation rent from a date previous to the order fixing the rent and appointing the Receiver. Lloyd *v.* Mason, 2 M. & C. 487.

[6] See Codrington *v.* Johnstone, 1 Beav. 524; Duffield *v.* Elwes, 11 Beav. 590.

[7] See *ante*, pp. 1739, 1740.

[8] For form of notice, see Vol. III.

[9] For form of notice of motion, see Vol. III.

[10] Reid *v.* Middleton, T. & R. 455; Hobhouse *v.* Hollcombe, 2 De G. & S. 208.

[11] For forms of orders, see Seton, 1012, No. 1; 1013, No. 2; and forms of affidavits, see Vol. III.

[1] Hobhouse *v.* Hollcombe, 2 De G. & S. 208.

[2] Ord. XXIII. 10, *ante*, p. 1043.

[3] As to the mode of service, see *ante*, p. 1044.

affidavit of such service, and of an affidavit by the Receiver of non-compliance, he will seal an attachment against the disobedient party.[4] The attachment is prepared, issued, and executed in the manner before explained.[5]

In *Reid* v. *Middleton*,[6] it appeared that the tenant in possession had not agreed to pay any specific rent; and, in consequence, an order was made, that an occupation rent should be settled by the Master, and that the tenant should pay the arrears and future payments of such occupation rent; and where the tenant had not attorned, he was, nevertheless, ordered to pay his arrears of rent within fourteen days.[7]

It may be mentioned here, that the attornment to the Receiver will not enure for the benefit of the person who may ultimately be found to have in him the legal estate.[8]

The possession of a Receiver is deemed to be that of the Court; and any attempt to disturb it, without the leave of the Court first obtained, will be a contempt on the part of the person making it,[9] and will be restrained by injunction;[10] or the person making it will be committed for his contempt.[11]

This was settled in *Angel* v. *Smith*,[12] where the rule was laid down, both with respect to Receivers and sequestrators, that their possession is not to be disturbed without leave;[13] and the same rule will be acted

[4] For forms of affidavit, see Vol. III.

[5] *Ante*, p. 1046 *et seq.*; Braithwaite's Pr. 172, 173; Ord. XXIX. 2, 3. For forms of attachment, *præcipe*, and indorsement, see Vol. III.

[6] T. & R. 455.

[7] Hobson *v.* Sherwood, 19 Beav. 575; and see Mitchel *v.* Duke of Manchester, 2 Dick. 787.

[8] Evans *v.* Mathias, 7 El. & Bl. 590; 3 Jur. N. S. 793, Q. B.; and see Hughes *v.* Hughes, 3 Bro. C. C. 87; 1 Ves. J. 161. As to attornment in general, see Woodfall, 206, 208; and to a Receiver in Chancery, *ib.* 51.

[9] See De Groot *v.* Jay, 30 Barb. (N. Y.) 483; [O'Mahoney *v.* Lucke, 37 N. Y. S. C. 380; Davis *v.* Gray, 16 Wall. 204; Southern Express Co. *v.* Western N. C. R. Co., 99 U. S. 191; S. C. 7 Rep. 673; Thompson *v.* Scott, 4 Dill. 508; Robinson *v.* Atlantic, &c. Ry. Co., 66 Penn. St. 160; De Graffenreid *v.* Brunswick, &c. R. Co., 57 Ga. 22; Bowen *v.* Bowen, L. R. 3 Eq. 541; People *v.* Brooks, 40 Mich. ; S. C. 7 Rep. 785. And, *a fortiori*, if the new action be instituted by a party to the suit in which the Receiver was appointed. Payne *v.* Baxter, 2 Tenn. Ch. 517; Brien *v.* Paul, 3 Tenn. Ch. 360. *Contra:* Paige *v.* Smith, 99 Mass. 395; Blumenthal *v.* Brainerd, 38 Vt. 408; Kinney *v.* Crocker, 18 Wis. 74; Allen *v.* Central R. Co., 42 Iowa, 683; at any rate where the suit is for property not embraced in the receivership: Hills *v.* Parker, 111 Mass. 508. See, on this subject, 2 South. L. Rev. 576, an article by Mr. High, and 4 South. L. Rev. 18, an article by Mr. Jones. An action brought against a Receiver without leave is, however, regular, until the Court interferes, and a judgment therein will be valid. Hackley *v.* Draper, 4 Thomp. & C. 614. Upon demurrer, the action cannot be maintained, although there is a State statute providing that all Receivers operating railroad trains may be sued without leave of the Court appointing them: Hale *v.* Duncan, 6 Rep. 422, U. S. D. C. N. D. Miss; but the appointing Court may leave the determination of a controversy with the Receiver to any Court of competent jurisdiction: Railroad Co. *v.* Smith, 6 Rep. 331, Sup. Crt. Kan.]

[10] Angel *v.* Smith, 9 Ves. 335; Tink *v.* Rundle, 10 Beav. 318; Evelyn *v.* Lewis, 3 Hare, 472; Russell *v.* East Anglian Railway Company, 3 M'N. & G. 104, 117; Turner *v.* Turner, 15 Jur. 218, V. C., Ld. C.; Hawkins *v.* Gathercole, 1 Drew. 12; Randfield *v.* Randfield, 1 Dr. & Sm. 310; Lane *v.* Sterne, 3 Giff. 629; 9 Jur. N. S. 320; Walton *v.* Johnson. 15 Sim. 352; 12 Jur. 299.

[11] Broad *v.* Wickham, 4 Sim. 511; Marsh *v.* Goodall, Seton, 1013; and see Ward *v.* Swift, 6 Hare, 312; 12 Jur. 173.

[12] 9 Ves. 335.

[13] Where the property is legally and properly in the possession of the Receiver, it is the duty of the Court to protect such possession, not only against violence, but also against suits at Law. But if the property is in the possession of a third person, under a claim of title, the Court will not protect the officer, who attempts by violence to obtain possession, any further than the law will protect him; his general authority being unquestioned. Parker *v.* Browning, 8 Paige, 388; 2 Story Eq. Jur. §§ 833 *a*, 833 *b*, and note; Noe *v.* Gibson, 7 Paige, 513.

on in cases where the Receiver has been appointed erroneously,[14] or without prejudice to the rights of persons *having prior *1744 charges.[1] This rule does not, however, apply until a Receiver has actually been appointed; and a direction to appoint a Receiver is not, in this respect, equivalent to the order appointing him.[2] The Court will not protect a sheriff executing process, after he has notice from a Receiver;[3] but will order him to withdraw from the possession, and restrain proceedings against him by the execution creditor;[4] and where the sheriff has taken property, part of which is claimed by a Receiver, the latter will be directed to give a list of the property claimed by him to the sheriff: who will be ordered to withdraw from the possession of the specified property.[5] It has recently been held, in Ireland, that where a Receiver has been appointed over the estate of a tenant for life, the remainder-man has a right, immediately on the decease of the tenant for life, to go into possession, without making any application to the Court.[6]

Any person who considers himself prejudiced by having a Receiver put in his way, must apply by motion or summons, on notice, for an inquiry as to his interest, or for leave to commence proceedings against the Receiver;[7] and he must do this, although his right to take possession is clear.[8] The inquiry as to interest is conducted in the same manner as it would be if the property were in the possession of sequestrators under a commission of sequestration.[9]

It may be mentioned here, that where an ejectment was actually

[14] Ames *v.* Trustees of the Birkenhead Docks, 20 Beav. 332; 1 Jur. N. S. 529; Randfield *v.* Randfield, *ubi sup.*

[1] See Anon., 6 Ves. 287; Bryan *v.* Cormick, 1 Cox, 422.

[2] Defries *v.* Creed, 11 Jur. N. S. 360; 13 W. R. 632, V. C. K. [In Fairfield *v.* Weston, 2 S. & S. 96, it was held that, as between the parties to the suit, the appointment of a Receiver was operative from the date of the reference to the Master. Afterwards, in a contest between a mortgagee and execution creditor, under 17 & 18 Vic. c. 31, § 1, which required the instrument of mortgage to be registered, it was held that the sheriff had the better title to the property by levy made between an order appointing a Receiver on bill filed by the mortgagee and the giving of the security by the Receiver in compliance with the order of appointment. Edwards *v.* Edwards, 2 Ch. Div. 291, overruling S. C. 1 Ch. Div. 454. But an interim Receiver will be appointed in a case of urgency, whose title will date from the order. Taylor *v.* Eckersley, 2 Ch. Div. 302.

In the United States, the weight of authority is that the qualification of the Receiver by the execution of a bond relates back to the date of the appointment, and overrides intermediate rights. Maynard *v.* Bond, 6 Rep. 539, Sup. Ct. Mo.; Rutter *v.* Tallis, 5 Sandf. 610; State *v.* Sturgis, 5 Abb. Pr. Rep. 442; High on Rec. § 136. In Farmers' Bank *v.* Beasten, 7 G. & J. 421, it was held that the appointment and qualification of a Receiver by the Federal Court would not prevail against the levy of an execution from the State Court afterwards, but before the Receiver actually took possession. And see Gephart *v.* Starrett, 47 Md. 396.]

[3] Try *v.* Try, 13 Beav. 422; Rock *v.* Cook, 2 Phil. 691; 2 De G. & S. 493; Onyon *v.* Washbourne, 14 Jur. 497, V. C. E.

[4] Russell *v.* East Anglian Railway Company, 3 M. N. & G. 104.

[5] See Willmer *v.* Kidd, Seton, 1002, No. 2, where the order is given.

[6] *Re* Stack, 13 Ir. Chan. Rep. 213.

[7] Gomme *v.* West, 2 Dick. 472; Anon., 6 Ves. 287; Bryan *v.* Cormick, 1 Cox, 422; Angel *v.* Smith, 9 Ves. 335, 336; Brooks *v.* Greathed, 1 J. & W. 176, 178; Smith *v.* Earl of Effingham, 2 Beav. 232; Gooch *v.* Haworth, 3 Beav. 428; Russell *v.* East Anglian Railway Company, *ubi sup.*; Potts *v.* Warwick, &c. Canal Company, Kay, 142; [Randfield *v.* Randfield, 3 De G., F. & J. 766; Eyton *v.* Denbigh, &c. R. Co., L. R. 6 Eq. 14; Brien *v.* Paul, 3 Tenn. Ch. 357.] For forms of notice of motion and summons, see Vol. III.

[8] Anon., 6 Ves. 287. [*Ex parte* Cochrane, L. R. 20 Eq. 282.]

[9] *Ante*, p. 1057.

brought against a Receiver, although it was without the previous leave of the Court, the Court directed an inquiry whether it would be for the benefit of the parties interested, who were adults, that the Receiver should defend the ejectment, and charge the expense in his accounts.[10]

Where a Receiver paid a judgment creditor of the defendants, an amount demanded by him under a garnishee order obtained[11] on a consent improperly given by the Receiver, the judgment creditor was, on motion, ordered to refund the amount to the defendants; and he and the Receiver were directed to pay the costs of the motion.[12]

*1745 * The appointment of a Receiver does not affect the rights of the landlord of the premises; but he will not be permitted to exercise those rights without first obtaining the leave of the Court; and where he has not distrained, and the furniture in the house of a tenant has been sold under the direction of a Receiver, the landlord has no priority over the other creditors in the proceeds of the sale.[1]

Section V. — *Salary and Allowances.*[2]

Unless it is otherwise ordered (as where he consents to act without salary),[3] a Receiver will be allowed a salary, or have some other allowance made to him, for his care and pains in the execution of his duties.[4] The amount of his salary or allowance is not, in general, fixed till the passing of the first account: when the Receiver will be allowed either a percentage upon his receipts, or a gross sum, by way of salary.

The allowance to a Receiver of the rents and profits of a landed estate is generally 5*l.* per cent on the gross amount received. This allowance may, however, be increased, if there is any special difficulty in the collection; or diminished, or a stated salary allowed, where the rental is very considerable.[5] Under very special circumstances, an order has been made that the Receiver should be allowed such salary as the Judge might, on the passing of each account, think reasonable.[6]

[10] Anon., 6 Ves. 287.

[11] Under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), §§ 60–65.

[12] De Winton *v.* Mayor of Brecon, 28 Beav. 200; 6 Jur. N. S. 1046.

[1] Sutton *v.* Rees, 9 Jur. N. S. 456, V. C. K.

[2] For a full consideration of this subject, see Edwards, Receivers, 530 *et seq.*; Matter of Kellogg, 7 Paige, 265; Vanderheyden *v.* Vanderheyden, 2 Paige, 287; Matter of Roberts, 3 John. Ch. 43; Williamson *v.* Wilson, 1 Bland, 439; Holcombe *v.* Holcombe, 2 Beasley (N. J.), 415; Commonwealth *v.* Eagle Fire Ins. Co., 14 Allen, 344; [Grant *v.* Bryant, 101 Mass. 567].

[3] *Ante*, p. 1732.

[4] Ord. XXIV. 1.

[5] Seton, 1006; see Day *v.* Croft, 2 Beav. 488; 4 Jur. 429; Malcolm *v.* O'Callaghan, 3 M. & C. 52; 1 Jur. 838; see also Shore *v.* Shore, 4 Drew. 501, 510, as to the party to bear the allowance.

[6] Neave *v.* Douglas, 26 L. J. Ch. 756, M. R. In Price *v.* White, 1 Bailey Eq. 240, it was held, that a Receiver who discharges the duty assigned to him, is entitled to the usual commissions, although they appear to be more than a reasonable compensation for the services rendered. In some instances they may be more, and in some instances less, than an adequate remuneration; but even this is preferable to the uncertainty of suffering the rate of compensation to depend upon the discretion of the Master. Nor is it any ground for an exception to the general rule, that the business was conducted almost entirely by overseers and factors, inasmuch as the Receiver has incurred the responsibilities incident to these sub-agencies. [The compensation should be such as is reasonable for the services rendered by a person

The subject of the amount proper to be allowed to a Receiver, by way of salary, underwent investigation in *Day* v. *Croft*;[2] and, in the judgment in that case Lord Langdale M. R., who had inquired of the Masters what were the principles upon which they acted, and the practice adopted on this point in their several offices, thus states the result of his inquiries: "The Masters have each of *them been *1746 good enough to furnish me with a certificate; and I find that there is no general rule which universally prevails as to the allowance to a Receiver. Where the receipts consist of rents of freehold and leasehold estates, 5*l.* per cent upon the amount received is most frequently allowed. If there be any special difficulty in collecting the rents, on account of the sums being extremely small or of the payments being very frequent, as weekly payments, then the allowance is increased. On the other hand, if there should be very great facility in receiving the rents, then less than 5*l.* per cent is allowed. One of the Masters has certified to me a case where, after consideration, he allowed only 4*l.* per cent for the receipts of rents and profits of freehold and leasehold estates. Another Master has certified to me a case in which a sum paid to the Receiver amounted to 300*l.* a year for the first year; the Receiver was afterwards allowed 150*l.* only for a succession of years: which was afterwards reduced to 50*l.* a year, for the receipt of the same rents. It cannot, therefore, be considered as a universal or general rule that 5*l.* per cent should be allowed, even upon the receipts of rents and profits. It may be increased if there be any extraordinary difficulty; or diminished if there be any extraordinary facility in the collection. With respect to other receipts, each Master considers himself bound to have regard to the degree of facility or difficulty there may be in receiving them. They have sometimes allowed 2½*l.* per cent; but, for gross sums of money, this has been very much reduced, and 1½*l.* per cent has been allowed upon many occasions. It appears, therefore, that the Masters, as they ought, consider upon each occasion what is fit or proper to be allowed, having regard to the degree of difficulty or facility experienced by the Receiver." In the case above cited, an objection was taken to an allowance which had been made to the Receiver, of 5*l.* per cent on certain gross sums, which had been paid to him for the redemption of mortgages and annuities, and for annuities and interest upon mortgages; and Lord Langdale thought that there was sufficient in the case to warrant an order to review the report.[1]

The practice of the Masters' offices, as above stated, is generally fol-

contented to perform the duty, rather than any fixed compensation. Lord v. Keen, 115 Mass. 173, and should not be based on the rates of profit in the specific business, nor on the special qualifications of the Receiver: Grant v. Dexter, 101 Mass. 567, and see Special Bank Commissioners v. Franklin Sav. Inst., 11 R. I. 557; should be the usual commissions or wages for similar services, and is, ordinarily, five per cent on incomes, where the services consist in renting land, or managing lands. Strutt v. Gowdey, 3 Ban. Ch. 505; *supra*, 1754, n. 2.]

[2] 2 Beav. 488, 491.

[1] Day v. Croft, 2 Beav. 488; 4 Jur. 129; Holcombe v. Holcombe, 2 Beasley (N. J.), 415, 417.

lowed in the Chambers of the Judges, in fixing the salary, or making an allowance, to a Receiver.

In connection with this subject it may be mentioned, that where a Receiver had been appointed to get in the outstanding estate of a testator, Lord Langdale held that the Receiver had not such a vested right to collect the whole estate as entitled him to prevent the money *1747 being paid into Court, without passing through his * hands, in order that he might obtain his poundage; and made an order, on the petition of some of the parties interested, that a debtor to the estate, who was willing to pay the amount of his debt to the Accountant-General at once, might be at liberty to do so.[1]

A Receiver may be entitled to allowances beyond his salary, for any extraordinary trouble or expenses he may have been put to in the performance of his duties;[2] or in prosecuting or defending any legal proceedings brought by or against him.[3] If, however, such allowances are objected to, they will not, in general, be sanctioned, unless they have been incurred with the approbation of the Court or Judge.[4]

Upon this ground, Lord Cottenham discharged an order of Sir Lancelot Shadwell V. C., directing the Master to review his report upon a Receiver's account, with reference to certain sums which the Receiver had claimed on account of journeys taken by him to France, for the recovery of property belonging to the estate before the tribunals there, but which the Master had disallowed. It is to be observed, however, that the result of the journeys had been unfavorable, and that no benefit had accrued to the estate from the proceedings instituted; but it may be inferred from his Lordship's judgment, that if success had attended the exertions of the Receiver, and he could have shown that such success had arisen from his presence in Paris, he would have considered it "inequitable for the parties to take the benefit of such exertions, without defraying the expenses which had attended them, although no previous authority for incurring them had been given."[5]

In a case before Sir Anthony Hart, in Ireland, where the Receiver of a lunatic's estate had instituted proceedings, which, being wrong in form, he abandoned, and afterwards took other proper proceedings, which were successful for the estate, the Court refused to allow him the costs of the abandoned proceedings: although the Master reported that the Receiver had acted *bonâ fide*, and ought to be allowed the costs.[6]

[1] Haigh *v.* Grattan, 1 Beav. 201.

[2] See Williamson *v.* Wilson, 1 Bland, 433; Adams *v.* Haskell, 6 Cal. 475. The commissions allowed by law are intended to be a full compensation to the Receiver for his personal services in the execution of his trust. He is not authorized to act himself as counsel in the business of his trust, so as to entitle himself to extra counsel fees for professional services, beyond the allowances provided in the fee-bill to attorneys, solicitors, &c. Matter of the Bank of Niagara, 6 Paige, 213.

[3] Potts *v.* Leighton, 15 Ves. 276; Courand *v.* Hanmer, 9 Beav. 3; see Holcombe *v.* Holcombe, 2 Beasley (N. J.), 415.

[4] *Re* Ormsby, 1 B. & B. 189; Swaby *v.* Dickon, 5 Sim. 629; Bristowe *v.* Needham, 2 Phil. 190.

[5] Malcolm *v.* O'Callaghan, 3 M. & C. 52, 58, 63; 1 Jur. 838; Bristowe *v.* Needham, *ubi sup.*

[6] *Re* Montgomery, 1 Moll. 419.

Where an application by a defendant against a Receiver was refused with costs, and the defendant was unable to pay the costs, * the Receiver was held to be entitled to deduct his costs, as between solicitor and client, from the balance in his hands.[1] *1748

Section VI. — *Powers, Duties, and Liabilities of Receivers.*

The course to be pursued, to obtain possession or attornment of estates comprised in a receivership, has been discussed in a former page.[2]

If a solicitor in the cause has received rents, he must pay them over to the Receiver appointed therein; and he will not be permitted to set up a lien on them for his costs.[3]

The Receiver is entitled to all the rents in arrear at the time of his appointment,[4] and to the rents which subsequently accrue during the continuance of the receivership; and an order may be obtained on motion or summons, with notice to the tenant, for payment thereof by him to the Receiver, notwithstanding he has not attorned.[5]

After the tenants have attorned to the Receiver, and so created a tenancy, as between them,[6] the Receiver may also distrain, in his own name, for rent accrued during such tenancy,[7] without first obtaining an order so to do;[8] but a distress for rent accrued before that time must be made in the name of the person who has the legal right to the rent;[9] and if he is a party to the suit, or otherwise bound by the proceedings therein, or if there is any doubt who has the legal right to the rent, an application should be made to the Judge at Chambers for his directions thereon.[10] It * appears also, from *Brandon* v. *Brandon*,[1] *1749

[1] Conrand *v.* Hanmer, *ubi sup.*

[2] See *ante*, pp. 1741, 1742.

[3] Watkins *v.* Townshend, 1 R. & M. 361.

[4] Codrington *v.* Johnstone, 1 Beav. 524; [Seat *v.* Knight, 3 Tenn. Ch. 262;] *ante*, p. 1742.

[5] Hobson *v.* Sherwood, 19 Beav. 575; *ante*, p. 1743. For forms of notice of motion and summons, see Vol. III.

[6] Woodfall, 376; Evans *v.* Mathias, 7 El. & Bl. 590, 601; 3 Jur. N. S. 795, 796; and see White *v.* Smale, 22 Beav. 72; S. C. *nom.* White *v.* James, 26 Beav. 191; 4 Jur. N. S. 1214.

[7] Woodfall, 376; Mitchel *v.* Duke of Manchester, 2 Dow, 787.

[8] Woodfall, 376; Pitt *v.* Snowden, 3 Atk. 750; Dancer *v.* Hastings, 4 Beav. 2; 12 Moore, 34; Bennett *v.* Robins, 5 Car. & P. 379.

[9] Woodfall, 376; Pitt *v.* Snowden, *ubi sup.*; and see Shelly *v.* Pelham, 1 Dow, 120; Raincock *v.* Simpson, *ib.* 120, n.; Hughes *v.* Hughes, 3 Bro. C. C. 87; 1 Ves. J. 161.

[10] *Ibid.* A Receiver is under no obligation to attempt to take property from the possession of a third person, or even from the defendant himself, by force, without an express order of the Court directing him to do so. Parker *v.* Browning, 8 Paige, 388; see 2 Story Eq. Jur. § 833; Sea Ins. Co. *v.* Stebbins, 8 Paige, 565. He has no powers except such as are conferred on him by the order for his appointment, and the course and practice of the Court: Verplanck *v.* Mercantile Ins. Co., 2 Paige, 452; excepting where he is appointed under particular statutes, as in cases of proceedings against corporations, in which, in New York, he is a statutory assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. *Ibid.*; Attorney-General *v.* Life & Fire Ins. Co., 4 Paige, 224; Edwards, Receiv. 4. Persons, appointed Receivers or trustees in such cases, hold a power much larger and of a different character from that of ordinary Receivers in a Chancery suit. See Atlas Bank *v.* Nahant Bank, 2 Pick. 480; S. C., 3 Met. 581. As to distresses for rent, see Add. Cont. 333; Dixon, 194-240; L. C. Conv. 260-266; Woodfall, 357-429.

[1] 5 Mad. 473.

that the practice is for the Receiver to distrain upon his own discretion for rent in arrear within the year; but if in arrear for more than a year, then an order is necessary.

An application for leave to distrain is made at Chambers, and ordinarily by summons; but it is not usual to draw up a formal order in such cases: the minute made by the Chief Clerk of the directions given being deemed sufficient.[2]

In an ordinary case, a Receiver may, in his discretion, let for a year certain or less, or for any term not exceeding three years, without applying for the sanction of the Judge.[3] He has also an implied authority to determine such tenancies by a regular notice to quit;[4] but he ought not to raise their rents, on slight grounds, without leave of the Court;[5] and he cannot bring an ejectment, or take any other step to evict a tenant, without the sanction of the Judge.[6]

A Receiver may, with the sanction of the Judge, demise for terms of years;[7] but, under the present practice, leases of property in the hands of a Receiver are usually directed to be made by the person having the legal estate or power of leasing; and, if necessary, recourse is had to the provisions of the various statutes conferring jurisdiction on the Court to sanction leases.[8] The sanction of a Judge to a lease, or agreement for a lease, of property comprised in a receivership, is obtained in the manner before explained in treating of the management of property.[9]

The Court will not permit a Receiver to lay out more than a small sum at his own discretion. It is improper, therefore, for a Receiver, or a guardian, to do, without the sanction of the Judge, any act which may involve the estate in expense.[10] Upon this ground, if an ejectment is brought against a Receiver, or an action for any thing done by him in the performance of his duty, he should not defend the action *1750 without the sanction of the Judge * previously obtained; and

2 For form of order to distrain in the name of a defendant, see Seton, 1013, No. 3; and for form of summons, see Vol. III.

3 Shuff *v.* Holdaway, M. R. in Chambers, 27 May, 1863.

4 Woodfall, 52, and cases there cited. As to notices to quit, see *ib.* 286–308, 998.

5 Woodfall, 52.

6 Wynne *v.* Lord Newborough, 1 Ves. J. 164; 3 Bro. C. C. 88.

7 1 Platt on Leases, 389; Woodfall, 51 see also Dancer *v.* Hastings, 4 Bing. 2; Neale *v.* Bealing, 3 Swanst. 304, n.; Wynne *v.* Lord Newborough, *ubi sup.*; Gibbins *v.* Howell, 3 Mad. 469; Baylies *v.* Baylies, 1 Col. 537.

8 See *post*, Chap. XLV., *Statutory Jurisdiction.*

9 *Ante*, pp. 1343, 1344; and see Whitehead *v.* Bennett, 5 W. R. 419, V. C. K.

10 In general, a Receiver should pay out nothing without an order of Court, but he will not be denied reimbursement in every case in which he neglects to obtain this order. Adams *v.* Woods, 15 Cal. 206; Hooper *v.* Winston, 24 Ill. 353. In a case where a Receiver was authorized to prosecute suits for the recovery of assets of the estate, and the Receiver having, without an order of Court, paid a sum exceeding one thousand dollars, as a reward for finding of important books of accounts, which had been lost, it was held, that this amount should nevertheless be allowed in his accounts. Adams *v.* Woods, *supra.* What is said, *ante*, pp. 1342, 1343, as to management of property by trustees will apply, in general, to Receivers. [Confirmation is necessary to the validity of a Receiver's sale. Simmons *v.* Wood, 45 How. Pr. 262. A purchaser from a Receiver, under order of Court, is not bound to inquire whether errors intervened in the action of the Court, or irregularities in the action of the Receiver. Koontz *v.* Northern Bank, 16 Wall. 196.]

where the Receiver, without the authority of the Court, defended actions arising out of a distress made by him upon a tenant of the estate, for rent, the Court refused to allow him his costs of the action.[1]

So likewise, although a Receiver may lay out small sums of money in customary repairs, or may allow the same to the tenant, the Court is not in the habit of permitting Receivers to apply the trust funds in repairs, to any considerable extent, without a previous application to the Judge.[2] Formerly, the Court acted strictly upon this rule, and never permitted a Receiver to lay out money on the estate without a previous order: but now, where the Receiver has laid out money, in repairs or otherwise, without such previous order, he may be allowed the money so laid out, if it is found to have been beneficial to the estate;[3] and where he has defended an action successfully, he may be allowed his costs, although he had not obtained the previous sanction of the Court.[4]

When a Receiver is appointed to get in outstanding personal property, it is his duty to collect all that he can get at: to enable him to do which, the order, under which his appointment is made, usually directs the parties to deliver up to him all securities in their possession for such property, together with all books and papers relating thereto.[5] If the parties in whose hands such securities or papers are, refuse to deliver them up, the Receiver should give notice of such refusal to the party conducting the proceedings: to the intent that he may take the necessary steps for enforcing the order.[6] If the persons indebted to the estate refuse to pay the amounts due from them, the sanction of the Judge must be obtained to the Receiver putting the same in suit.[7]

* Where the order directs that the Receiver shall keep down the *1751

[1] Swaby *v.* Dickon, 5 Sim. 629.

[2] Attorney-General *v.* Vigor, 11 Ves. 563; and see Blunt *v.* Clitherow, 6 Ves. 799; Thornhill *v.* Thornhill, 14 Sim. 600. As a general rule, the amount should not exceed 30*l.* a year. Where the amount proposed to be expended by the Receiver is small, the sanction of the Judge will be given on production to his Chief Clerk of a letter from the Receiver, stating the propriety of the intended expenditure, and the maximum amount to be laid out.

[3] Tempest *v.* Ord, 2 Mer. 55; and see Morris *v.* Elme, 1 Ves. J. 139; Blunt *v.* Clitherow, and Attorney General *v.* Vigor, *ubi sup.*

[4] Bristowe *v.* Needham, 2 Phil. 190.

[5] See form of order, Seton, 1092, No. 1; *ante*, p. 1748.

[6] For mode of enforcing orders, see *ante*, p. 1043 *et seq.*

[7] See Seton, 1093, 1931, and Wood *v.* Hitchcock, 2 Beav. 289, 294; 4 Jur. 858; and see *ante*, p. 1343; Bristowe *v.* Needham, 2 Phil. 190; Ward *v.* Smith, 6 Hare, 342; Swaby *v.* Dickon, 5 Sim. 629; 1 Seton Dec. (3d Eng. ed.) 581. [But see *Ex parte* Harris, 2 Ch. Dec. 423.] Where the property is in the possession of a third person, who claims the right to retain it, the Receiver must either proceed by suit against him, or the plaintiff must make him a party to his suit, and apply to have his receivership extended to the property in his hands, so that an order may be made for its delivery, and may be enforced by process of contempt. Parker *v.* Browning, 8 Paige, 388. A Receiver can neither be bound by any implied waiver, nor can he expressly waive any legal technical defence, or abandon an equitable one. McEvers *v.* Lawrence, 1 Hoff. Ch. 172. Nor has a Receiver power to dispense with the conditions of a policy. *Ibid.* A Receiver may maintain an action against the judgment debtor for property converted by him after the Receiver's appointment. Gardner *v.* Smith, 29 Barb. (N. Y.) 68. But a Receiver, appointed in a suit in Equity to foreclose a mortgage of a railroad, cannot maintain a suit to recover earnings of the road accruing before his appointment. Noyes *v.* Rich, 52 Maine, 115. Receivers appointed in another State or country may sue in the Courts of New York. Runkle *v.* St. John, 29 Barb. (N. Y.) 585. In an action by a Receiver, it is not necessary that he should set out all the proceedings by which he was appointed. Stewart *v.* Beebe, 28 Barb. (N. Y.) 34.

[The weight of authority is that a receiver

interest of incumbrances, or make any other payments, he must, of course, comply with that order, and the sums so paid by him will be allowed him in his account. He must, however, take proper receipts from the persons to whom he makes such payments;[1] and it must be remembered that, in passing his accounts, the Receiver will be subject to the rules to which all other accounting parties are subject;[2] and he will only be allowed to discharge himself by affidavit as to those payments which are under forty shillings: for all other payments, he must produce proper vouchers.

A Receiver will be responsible for any loss which may be occasioned to the estate from his wilful default:[3] therefore, if he places money received by him in what he knows to be improper hands, the Court will oblige him to pay it out of his own pocket.[4] But if he deposits the moneys with a banker for safe custody, he will not be answerable for the failure of the banker if the moneys are not mixed with his own moneys, and they were *bonâ fide* deposited for safe custody, under circumstances in which they could not properly have been paid into Court.[5]

A Receiver, however, will be held answerable for the loss occasioned by the failure of a banker with whom he deposited moneys for security,

must sue at Law in the name of the person having the legal right, and cannot sue in his own name unless clothed with the legal right either by Law or the order of the Court. Manlove *v.* Burger, 38 Ind. 211; High on Rec. § 209 *et seq.* And see, for the opposite views of the effect of an order of Court in authorizing the Receiver to sue on choses in action in his own name, Wray *v.* Jamison, 10 Humph. 186 and Battle *v.* Davis, 66 N. C. 252. He may sue in his own name without having the parties interested before the Court. Davis *v.* Gray, 16 Wall. 203, affirming S. C. 1 Woods, 420. If chattels have been reduced to possession by the Receiver, or conveyed to him, he may sue for them in his own name, even in another State. Graydon *v.* Church, 7 Mich. 51; Cagill *v.* Wooldridge, 4 Cent. L. J. 6, a decision of the Sup. Crt. of Tennessee. And, generally, a Receiver may sue in another State for property, when the only question is one of title. Hurd *v.* City of Elizabeth, 8 Cent. L. J. 493, a decision of the Sup. Crt. of New Jersey. It would be otherwise where the suit would interfere with the rights of creditors in such State, or contravene its policy. Booth *v.* Clark, 17 How. 322; Insurance Co. *v.* Needles, 52 Mo. 17; McAlpin *v.* Jones, 2 La. Ann. 710; Willitts *v.* Waite, 25 N. Y. 584; Taylor *v.* Columbian Ins. Co., 14 Allen, 353; Hunt *v.* Columbian Ins. Co., 55 Me. 298. And see Bidlock *v.* Mason, 11 C. E. Green, 230. And the title of a Receiver who takes property to another State will prevail there. Pond *v.* Cooke, 6 Rep. 576, Sup. Crt. Conn.

A Receiver appointed "to collect" the effects of a corporation, has no authority to bring suit to get in the effects unless specially authorized by order of the Chancellor, and the failure to produce such order will be fatal to his suit. Screven *v.* Clark, 48 Ga. 41. If the Receiver has not been authorized to sue by the order appointing him, he may be by a subsequent order. Lathrop *v.* Knapp, 37 Wis. 307. And see, as to the authority to sue conferred by order of Court, Hayes *v.* Brotzman, 46 Md. 519.

Receivers appointed by statutory authority are clothed with greater power than an ordinary Receiver, and may sue in their own name. Bostwick *v.* Menck, 40 N. Y. 383; Hamlin *v.* Wright, 23 Wis. 491; Miller *v.* Mackenzie, 29 N. J. Eq. 291.]

[1] As to the Receiver's liability to an incumbrancer, in case he allows an improper party to receive rents, see Gurden *v.* Badcock, 6 Beav. 157.

[2] *Ante*, p. 1221 *et seq.*

[3] If two Receivers are appointed to close up the affairs of a corporation, and one of them misappropriates the funds by using them for his own profit, and the other is guilty of gross neglect of his duties, giving no attention to the matters intrusted to his care and supervision, they will be jointly liable for the balance found justly due upon stating their account, and will be chargeable with interest. Commonwealth *v.* Eagle Fire Ins. Co., 14 Allen, 344.

In Hooper *v.* Winston, 24 Ill. 353, the Receiver was ordered to account for interest which he might have earned.

[4] Knight *v.* Lord Plimouth, 3 Atk. 480; 1 Dick. 120; but see 2 R. & M. 219; see also Rowth *v.* Howell, 3 Ves. 565.

[5] Salway *v.* Salway, 4 Russ. 60; 2 R. & M. 215; S. C. *nom.* White *v.* Baugh, 9 Bli. N. S. 181; 3 Cl. & F. 44.

if the deposits are made in such a way that he parts with the absolute control over the fund. Therefore, in the case last cited, where a Receiver paid the sums which he had received into a banking house to the joint account of his sureties, under an arrangement with them that all drafts for the sums so paid in should be written by one of the sureties and signed by himself, it was held by Lord Brougham, and afterwards by the House of Lords upon appeal, that the Receiver was liable to the loss occasioned by the failure of the banking house.[6]

The case will be the same, if the Receiver deposits the money with, or remits it to, a banker for his own credit and use, and not to a separate account for the trust, and the banker afterwards * fails ;[1] *1752 or where, although he has deposited the amount to a separate account, he has been in default in passing his accounts.[2]

A Receiver is not, in general, justified in making any application himself to the Court. If, in the course of the proceedings, it should become necessary to take the directions of the Judge, the Receiver should apply to the party conducting the proceedings to make the necessary application; and, in the event of his refusal, the Receiver may himself apply.[3]

Applications, with reference to the property under the management of a Receiver, are usually made by summons at Chambers ;[4] but where the application is made by a person not a party to the suit, with reference to landed property, it has been made by petition.[5]

[The liability of a Receiver has been frequently considered of late years, the decisions being conflicting, as shown by the note.[6]]

[6] Salway *v.* Salway, 2 R. & M. 215; Affd. *nom.* White *v.* Baugh, *ubi sup.*

[1] Wren *v.* Kirton, 11 Ves. 377.

[2] Drever *v.* Maudesley, 8 Jur. 547, L. C.; 7 Jur. 8, V. C. E.; and see Wilkinson *v.* Bewick, 4 Jur. N. S. 1010, M. R.

[3] Ireland *v.* Eade, 7 Beav. 55; Parker *v.* Dunn, 8 Beav. 497.

[4] See Seton, 1017. For forms of orders on such applications, see *ib.* 1012 *et seq.*; and for forms of summonses, see Vol. III.

[5] Richards *v.* Richards, Johns. 255.

[6] "A Receiver, operating a railroad under the orders of a Court of Equity, stands, in respect to duty and liability, just where the corporation would, were it operating the road; and the question whether or not the Receiver is liable for negligence must be tested by the same rules that would be applied if the corporation was the actual party defendant before the Court." Per Van Fleet V. C. in Klein *v.* Jewett, 11 C. L. Green, 474, citing Meara *v.* Holbrook, 20 Ohio St. 137; Blumenthal *v.* Brainerd, 38 Vt. 402; Paige *v.* Smith, 99 Mass. 395; St. Joseph R. Co. *v.* Smith, 19 Kan. 225. But in Cardot *v.* Burney, 63 N. Y. 281, where these cases are reviewed, the decision was that the Receiver, in the absence of evidence that he assumed to act otherwise than as an officer of Court, was not liable in an action for negligence causing the death of a passenger, no personal neglect being imputable to him, either in the selection of the agents or in the performance of any duty. So, it has also been held, in the case of the injury of an employée by the negligence of a co-employée. Henderson *v.* Walker, 55 Ga. 481. And the liability of the Receiver is not, ordinarily, personal, but only a charge upon the earnings of the subject of the Receivership. Meara *v.* Holbrook, *ubi supra*; Cowdrey *v.* Galveston, &c. R. Co., 93 U. S. 352. And these earnings are chargeable with the value of goods lost in transportation, and with damages to property during the management. 93 U. S. 352; Newell *v.* Smith, 49 Vt. 255. Subject, however, to pre-existing liens. Davenport *v.* Receivers, 2 Woods, 519. A Receiver appointed by the Governor of the State under a statutory mortgage is a public agent, and not liable for the acts of his agents. Erwin *v.* Davenport, 9 Heisk. 44; Hopkins *v.* Connel, 2 Tenn. Ch. 326; State *v.* Hill, 54 Ala. 67. And see Duncan *v.* Findlater, 6 Cl. & F. 894, and Mersey Docks Trustees *v.* Gibbs, L. R. 1 H. L. 111. Receivers who wilfully and corruptly exceed the powers conferred upon them are liable for the actual damage sustained. Stanton *v.* Alabama, &c. R. Co., 2 Woods, 506. And see Davis *v.* Gray, 16 Wall. 203, where the offices, duties, and powers of a Receiver of a railroad are stated. The receiver of a corporation is bound by the charter to the same extent as

Section VII. — *Receivers' Accounts.*

A Receiver must leave his accounts at the Judge's Chambers, on the days appointed for that purpose by the Judge.[7]

The account should be made out in the prescribed form.[8] In the first account the Receiver passes he should state, in the column for observations, how each tenant holds; and every alteration should be noticed in the subsequent accounts: in this column should also be entered any remarks the Receiver may think proper to make as to the arrears of rent, the state of repairs, or otherwise.[9] If the account is drawn in an irregular manner, the Receiver may be ordered to draw it up in proper form, and to pay the costs occasioned by his irregularity.[10]

Upon leaving the account, a summons to proceed thereon is taken out by the Receiver's solicitor, and served upon such parties as are entitled to attend the passing of the accounts.[11] If the Receiver neglects to take out this summons, any of the parties may do so. The Receiver is usually directed to hand copies of his account to such of the parties as are entitled to attend upon the passing thereof; and to charge *1753 for the same in his costs; [12] and * where the plaintiff or a defendant is entitled to attend, he is allowed to take a copy, notwithstanding his solicitor is also the solicitor for the Receiver.

Upon the return of the summons, the parties attend at the Chambers, and the account is substantiated in the manner before described.[1]

The Receiver also brings in his bill of costs upon passing the account: which is then taxed, and the amount included in his disbursements.[2] Parties attending the passing of a Receiver's account only have costs

the directors. Safford *v.* People, 85 Ill. 558.

Suing in one Court a Receiver appointed by another is a contempt of the latter Court. Thompson *v.* Scott, 4 Dill, 508. But see 19 Kan. 225, and other cases *supra*, where such a suit seems to have been sustained. Any irregularities in his proceedings can only be corrected by the Court which appointed him. Stewart *v.* Lay, 45 Iowa, 604. *Ante*, 1743 n. 9. And he is responsible to the Court in the suit in which he is appointed, and not to the parties in another suit for any profits made by him by the use of the funds in his hands. Whitesides *v.* Lafferty, 3 Humph. 150.]

[7] Ord. XXIV. 2; Regul., 8 Aug., 1857, r. 16; see Hooper *v.* Winston, 24 Ill. 353; [Lowe *v.* Lowe, 1 Tenn. Ch. 515].

[8] *Ib.* r. 24. For forms of account, see *ib.* Sched. No. 14; and Vol. III.

[9] Bloxam, 51.

[10] See Bertie *v.* Lord Abington, 8 Beav. 53, 60.

[11] Ord. XXIV. 3; see *ante*, p. 1332. On leaving the first account, a copy of the order appointing the Receiver, certified by the solicitor to be a true copy thereof, must be lodged at Chambers, if not previously done. For forms of summons and certificate, see Vol. III.

[12] See *ante*, pp. 1172–1175; and scale of costs, Regul., 8 Aug., 1857, Sched. No. 15.

[1] *Ante*, p. 1221 *et seq.*

[2] The Receiver's costs of completing his appointment will also be taxed and allowed, on passing his first account. For scale of costs, see Regul. 8 Aug., 1857, Sched. No. 15. [The compensation of the Receiver should be allowed out of the property in his hands or taxed as costs, and he cannot recover judgment therefor against the parties by motion in the cause. Hutchinson *v.* Hampton, 1 Montana, 39. When it becomes the duty of a Court to take property under its charge through a Receiver, the property becomes chargeable with the expenses incurred in taking care of, and saving it (in this case a growing crop), including the allowance to the Receiver, even against a party (in this case the landlord), having a superior lien not contested, the Receiver having been appointed at the instance of other persons. Beckwith *v.* Carroll, 56 Ala. 12. And see, as to compensation, Gardiner *v.* Tyler, 2 Abb. App. Dec. 247; and *ante*, 1745, n. 6.]

from the Receiver after a decree disposing of the costs of the suit, and showing who is entitled to costs out of the rents: in other cases, the costs of the parties are costs in the cause.[3] Where the parties are entitled to have their costs paid by the Receiver, such costs are taxed at Chambers, and paid by the Receiver and included in his account.[4]

If the Receiver does not attend and substantiate his account, he may be charged with the amount of his receipts, but may be disallowed such of his payments as he has failed to vouch.[5]

When the account is passed, it is entered by the solicitor of the Receiver in duplicate books, and the entry in each book must be verified by his affidavit: which must refer to the account as an exhibit, and not be annexed to it.[6] The books, with an office copy of the affidavit, are then left at the Judge's Chambers, and a memorandum of the allowance of the account is written at the foot of it, and signed by the Chief Clerk.[7] One of these books, which is called "The Receiver's Book," is retained at the Chambers until the completion of the receivership: when it is deposited at the Record and Writ Clerks' office.[8] The other is delivered back from time to time to the Receiver.

A certificate of the allowance of the account, stating the balance due from the Receiver, and the day on which it is to be paid into Court, is then made and signed by the Chief Clerk,[9] and approved and signed by the Judge without delay; and, upon being so signed, is filed at the Report office, and forthwith acted upon.[10]

* Where the certificate directs a payment to be made into *1754 Court, the solicitor for the Receiver should obtain an office copy of the certificate, and leave it at the Accountant-General's office, together with the order directing the payment of the Receiver's balances into the bank; and obtain a direction for such payment. The amount is paid in on such direction, in the usual manner.[1]

Although a Receiver is only bound by his recognizance to pass his accounts at the periods appointed by the Judge, he may, at any time, apply to the Court to pay in moneys in his hands; and if, in the interval between passing his accounts, he receives sums of such an amount as to make it worth while to lay them out, he ought to apply, by summons, for an order to pay them into Court: in order that they may be made productive for the benefit of the estate.[2] Where the order for

[3] Bloxam, 52.

[4] For a scale of such costs, see Regul., 8 Aug., 1857, Sched. No. 16.

[5] See Section, 1020.

[6] Ord. XXIV. 3. For form of affidavit, see Regul., 8 Aug., 1857, Sched. No. 17; and Vol. III.

[7] For form of memorandum, see Vol. III.

[8] Ord. XXIV. 4.

[9] In addition to the ordinary fee of 20s upon the certificate, a further fee is payable, in fee fund stamps, of 10s. in respect of each 100*l.* of the net balance received by the Receiver, after deducting all necessary outgoings for rents, taxes, rates, repairs, and management of the property. Regul. to Ord. Sched. 4; and see before this order, Buckmaster *v.* Buckmaster, 7 W. R. 678, L. C. & L. JJ.; Wells *v.* Wales, 4 De G., M. & G. 816; Wastell *v.* Lesbie, *ib.* 818 n. For form of certificate, see Vol. III.

[10] Ord. XXXV. 54.

[1] See *post*, Chap. XI., *Payment into Court*. As to enforcing such payment, or a payment to the parties, see *ante*, p. 104; *et seq.*

[2] Shaw *v.* Rhodes, 2 Russ. 559. For form of summons, see Vol. III.

appointing a Receiver does not provide for the payment of his balances into the bank, the Receiver will not be allowed to avail himself of the omission, and to keep a balance in his hands without interest, under a pretence of waiting for some party in the cause to obtain an order upon him for payment. He ought to apply by summons, which should be served on the parties to the cause, for an order for that purpose, and that the costs thereof may be allowed him in his next account; and, unless he does so, the Court will charge him with interest.[3]

A Receiver may be directed to pass his accounts and pay over the balance, although the bill has been dismissed,[4] or the proceedings ordered to be stayed.[5]

If the Receiver does not leave his account, or pay in the balance found due from him, at the appointed times, any party interested in the account may apply, by summons, that he may leave his account,[6] or pay in the balance, within a limited time (usually four days), after service upon him of the order to be made on the summons, and pay the costs of the application.[7] The summons must be served on the Receiver; and if he does not appear, the order will be made, on production of an affidavit of service of the summons, or, where the default consists in not making a payment into Court, of the order and certificate under which such payment is to be made; and the Accountant-General's certificate of such default must be produced in support *1755 of the application. The order is * drawn up by the Registrar; and an indorsed copy of the order must be served personally upon the Receiver;[1] or if personal service of the order cannot be effected, an order giving leave to substitute service should be obtained at Chambers, on an *ex parte* application by summons, supported by affidavit;[2] and the order must be served in conformity with the directions thereby given. If, after such original or substituted service, the Receiver neglects to obey the order, it may be enforced against him by attachment and other process of contempt.[3] A similar course should be pursued against a Receiver who is directed to pay his balance to the parties, instead of into Court, and neglects to do so; but it is irregular to issue a writ of *fieri facias* against him for such balance.[4]

Where a Receiver neglects to leave or pass his account, and pay the

[3] See Potts *v.* Leighton, 15 Ves. 273, 274. For form of summons, see Vol. III.

[4] Pitt *v.* Bonner, 5 Sim. 577; and see Hutton *v.* Beeton, 9 Jur. N. S. 1339, V. C. S.

[5] Paynter *v.* Carew, Kay Ap. 36, 44; 18 Jur. 417.

[6] A Receiver cannot be compelled to account and show his books to a party in a suit. He is to account to the Court only. Musgrove *v.* Nash, 3 Edw. Ch. 172; Edwards, Receiv. 506. For a full view of the practice on accounting by a Receiver, see Edwards, Receiv. 493 *et seq.*, c. 14.

[7] For form of order, see Seton, 1018, No. 1; and for form of summons, see Vol. III.

[1] *Ante*, p. 1043 *et seq.*

[2] As to substituted service, see *ante*, p. 1045.

[3] See *ante*, p. 1046; Seton, 1020. [Foster *v* Bell, L. R. 9 Eq. 172. The restoration of the property to the parties entitled, and the payment of money found to be due from him, may be enforced by process of contempt and imprisonment, and the latter may be imposed as punishment if the Receiver is unable to comply with the order of delivery or payment. Cartwright's Case, 114 Mass. 230; People *v.* Jones, 33 Mich. 303.]

[4] Whitehead *v.* Lynes, 34 Beav. 161; 11 Jur. N. S. 74; Affd. on this point, 12 L. T. N. S. 332, L. C. Westbury. Since this case

balances thereof at the times fixed by the Judge for the purpose, the Judge before whom such Receiver has to account will from time to time, when his subsequent accounts are produced to be examined and passed, not only disallow the salary therein claimed by such Receiver, but also charge him with interest, after the rate of 5*l.* per cent per annum, upon the balances so neglected to be paid by him, during the time the same shall appear to have remained in his hands.[5]

The Receiver is charged with interest: not upon each sum from the moment at which it came into his hands, but in the same manner that an executor is charged with interest: that is, by making yearly or half-yearly rests in the account.[6] And it appears that this rule will be applied, as well in cases where the Receiver has been discharged, as where he is still in office. Therefore, where a Receiver, who had been discharged, had not paid in his balance, he was ordered to pay in the same, and also the amount allowed for his salary, together with interest on both sums, at 5 per cent, from the day appointed, and to pay the costs of the application;[7] but where the default was made by the executors of a deceased * Receiver, the sureties were only or- *1756 dered to pay interest at the rate of 4*l.* per cent.[1]

A Receiver may be charged with interest on money improperly kept in his hands, although he has passed his account, and all parties have expressed themselves satisfied, and, for this purpose, an inquiry what money he has received from time to time, and how long he has kept it in his hands, may be directed;[2] and in —— v. *Jolland*,[3] Lord Eldon appeared to think, that if such a case should be brought before him, he should direct a Receiver to make good any loss which might be occasioned from a difference in the price of the funds, between the time when the Receiver's balances were paid in, and the time when they ought to have been paid in.

In *Hicks* v. *Hicks*,[4] where a Receiver had been appointed during the minority of an infant who had no guardian, and was directed to place out the surplus of the rents and profits, when they should amount to a competent sum, with the approbation of the Master, on government or

it has been doubted, at the Record and Writ Clerks' office, whether an attachment can be issued against a Receiver; and whether the proper remedy against his person is not by an order for his commitment, on notice, under the former practice: as to which, see 1 Tam. & Vin. 470; and see Macarty v. Gibson, Miss. 40; Davies v. Cracraft, 14 Ves. 143; Scott v. Platel, 2 Phil. 229.

[5] Ord. XXIV. 2. Regul., 8 Aug., 1857, r. 15; Bristowe v. Needham, 9 Jur. N. S. 1168, 11 W. R. 926, V. C. K.; and see Belcher v. Dodd, 1 Ves. J. 85; Ward v. Swift, 8 Hare, 139; [Stretch v. Gowdey, 3 Tenn. Ch. 565].

[6] Potts v. Leighton, 15 Ves. 273; see also Fletcher v. Dodd, *ubi sup.*; —— v. Jolland, 8 Ves. 72. Where a Receiver improperly retains a balance in his hands, and does not regularly pass his accounts, he will have to pay interest on the amount, if the Master should deem it just, unless he can show a special case of exemption. Harman v. Foster, 1 Hogan, 318; *In re* Carter, 3 Paige, 146; *In re* Seaman, *ib.* 409; see Commonwealth v. Eagle Fire Ins. Co., 14 Allen, 344. The Court is strict in requiring compliance with the rule to account. Edwards, Receiv. 482. As to charging interest against agents, Receivers, trustees, &c., see *ante*, 1569.

[7] Harrison v. Boydell, 6 Sim. 211.

[1] Clements v. Brierstead, 10 Jur. 771, V. C. K. B.; and see Dawson v. Raynes, 2 Russ. 466.

[2] Fletcher v. Dodd, 1 Ves. J. 85.

[3] 8 Ves. 72, 73. The name of this case is Frotherstone v. Jolland.

[4] 3 Atk. 274.

other securities, but omitted so to do, Lord Hardwicke directed that he should pay interest at the rate of four per cent on the surplus rents and profits, from the date of the decree till the infant came of age: although the infant, two days after he came of age, settled accounts with the Receiver, who delivered up his vouchers, and gave him copies of all the accounts passed by the Master.

In case of default by any Receiver in leaving or passing any account, or in making any payment, he may be required to attend at Chambers, at a time to be appointed for that purpose, to show cause why such account has not been left or passed, or payment made; and thereupon such directions may be given at Chambers, or by adjournment in open Court, as shall be proper to insure the prosecution thereof by some person interested therein, and for the discharge of the Receiver and appointment of another, and for payment of the costs incurred by any neglect or default; or a certificate by the Chief Clerk of such neglect or default, or of any abandonment or abatement of the proceedings or otherwise, according to the facts, may be made and filed, without any fee being made payable thereon; and after such certificate has been so made, unless the same is discharged, none of the parties are to be at liberty to further prosecute the proceeding at Chambers, unless and until the Court or Judge shall, upon application, make an order directing the same to be prosecuted; and upon such certificate becoming binding, any party may apply to the Court, and the Court may *1757 make such order relative to costs, and to relieve * any party from the effect of any decree or order before made, or proceedings taken, which shall not have been duly prosecuted, or otherwise, as may be thought proper. And for the purposes aforesaid, any party, or the solicitor of the Suitors' Fund, may be directed to summon the persons whose attendance is required, and to conduct any proceedings, and carry out any directions which may be given; and the costs of the solicitor of the Suitors' Fund are to be paid by such parties, or out of such funds, as the Court or Judge may direct; and if any costs of the solicitor of the Suitors' Fund be not otherwise paid, the same are to be paid out of the Suitors' Fund.[1]

The Court has no jurisdiction, on the death of a Receiver, to order, in a summary way, that his executors shall bring in and pass his accounts, and pay the balance found due from him out of his assets.[2] The proper course, in such a case, if the recognizance cannot be put in suit, is to file a bill against his personal representatives for an account. This course may, however, be avoided, if the representatives will obtain or consent to an order to pass his accounts, and to pay the balance. Such order may be obtained at Chambers, on summons;[3] and where,

[1] Ord. XXXV. 23; see also *ante*, p. 1331.

[2] Jenkins *v.* Briant, 7 Sim. 171; Ludgater *v.* Channell, 15 Sim. 479; 11 Jur. 273; 3 M'N. & G. 175.

[3] For form of order, see Seton, 1022; and for form of summons, see Vol. III.

on the executors' application, liberty had been given to them to pass the accounts, and pay in the balance, they were not allowed, after the lapse of many years, to object to the order on the ground of want of assets.[4]

Where the Receiver's recognizance is to be put in suit, an order must first be obtained to authorize the proceeding.[5] This order is usually obtained on summons: which must be served upon the Receiver, and on the sureties also if they are to be proceeded against.[6] The amount due from the Receiver must also have been ascertained, unless the application is for leave to put the recognizance in suit against the Receiver's representatives, or his sureties, or, as it seems, the Receiver has absconded.[7]

An order for leave to put the recognizance in suit having been obtained, the next step is to proceed by *scire facias* in the names of the Master of the Rolls, and senior Vice-Chancellor, or other the cognizees named in the recognizance, or the survivor of them, or the executors or administrators of the survivor,[8] against the cognizors * therein *1758 named, or any of them, or their respective heirs, executors, or administrators.[1]

A *scire facias* is a judicial writ, founded upon some record, and requiring the person against whom it is brought to show cause why the party bringing it should not have advantage of such record: it is considered in Law as an action; and should be sued out of the Court in which the record is supposed to remain.[2]

A *scire facias* upon a Receiver's recognizance is, accordingly, sued out of the office of the Petty Bag on the Common Law side of the Court of Chancery: the proceedings in which are regulated by "The Petty Bag Office and Enrolment in Chancery Amendment Act, 1849;"[3] and by the general orders[4] made in pursuance thereof, and of the statute thereby repealed.[5] The Act and Orders provide, generally, that all rules, orders, writs, and documents, issued or delivered out of the Petty Bag office, shall be sealed with the Chancery Common Law Seal provided by the Act;[6] that every solicitor of the Court of Chancery, by

[4] Gordon v. Badcock, 6 Beav. 157, 159.

[5] [Jenkins v. Briant, *ut supra*.]

[6] For form of order, see Seton, 1018, No. 3; and for form of summons, see Vol. III.

[7] Ludgater v. Channell, 15 Sim. 479, 483; 11 Jur. 274; 4 M'N. & G. 175, 180.

[8] As to the cases where the cognizors are dead, see Seton, 1019. For form of order to put recognizance in suit, in the cause of the executors of a deceased Master of the Rolls, upon the petitioner's recognizance to indemnify his estate, see Blair v. Tuppett, cited Seton, 1019.

[1] At Common Law, though a recognizance is against two, a writ of *scire facias* may be issued against one, because the recognizance is joint and several. Chitty's Arch. 1132.

[2] *Ib.* 1130, 1131.

[3] 12 & 13 Vic. c. 109.

[4] 20 Dec., 1848: 11 Beav. xxi.; and 3 Aug., 1849: 11 Beav. xxv.; Chitty's Arch. 1747, 1751.

[5] 11 & 12 Vic. c. 94. As to the clerk of the Petty Bag, and the clerks appointed to assist him, their salaries, and duties, see *ib.* §§ 2, 3; 12 & 13 Vic. c. 109, §§ 1-9. The official attendance and vacations are the same as in the Record and Writ Clerks' office. Gen. Ord. 20 Dec., 1848, r. 3; see *ante*, p. 412.

[6] 12 & 13 Vic. c. 109, §§ 11, 14. As to impressions of the seal and sealed copies being evidence, and the punishment for forging or altering any seal or document, see *ib.* § 20.

virtue of his admission as such, shall be allowed and entitled to practise as an attorney on the Common Law side of the Court;[7] that all such documents and duties as were before the Act prepared and performed by the senior, second, and third clerks of the Petty Bag, as attorneys, shall be prepared and performed by the client in person, or by an attorney of the Court;[8] that every writ issued under the Chancery Common Law Seal, and every record and proceeding whatsoever on the Common Law side, shall be prepared, engrossed, and issued by the party requiring or conducting the same, subject to the rules and regulations for the time being in force for regulating the practice of the Common Law side of the Court, and to the payment of such fees *1759 as may be payable in respect thereof;[9] that * every attorney or party practising on the Common Law side of the Court, shall be entitled to charge and be paid and allowed such costs, fees, and charges for the transaction of business therein as are allowed to attorneys or parties for business of a similar nature in the Superior Courts of Common Law;[1] that every attorney or party acting in person shall, before he takes any proceeding, cause to be entered, in a book kept at the Petty Bag office, his name, and also his address, or some place at or to which pleadings, notices, or other proceedings may be left or sent for him;[2] that any party changing or ceasing to employ his attorney, in the course of any action, suit, or proceeding, is to cause an entry of such change or cessation of employment to be made and entered with the Clerk of the Petty Bag, and to cause notice of such change or cessation, and of such entry, to be served on every party to the action, suit, or proceeding; and that until such entry and notice shall have been made and served, the former attorney is to be deemed and taken, for all purposes of the action, suit, or proceeding, to be and remain the attorney of the party;[3] that every writ, rule, or document issued or delivered out of the Petty Bag office is to be tested or dated on the day on which the writ is sealed, or the rule or other document is made;[4] that every writ may be issued or tested on any day (not being a Sunday, Good Friday, or Christmas-day), whether in term time or vacation;[5] that every such writ, whether returnable in that Court or in any

[7] *Ib.* § 24; and see Gen. Ord. 29 Dec., 1848, r. 9.

[8] 12 & 13 Vic. c. 109, § 24.

[9] *Ib.* § 38. The following fees, amongst others, are payable under Gen. Ord. 29 Dec., 1848, and Schedule made in pursuance of sec. 19 of the repealed Act, 11 & 12 Vic. c. 94; and see 12 & 13 Vic. c. 109, § 21: For sealing every *alias* or *testatum scire facias*, 2*l.* 10*s.*; for sealing every *scire facias* on recognizance, 1*l.*; for entering appearance for every defendant, 10*s.*; for entering every rule requiring entry only, 7*s.*; for drawing up and entering every other rule, 10*s.*; for signing every judgment or entry of *nolle prosequi*, 1*l.*; for filing a record of issue on a *scire facias* on recognizance, 2*l.*; for swearing every deponent to an affidavit, 1*s.* 6*d.*; for every exhibit thereto, 2*s.* 6*d.*; for filing every affidavit, 1*s.*; for copy of an affidavit, per folio, 4*d.*; for preparing, engrossing, and perfecting the exemplification of any record, if one skin only, 5*l.* 5*s.*; for every additional skin, 1*l.* 6*s.* 8*d.*; for every search for a *præcipe* or writ filed, 1*s.*; for inspection of any record, besides the search, 2*s.* 6*d.*; for the office copy of any record, per folio, 4*d.*; and for certificate of examination under the officer's hand and the office seal, 3*s.* 4*d.*

[1] 12 & 13 Vic. c. 109, § 25.

[2] *Ib.* § 44.

[3] Gen. Ord. 29 Dec., 1848, r. 10.

[4] *Ib.* r. 6.

[5] 12 & 13 Vic. c. 109, § 26.

of the Superior Courts of Common Law, may be made returnable and returned on any day certain, to be in such writ mentioned (not being a Sunday, Good Friday, or Christmas-day), whether in term time or vacation, or forthwith after the execution thereof; but that, where any particular period of time ought to elapse between the *teste* and return of any writ, such writ, if made returnable forthwith after the execution thereof, shall be returned after the execution thereof, and after such period shall have elapsed;[6] that all proceedings in or by the Court may be had on any day (not being a Sunday, Good Friday, or Christmas-day), whether in term or vacation;[7] that every writ returned by the sheriff is to be immediately filed, and thereupon the day and hour of the filing are to be indorsed on the writ;[8] and that any affidavit, affirmation, or declaration, to be sworn, made, or taken, and read or used in the * Court, may be sworn, made, or taken by or before *1760 the Clerk of the Petty Bag;[1] and is to be filed in the Petty Bag office.[2]

A writ of *scire facias* upon the record of a Receiver's recognizance is prepared on parchment by the attorney acting for the cognizees or plaintiffs, tested on the day on which the writ is sealed, and indorsed with his name and address, and the name of the Court of Common Law in which future proceedings are intended to be taken. The writ will be sealed at the Petty Bag office on production of the order giving leave to sue on the recognizance, and of an office copy of such recognizance, and on a *præcipe* being filed there, stating the nature of the writ, the names of the parties, the cause of action, the county to which directed, the return day, the name and address of the attorney suing out the writ, and the date of issuing.[3]

The writ is always directed, in the first instance, to the sheriff of Middlesex, although the defendants live in other counties. It is made returnable immediately, and is lodged by the plaintiff's attorney at the sheriff's office, and executed by the sheriff, in the usual way.[4]

If the sheriff returns *nihil*, a *testatum scire facias* may be issued, directed to the sheriff of the county in which the defendant is actually resident.

On a return by the sheriff *scire feci*, either to the original or *testatum* writ, if the defendant neglects to enter an appearance, the plaintiff may obtain, at the Petty Bag office, a rule for the defendant to appear in eight days: otherwise judgment; and on the expiration thereof, if no appearance is entered, judgment may be signed by default.

An appearance by the defendant is entered at the Petty Bag office; and notice of appearance should be given to the plaintiff's attorney.[5]

When the defendant has appeared, the next step is for the plaintiff

6 *Ib.* § 27.
7 12 & 13 Vict., c. 109, § 28.
8 Gen. Ord. 29 Dec., 1848, r. 7.
1 12 & 13 Vict., c. 109, § 45; and see Gen. Ord. 29 Dec., 1848, r. 5.
2 *Ibid.*
3 For forms of *scire facias*, *testatum* clause, and *præcipe*, see Vol. III.
4 *Ante*, p. 466.
5 For form of notice, see Vol. III.

to deliver to the defendant a declaration in the action; but no time is limited for so doing. The declaration recites the writ, the sheriff's return, and the defendant's appearance; and concludes with a prayer of execution. The declaration is indorsed with a notice, requiring the defendant to plead in eight days: otherwise judgment.[6] The venue must always be laid in Middlesex.

The defendant may either demur or plead to the declaration;[7] *1761 *and every demurrer or plea and subsequent pleading is to be delivered by the party demurring or pleading, or his attorney, to the opposite party or his attorney;[1] and no declaration or subsequent pleading is to be filed in the Petty Bag office.[2]

Further time to plead is obtained of a Judge of the Court of Common Law, the name of which is indorsed on the writ, in the same manner as in an ordinary action in such Court.[3]

The issue is to be delivered only, and not filed; and may be made up and delivered by either party, or his attorney, to the opposite party, or his attorney.[4]

When an issue respecting any matter of fact to be tried by the country has been joined in the action, the record is made up and filed in the Petty Bag office. Such issue may be tried in the Court of Queen's Bench, Common Pleas, or Exchequer of Pleas; and in every such case, the *venire facias juratores*[5] for summoning a jury to try such issue is to be made returnable and returned in such Court; and a transcript of the record in Chancery, containing such issue, is thereupon to be sent or taken into the Court in which such writ is made returnable, in like manner as records containing issues might formerly be sent or taken from the Common Law side of the Court into the Court of Queen's Bench; and where such writ of *venire facias* is made returnable in the Court of Common Pleas or Exchequer of Pleas, such Court, upon the transcript of the record being brought into such Court, is to proceed to try such issue either at Bar or at *Nisi Prius*, as such Court thinks fit, and in like manner as such issue might have been tried in the Court of Queen's Bench in case such writ of *venire facias* had been made returnable in that Court, and such transcript, or the original record, had been taken or deemed to be taken by the Lord Chancellor into that Court; and upon any such transcript being taken or brought into the Court of Common Pleas or Exchequer, such Court is to issue such writs, make such rules, and proceed therein in all respects for the trial or other lawful determination of the issue therein contained, in like manner as the

6 For forms of declaration and notice, see Vol. III.

7 In Wellesley *v.* Mornington, 13 Ir. Chan. Rep. 559, L. C., the Receiver was not allowed to plead to the *scire facias* that the recognizance was taken by an unauthorized person. For forms of pleas, see Vol. III.

1 12 & 13 Vic. c. 109, § 31.

2 *Ib.* §§ 30, 31.

3 For the practice at Law in such cases, see Chitty's Arch. 244 *et seq.*

4 12 & 13 Vic. c. 109, § 31.

5 This writ is no longer necessary or used at Common Law; see Common Law Procedure Act, 1852 (15 & 16 Vic. c. 76), § 104. For the present practice as to summoning a jury at Law, see Chitty's Arch. 365 *et seq.*; and see *ante*, p. 1084 *et seq.*

Court of Queen's Bench might have done if such transcript or the original record had been taken into the latter Court, and with full power to set aside or vacate any trial, verdict, or other proceeding, in like manner as might have been done by the Court of Queen's Bench.[6]

In case any issue or issues in law, or issues both in fact and in *law, are joined in the action, the record thereof is to be *1762 made up and filed in the office of the Petty Bag; and a transcript of the record is thereupon to be sent or taken into the Court of Queen's Bench, Common Pleas, or Exchequer; and such Court is, upon the transcript being brought into such Court, to proceed to hear and determine the same, in like manner as issues in law or issues in law and fact from the Common Law side of the Court of Chancery were, before the Act, heard and determined in the Court of Queen's Bench.[1]

The Courts of Queen's Bench, Common Pleas, and Exchequer, and the Judges thereof respectively, have the same power and authority in respect of the transcript of any record so brought before them, and the pleadings, issues, and matters therein contained, as they have in respect of the record in any action, suit, or proceeding commenced or pending in such Court, and the pleadings, issues, and matters in such record contained; but the Act does not authorize the giving final judgment in any case in which the Court of Queen's Bench had not such authority before the Act.[2]

Upon the trial or determination of any such issue or issues, the Court in which the same are tried or determined is to proceed to give judgment thereon, and execute such judgment, in like manner as the Court of Queen's Bench might have done before the Act.[3]

Upon the trial or determination of any such issue or issues by a Court of Common Law, or upon any rule or order being made or judgment given in any action in which the transcript of the record has been brought before such Court, a transcript of such judgment, rule, or order, and of the proceedings of the Court of Common Law upon such issue, may be taken into the Court of Chancery: to the end that judgment may be given or other proceedings had in Chancery; and no writ is necessary for the purpose of remanding or taking a transcript of the proceedings in the Superior Court into the Court of Chancery.[4]

In all cases where any party is entitled to the costs of any such issues, or of any other proceedings or matters provided for by the Act, in any of the Superior Courts, such costs are to be taxed and regulated by one of the Masters thereof: who is to indorse his *allocatur* on the rule or order, or upon the *postea*, before the same is taken or returned into the Court of Chancery.[5]

In every such action, the Superior Courts of Common Law, and the Judges thereof respectively, are to hear and determine all such matters

6 12 & 13 Vic. c. 109, § 32.
1 12 & 13 Vic. c. 109, § 33.
2 *Ib.* § 34.
3 *Ib.* § 35.
4 12 & 13 Vic. c. 109, § 36.
5 *Ib.* § 37.

or applications arising in or incident to any such action, as be-
*1763 fore the Act might have been heard and determined * by the Lord Chancellor and the Master of the Rolls, or either of them, and also to transact, do, and perform all such business, matters, and things in, about, touching, or concerning such action, as by virtue of any orders or regulations for the time being in force by virtue of the Act may be transacted, done, or performed by such Judge: subject nevertheless and according to the provisions of the Act, and the laws, rules, and regulations for the time being in force for the regulation of the said Court, and the practice and proceedings thereof;[1] but the Act is not to diminish or prejudice the jurisdiction, or any of the powers, rights, or privileges of the Lord Chancellor, as Judge of the Court of Chancery, or otherwise, or the jurisdiction, or any of the powers, rights, or privileges of the Master of the Rolls, as Keeper of the Records of the Court, or as a Master or Judge of the Court, or otherwise.[2]

In *Walker* v. *Wild*,[3] where a Receiver absconded, and his recognizance had been estreated, and an action brought against the sureties, one of them obtained an order for a reference to see what was due from the Receiver, and for payment by the applicant of the amount (not exceeding the penalty), by instalments into Court, and for a stay of proceedings in the mean time: the applicant paying the costs of the motion, and of the subsequent proceedings in consequence of it.

In any proceeding at Law upon the recognizance, the penalty of the recognizance is the debt for which execution will be issued.[4] The Receiver, therefore, or his sureties, if they wish to avoid the consequences of the forfeiture of the recognizance, must apply to the Court to stay the proceedings upon payment of the amount actually due.[5] It seems, from the judgment of Lord Eldon, in *Dawson* v. *Raynes*,[6] that the sureties will not be relieved from the effect of the recognizance, unless they pay in all that the Receiver himself could have been required to pay. In that case, the Vice-Chancellor was of opinion that the sureties were not liable to pay the interest on the Receiver's balance; which the Receiver had been ordered to pay; but Lord Eldon, upon appeal, held the general rule to be that, where the principal debtor is obliged to pay interest, there can be no equity that the surety should not pay the interest, in default of the principal. Under the peculiar circumstances of the case, however: the Receiver having been bankrupt, with the knowledge of all parties, for a considerable length of time, during which no steps were taken to compel the passing of his accounts: his Lordship affirmed the Vice-Chancellor's order.

*1764 * Where a bill of exchange given by a Receiver to a creditor, who had supplied goods for the estate, was dishonored, the cred-

1 12 & 13 Vic. c. 109, § 39.
2 *Ib.* § 46; see The Queen *v.* Hancock, 5 De G., M. & G. 332.
3 1 Mad. 528.
4 See the certificate of the Court of K. B., in Dawson *v.* Raynes, 2 Russ. 468.
5 See Walker *v.* Wild, 1 Mad. 528.
6 2 Russ. 466, 471.

itor was ordered to be paid out of a fund applicable to pay the balance due to the Receiver.[1]

Section VIII. — *Discharge of Receiver.*

When a Receiver has been appointed, and has given security, he cannot be discharged upon his own application, without showing some reasonable cause why he should put the parties to the expense of a change.[2] Where a Receiver applied to be discharged on the ground of ill health, he was not only ordered to be discharged and his recognizance vacated, on passing his accounts, but he was allowed, although this part of the application was opposed, to retain his costs "of the application, and incidental thereto," out of the balance in his hands.[3]

A Receiver is generally continued till the decree; but if the right of the plaintiff ceases before that time, the Receiver may be discharged, and cannot be continued at the instance of a defendant. Upon this ground, Lord Eldon determined, in *Davis* v. *The Duke of Marlborough*, that where the plaintiff had been satisfied by the payment of his demand, the order for the Receiver must be discharged: although the discharge was opposed by two creditors having prior annuities to the plaintiff's. His Lordship observed: "I apprehend that with the right of the plaintiff to have the Receiver, must fall the rights of the other parties. It would be most extraordinary, if, because a Receiver has been appointed on behalf of the plaintiff, any defendant is entitled to have a Receiver appointed on his behalf."[4]

A Receiver, being appointed for the benefit of all parties, will not be discharged on the *ex parte* application of the party at whose instance he was appointed;[5] nor, where appointed on behalf of infant tenants in common, will he be discharged as to the share of one of them who has attained twenty-one.[6]

If, during the course of the proceedings, the continuance of a Receiver becomes unnecessary, he will be discharged. Thus, upon new trustees being appointed in a suit, a Receiver was, on the application of the plaintiff, which was opposed by some of the *defendants, who were beneficially interested in the property as legatees, ordered to be discharged, upon the new trustees undertaking, without entering into recognizances, to account half-yearly, in the same way as the Receiver.[1] *1765

Where the Receiver becomes bankrupt, he will be discharged, and a new Receiver appointed.

1 Tempest *v.* Ord, 1 Mad. 89.

2 2 Hare, 561. Newl. 503. On a final and full account, a Receiver or his representatives, may be discharged and his bond cancelled. Williamson *v.* Wilson, 1 Bland, 429.

3 Richardson *v.* Ward, 6 Mad. 266.

4 2 Swanst. 167, 168; but see *ib.* 118; Largen *v.* Bowen, 1 Sch. & Lef. 296.

5 *Ibid.*; Davis *v.* Duke of Marlborough 2 Swanst. 108, 118; Bainbrigge *v.* Blair, 3 Beav. 421, 423.

6 Smith *v.* Lyster, 4 Beav. 227, 229.

1 Bainbrigge *v.* Blair, *ubi sup.*

The appointment of a Receiver, made previous to a decree, will be superseded by it, unless the Receiver is expressly continued.[2]

The application to discharge a Receiver may be made by petition, motion, or summons.[3]

The petition, or summons, or notice of the motion, should be served on all the parties; but the Receiver, though served, is not entitled to appear at the hearing of the application.[4] The direction for the discharge of the Receiver may also be given in the decree at the hearing, or upon further consideration.[5]

If the Receiver has not passed his final account, and paid over the balance found due from him, the order directs him so to do; and if he has given a recognizance, it directs the recognizance to be vacated on his passing his final account, and paying the balance found due from him, if that has not already been done.[6] An office copy of the recognizance, if any, must be procured from the Enrolment office, and left at the time of bespeaking the order.[7]

When a recognizance is directed to be vacated, the order must be taken, together with an office copy of the Chief Clerk's certificate, and the Accountant-General's certificate of payment of the balance into Court, or an office copy of an affidavit of payment of the balance to the person entitled to it, where the order directs such payment,[8] to the Secretary of the Master of the Rolls: who, if the evidence of payment is satisfactory, makes a note of it, and marks the order with his initials. The order must then be taken to the Enrolment office; and the recognizance will be marked as vacated.[9] If the recognizance is not duly vacated, and a material error is afterwards discovered in the Receiver's account, the money may be recovered.[10]

Where a Receiver is entitled to his discharge, he is also entitled to the costs of it.[11]

*1766 * Section IX. — *Liabilities and Rights of Sureties.*

The sureties of a Receiver cannot be discharged at their own request. Where, therefore, an application was made to discharge a Receiver on the ground of misconduct, and the sureties joined in the application, Lord Hardwicke held, that no regard was to be paid to their application, unless it was for the benefit of the parties in the cause, or something of that kind: "for, if people voluntarily make themselves bail or

2 See form of order, Seton, 1003, No. 6.

3 By consent of all parties, an application to vacate a Receiver's recognizance may be made by petition of course. For forms of petitions, notice of motion, and summons, see Vol. III.

4 Herman *v.* Dunbar, 23 Beav. 312.

5 Seton, 1023.

6 For form of order, see Seton, 1021.

7 Reg. Regul., 15 March, 1860, r. 36.

8 Seton, 1023.

9 A direction that the Clerk of Enrolments attend the Master of the Rolls, for the purpose of vacating the recognizance, is not now inserted in the order. See Ord. XLII. 14.

10 1 Turn. & Ven. 471.

11 Richardson *v.* Ward, 6 Mad. 266.

sureties for another, they know the terms, and will be held very hard to their recognizance, and not discharged at their request to have new sureties appointed: for then there would be no end of it."[1]

But although the general rule is not to discharge the surety of a Receiver on his own application, during the continuance of the receivership, such rule will yield to circumstances: "as where underhand practice is proved, and the person secured shown to be connected with such practice;[2] and where a surety does procure his discharge, during the continuance of the receivership, the Receiver must enter into a fresh recognizance, with new sureties.[3]

Where a surety becomes bankrupt, the Receiver is usually required to enter into a new recognizance, with two or more solvent sureties: the order is made on summons.[4]

In *Shuff* v. *Holdaway*,[5] an order was made, on the application of the surety, directing the Receiver's accounts to that time to be passed, and that on payment by the Receiver, or by the applicant, of the certified balance (not exceeding the penalty) into Court, the applicant should be discharged as surety, and be at liberty to apply to have the recognizance vacated as to him; and that the applicant should be at liberty to attend the taking of the account; but he was ordered to pay the costs of the application.

The surety's liability extends to all that the Receiver would have been required to pay, including the costs of appointing a new Receiver.[6] This point came before Lord Eldon, upon the question whether the sureties of a Receiver were liable to pay interest upon the balance in a Receiver's hand, when he became bankrupt, and his Lordship said: "It seems to me that it would be difficult to say that, where the principal debtor would be obliged to pay interest, there would not be an equity that the surety should pay the interest, in default of the principal.
The penalty is forfeited * by the breach of the condition; the *1767
amount of the penalty is the debt due from the sureties at Law.
How can they have a right to be discharged, in this Court, from their legal liability till they have paid all that the principal could have been required to pay?"[1]

This rule, however, is capable of relaxation where the circumstances of the case will warrant it: accordingly, as the Receiver, in the case referred to, had been bankrupt with the knowledge of all parties for a considerable time, and no steps had been taken to compel the

[1] Griffith *v.* Griffith, 2 Ves. S. 400.

[2] Hamilton *v.* Brewster, 2 Moll. 407; Griffith *v.* Griffith, 2 Ves. S. 400.

[3] See Vaughan *v.* Vaughan, 1 Dick. 90; Blois *v.* Betts, *ib.* 336.

[4] For form of summons, see Vol. III.

[5] V. C. W., in Chambers, for M. R., 3 Sept., 1857, Reg. Lib. B. 1747.

[6] Maunsell *v.* Egan, 3 J. & Lat. 251. [The Receiver and his sureties are responsible for all sums or property received, and not merely for the debts of the obligees to whom the bond was made payable. Regularly the bond should be made payable to the State. Ross *v.* Williams, 11 Heisk. 410. The liability of the surety would probably be limited to the penalty of the bond. State *v.* Blakemore, 7 Heisk. 657. And see, as to the liability of the receiver and surety on official bond, Commonwealth *v.* Gould, 118 Mass. 300.]

[1] Dawson *v.* Raynes, 2 Russ. 466, 471.

passing his accounts, Lord Eldon refused to make the sureties pay interest.[2]

It seems that, where a Receiver has become bankrupt, and the sureties are likely to be called upon to pay the balance due from him, liberty will be given to them to attend the passing of the Receiver's account;[3] and so, where the Receiver had died in insolvent circumstances, and his personal representative had consented to his final account being taken in the suit in which he was appointed, liberty was given him to attend.[4]

Where an action is brought against a Receiver's surety upon the recognizance, the proper course for him to pursue appears to be, to apply to the Court, by motion or summons, with notice to the parties interested in the suit, to stay the proceedings on the recognizance: offering, at the same time, to pay the amount due from the Receiver, but not exceeding the penalty of the recognizance, into Court.[5] The surety must, in addition, pay the costs of the application, and of the proceedings consequent upon it.[6] If the Receiver's account has not been taken, the application should also pray an inquiry what is due from the Receiver. It seems that, upon an application of this kind, the Court may indulge the surety by allowing him to pay the balance in by instalments.[7]

When a surety is called upon to pay any thing on account of the Receiver, he will be entitled to stand in the place of the Receiver for any thing which may be coming to him in the suit. Therefore, where the Receiver had borrowed money from his surety, to enable him to make necessary payments, Lord Eldon decided that the surety was entitled to be repaid the amount lent, out of the balance in Court reported due to the Receiver.[8] Upon the same principle, the share of the Receiver in property which was being administered by the Court,
*1768 was held liable to make good to the * surety the amount paid by him for the Receiver: although it was excepted from a mortgage which the Receiver had given the surety as an indemnity.[1]

Section X. — *Managers and Consignees.*

Where a Receiver is required for the purpose, not only of receiving rents and profits, or of getting in outstanding property, but of carrying on or superintending a trade or business, he is usually denominated "a manager," or "a Receiver and manager."

2 *Ibid.*

3 Dawson *v.* Raynes, 2 Russ. 466, 467.

4 Simmons *v.* Rose, M. R., in Chambers, 20 Nov., 1860.

5 *Ibid.* For forms of notice of motion and summons, see Vol. III.

6 Walker *v.* Wild, 1 Mad. 528; and see Mann *v.* Stennett, 8 Beav. 189, where it was held, that payment by the surety to the solicitor conducting the proceedings was insufficient.

7 Walker *v.* Wild, *ubi sup.*

8 Glossup *v.* Harrison, 3 V. & B. 134; G. Coop. 61.

1 Brandon *v.* Brandon, 3 De G. & J. 524; 5 Jur. N. S. 256.

The most usual cases in which managers are appointed are those in which partnership trades are to be carried on, or which relate to mines or collieries. The grounds upon which the Court usually acts, in making appointments in such cases, have been already pointed out.[2]

A manager will not be appointed in mining concerns at the instance of a plaintiff, not having the legal interest, who, after standing by and suffering the defendant to incur great expense and risk, comes forward, upon the concern turning out profitable, and claims an equitable interest.[3]

Where the suit relates to property abroad, or in the colonies, which partakes of the nature of a trade, it is also usual to appoint managers; and if the manager must necessarily be resident there, it is usual to add to the order, directing the appointment of a manager, an order for the appointment of one or more consignee or consignees resident in this country, to whom the produce of the property in question may be remitted, and by whom it may be disposed of.[4]

The course of proceeding, under an order for the appointment of a manager and consignee, is the same as that under an order for the appointment of a Receiver;[5] and the general orders of the Court which apply to Receivers, apply to managers and consignees also.[6]

In some cases, a manager has been appointed of a West India estate, without giving any security whatever;[7] but in *Rutherford* v. *Wilkinson*,[8] Lord Gifford M. R. stated that it had only been done under special circumstances; and that in general, to warrant * such a *1769 course, it should appear, by the report, that no manager could be found who would give security, or that the proposed person was fit to be appointed without security. Under the circumstances of that case, however, his Lordship made the order for the appointment to be without security, with the consent of such of the parties as were capable of consenting; but on a subsequent application in the same cause, security was required.[1]

The Court, in dealing with property in a colony, has provided against the inconvenience likely to arise from the death, absence, or incapacity of the manager in existence, or appointed by the Court, by appointing another manager to act in such event.[2]

Consignees appointed by the Court, in an administration suit, have a charge on the property, for payments sanctioned by the Court, in priority to incumbrances created before the suit; and will be allowed interest on the balance due to them.[3]

[2] *Ante*, pp. 1726-1728, [1731, n. 5]; and see Jefferys v. Smith, 1 J. & W. 298, 302.

[3] Norway v. Rowe, 19 Ves. 144, 159; and see Rowe v. Wood, 2 J. & W. 553.

[4] See Seton, 1035 *et seq.* As to the appointment of Receivers and managers of property abroad, see *ante*, p. 1731; see also Morris v. Elme, 1 Ves. J. 139; Morrison v. Morrison, 7 De G., M. & G. 214; 1 Jur. N. S. 1100; 2 Sm. & G. 564; 1 Jur. N. S. 339; *Re* Tharp, 2 Sm. & G. 575, n.

[5] *Ante*, p. 1738 *et seq.*

[6] Prel. Ord. 10 (7); *ante*, p. 1731, n. (19), n. (o).

[7] Seton, 1038.

[8] Seton, 1036, 1038.

[1] Seton, 1036, 1038.

[2] Rutherford v. Wilkinson, Seton, 1036.

[3] Morrison v. Morrison, 7 De G., M. & G. 214; 1 Jur. N. S. 1100; 2 Sm. & G. 564; 1 Jur. N. S. 339.

A Receiver and manager of a West India estate, who has been appointed at the instance of a mortgagee, is not entitled to the produce of the estate which has been shipped to the mortgagor's consignees prior to his appointment: although there had been no conversion prior to that time.[4]

A manager of a West India estate is entitled to a commission on the produce sold or remitted, so long as he is resident in the island and personally acting: if he is absent, he is not entitled to the commission himself, but he may be allowed such sums as he has paid to others for the management of the estate during his absence, provided the payments are reasonable.[5]

[4] Codrington *v.* Johnstone, 1 Beav. 520, 524.

[5] Forrest *v.* Elwes, 2 Mer. 68; Seton, 1037; and see Chambers *v.* Goldwin, cited 2 Mer. 69.

*CHAPTER XL. *1770

PAYMENT OF MONEY AND TRANSFER OF STOCK INTO COURT.

SECTION I. — *When directed.*

ONE of the most ordinary methods by which the Court enforces its jurisdiction of preserving property in dispute pending litigation, is, by ordering it to be brought in and deposited with, or in the name of, the Accountant-General of the Court. This officer was appointed pursuant to the statute 12 Geo. I. c. 32, and performs the same duties with reference to the delivery of the suitors' money and effects in the Bank, and taking them out of the Bank, and keeping the accounts with the Bank, and all other matters relating thereto, as were formerly performed by the Masters and Usher.[1]

The payment of money or the transfer of stock into Court is most usually ordered, on interlocutory application, in the case of personal representatives, or other persons filling the character of trustees, having money in their hands, or stock under their control, to which the plaintiff can make out a *primâ facie* title.[2] It is also frequently one of the terms upon which the Court grants an interlocutory injunction.[3]

It appears formerly to have been thought necessary for the plaintiff to show, in support of an application of this nature against an executor or trustee, that the executor or trustee had abused his trust, or that the fund was in danger from his insolvent circumstances; but now, except in the case of a creditor * suing for his own debt only;[1] *1771 the Court will order so much of the trust estate as the executor or trustee admits to be in his hands, to be paid into Court, whether he

[1] 12 Geo. I. c. 32; and see 54 Geo. III. c. 14; Trotter v. Block, 6 De G., M. & G. 170; 1 Jur. N. S. 1077. As to the constitution of the Accountant-General's department, forms of business in use therein, and provisions for the custody and management of the funds in Court, see Rep. Chan. Funds Com. (1864) *passim*. [For the practice under the Trustees Relief Act, 10 & 11 Vic. ch. 96; see Matthew v. Northern Assurance Co., 9 Ch. Div. 80; Pelling v. Gaddard, 9 Ch. Div. 185; *In re* Balcot, 9 Ch. Div. 316.]

[2] Darby v. Darby, 5 Jur. N. S. 51, M. R.; Whitmore v. Lampard, 1 J. & H. 296. Where a sum is reported to be due from a defendant guardian, and he acquiesces in the report, but the cause is delayed by other questions, the Court will order the reported sum to be paid into Court. Clarkson v. Depeyster, 1 Hopk. 274; see Campbell v. Braxton, 4 Hen. & M. 446. To obtain an order upon a defendant to bring money into Court before the final hearing, it must appear that he who asks it has an interest in the money, that he who holds it has no equitable right to it, and the facts as then shown must be open to no further controversy. M'Kim v. Thompson, 1 Bland, 166.

[3] *Ante*, p. 1672.

[1] Reeve v. Goodwin, 10 Jur. 1050, V. C. K. B.

has abused his trust or not,[2] and without requiring proof of any danger to the property pending the litigation.[3]

The existence of a discretionary power in the trustees over the fund affords no reason why the fund should not be ordered to be paid into Court: unless the exercise of the power would be thereby prevented. If, however, the trustees are about to exercise their discretion in a proper manner, the Court will, in order to avoid useless expense, decline to order the fund to be paid into Court.[4]

In *Blake* v. *Blake*,[5] Lord Redesdale appears to limit the rule, as regards personal representatives, to cases in which there are no debts, or the debts are all paid and there is no purpose for which the money is to be left outstanding; but the rule appears to be much more extensive; and any balance which may be in the executor's hands will be ordered into Court, notwithstanding there are demands upon it to which the executor is liable. Thus, in *Yare* v. *Harrison*,[6] an executor, having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into Court: although he stated that an action at Law was depending against him for a debt to a considerable amount, due from the testator. Liberty was, however, given to the executor to apply, in case the plaintiff in the action should recover against him. If the conduct of the trustees has been proper, and all the *cestui que trusts* are not before the Court, the trustees will only be required to pay in the shares of those before the Court;[7] and where the trustees of a creditors' deed, who had duly invested the fund, claimed a lien on it for their unsatisfied costs, an application by a single creditor, suing on behalf of himself and all other creditors, for an order for payment of it into Court, was refused.[8]

The same principle will apply to all persons who fill the charac-
*1772 ter of trustees: whether they are such by virtue of an actual * appointment, or by implication. Thus, the Court has ordered an auctioneer to pay into Court the balance of the deposit upon a sale, admitted by him to be in his hands, after deducting his claims as auctioneer.[1] Upon the same principle, where a testator, having a debt secured

[2] M'Kim *v.* Thompson, 1 Bland, 156. Where it appears from the answer of a defendant guardian, that he has in his hands a specific sum, which he admits to be due to the plaintiff, and other matters in the suit are contested, the Court will order the admitted debt to be paid to the plaintiff, without waiting for a final decree. Clarkson *v.* Depeyster, 1 Hopk. 274. [And so where the amount can be ascertained by deducting disputed items. Union Mut. Ins. Co. *v.* Kellogg, 5 Rep. 682, U. S. C. C.]

[3] Strange *v.* Harris, 3 Bro. C. C. 365; and see Blake *v.* Blake, 2 Sch. & Lef. 26; Rutherford *v.* Dawson, 2 Ball & B. 17; Edwards *v.* Edwards, 10 Hare Ap. 63; Strange *v.* Harris, 3 Bro. C. C. 365, Perkins's ed. note (*a*); and see Blake *v.* Blake, 2 S. & L. 26; Rutherford *v.* Dawson, 2 Ball & B. 17; see Hall *v.* Hall, 2 McCord Ch. 317; Hosack *v.* Rogers, 6 Paige, 415. Money may be brought into Court by trustee under a decree, if he doubts as to its proper application. Wells *v.* Roloson, 1 Bland, 456. So to stop interest and costs in certain cases. Chase *v.* Manhardt, 1 Bland, 343.

[4] Talbot *v.* Marshfield, 2 Dr. & Sm. 285.

[5] *Ubi sup.*

[6] 2 Cox, 377; but see Betagh *v.* Concannon, 2 Moll. 559.

[7] Hamond *v.* Walker, 3 Jur. N. S. 686, V. C. W.

[8] Chaffers *v.* Headlam, 17 Jur. 754, V. C. W.

[1] Yates *v.* Farebrother, 4 Mad. 239; and see Bourne *v.* Mole, 8 Beav. 177; Nokes *v.* Seppings, 2 Phil. 19.

on lands, bequeathed the debt to the mortgagor, with a desire that he would give a reversionary interest therein to a third person, and the mortgagor sold the estate, he was ordered to bring the mortgage money into Court, for the benefit of the devisee, subject to his own life-estate;[2] and so, where the defendant had covenanted to pay a sum of money to the trustees of his marriage settlement, but had omitted to do so, he was ordered to pay it into Court.[3] Where, also, the plaintiff, a shareholder in a company which had transferred its business, alleged that the directors of the company had, unknown to him and the other shareholders, received sums of money for making the transfer, they were ordered to pay such sums into Court.[4]

Where an executor admits a sum of money to be due from him, in his individual character, to his testator, the amount will be ordered to be paid into Court.[5] This was done, notwithstanding a statement in the answer that the debts of the testator were not all paid, and that there were several outstanding for which the executor was liable.[6] In such cases, the Court assumes that, as the persons to pay and the persons to receive are the same, what ought to have been done has been done; and orders the payment, not as a debt by a debtor, but as of moneys realized, and in the hands of the executor or trustee.[7]

Upon the same principle, money admitted by an executor to be in the hands of his partner, will be considered as in his own hands for the purpose of being called into Court;[8] but in *Freeman* v. *Fairlie*,[9] it was held, that an admission by an executor that the whole amount of the property was invested in India, on public securities, either in his own name or in the name of a house in which he was a partner, but subject to his disposal, unless some part was in the hands of the house at interest, which he believed * might be the case, was not a sufficient ad- *1773
mission of money in his hands to order the payment into Court of any part of it: for although an executor, dealing with money in his hands, is bound to ear-mark it, yet, if he does not do so, and cannot answer as to the state of it, the Court has no power to act as upon an admission.[1]

It is only upon the admission of the executor, or other trustee, that the trust money is actually in his hands that the Court will order it to be paid in. If, therefore, a defendant admits a sum of money to have

[2] Lewis v. King, 2 Bro. C. C. 600.
[3] Rothwell v. Rothwell, 2 S. & S. 218; Hall v. Hall, 2 McCord Ch. 317.
[4] Haskell v. Chambers, 1 No. 3, 26 Beav. 360, 5 Jur. N. S. 52.
[5] Rothwell v. Rothwell, *ubi sup.*
[6] Mestaer v. Leather, 2 Mer. 491.
[7] See Casey v. Gardiner, 3 Bro. C. C. (Perkins's ed.) 110, 111, note *(a)*, and cases cited; Wankford v. Wankford, 1 Salk. 299; Winship v. Bass, 12 Mass. 199; Stephens v. Gaylord, 11 Mass. 256; Hays v. Jackson, 6 Mass. 149; Bigelow v. Bigelow, 4 Ham. 138; Locker v. Smith, 1 Keb. 314; Kinney v. Ensign, 18 Pick. 232, 236; Hobart v. Stone, 10 Pick. 220; Ritchie v. Williams, 11 Mass. 50; Ips. Manuf. Co. v. Storey, 5 Met. 310; Bowen v. Furman, 6 Conn. 121; 2 Story Eq. Jur. § 1249; Pusey v. Clemson, 9 Serg. & R. 208; Decker v. Miller, 2 Paige, 149; Stagg v. Beekman, 2 Edw. Ch. 89; Marvin v. Stow, 2 Cowen, 781; Schell v. Schroder, 1 Bailey Eq. 334.
[8] Johnson v. Aston, 1 S. & S. 73; White v. Barton, 18 Beav. 192, and see Roy v. Gibbon, 4 Hare, 65, 66.
[9] 3 Mer. 39.
[1] See Roy v. Gibbon, *ubi sup.*

come to his hands properly belonging to the trust, but adds that he has made, or will have to make, payments on account of the estate, he will be allowed to deduct the amount of the payments, and to pay in the balance only.[2]

This, however, will be the case only where the payments have been properly made. Where the payments have been improperly made: as where they involve a breach of trust: the trustee will not be permitted to avail himself of such payments for the purpose of resisting the payment into Court. Therefore, where executors had by their answer admitted the receipt of the testator's property, but stated that they had lent it on a promissory note: upon an application that they might pay the money thus lent into Court, it was held that, having admitted the receipt of the money, the executors could not, by alleging an improper application of it, protect themselves from payment into Court.[3] So also, where moneys, directed by a settlement to be laid out in government or real securities, were lent by the trustees to the husband on bond, the trustees were ordered, on motion, to pay the money into Court.[4] This principle was likewise acted upon in *Rothwell* v. *Rothwell*,[5] before referred to, in which the Court ordered the defendant to pay in a sum of money which he had contracted to pay to the trustees of his marriage settlement, but had omitted to pay. And it is not only in cases where trust money has been improperly lent that it will be ordered into Court: it will be ordered in, even where the lending may have been warranted by the trust deed, upon the allegation that the fund is in danger.[6]

In order to induce the Court to direct the immediate bringing in of a sum of money upon an interlocutory application, the money must be clearly trust money. Where it is not impressed with a trust, but is in the nature of a mere debt, the Court will not make an order for the *1774 payment of it into Court till the hearing * of the cause. Thus, in *Peacham* v. *Daw*,[1] where a bill was filed against a defendant, insisting that a certain sum of money claimed by her as a gift from the testator, shortly before his death, continued to be part of his assets, and upon the coming in of the answer the plaintiff moved that the defendant might pay the money into Court, on the ground that she had admitted circumstances in her answer which made it clear that it was part of the testator's assets, the application was refused.

Where a Court of Equity traces out trust money in the hands of a person who has not, *primâ facie*, a right to hold it, that money must be brought into Court.[2]

It is not necessary, to induce the Court to order trust money to be paid in, that the trust should be one absolutely declared. It will, in

[2] Anon., 4 Sim. 359; Roy *v.* Gibbon, 4 Hare, 65.
[3] Vigrass *v.* Binfield, 3 Mad. 62; see also Beaumont *v.* Meredith, 3 V. & B. 180; Nokes *v.* Seppings, 2 Phil. 19.
[4] Collis *v.* Collis, 2 Sim. 365, 368.
[5] 2 S. & S. 217, *ante*, p. 1772.
[6] Payne *v.* Collier, 1 Ves. J. 170.
[1] 6 Mad. 98.
[2] Leigh *v.* Macaulay, 1 Y. & C. Ex. 260, 267; Payne *v.* Collier, 1 Ves. J. 170; see *post*, p. 1779.

many cases, do the same, where the trust is only implied: as in the case of vendors and purchasers, where, as the Court considers what is agreed to be done as done, it will treat the vendor as a trustee for the purchaser of the estate contracted for, and the purchaser as a trustee for the vendor of the purchase-money.[3]

Lord St. Leonards, in his learned Treatise upon the Law of Vendors and Purchasers of Estates,[4] thus states the rule in practice of calling upon the purchasers of estates to pay their purchase-money into Court, in a suit for specific performance: "A purchaser in possession of the estate, may, upon motion, be ordered to pay the purchase-money into Court. This has been done before answer;[5] but the purchaser has, in some cases, had the option to pay the money, or give up possession;[6] in others, occupation rent has been set, deducting interest on the deposit;[7] and in others, a receiver has been appointed;[8] and payment of the money will be ordered, although by the agreement it is payable by instalments, and a portion of it is to remain secured upon the estate.[9] This rule has been adopted: where the possession has been given under a mutual apprehension that the title could be immediately made good;[10] where the purchaser had a sort of mixed possession with the vendor, and had paid part of the purchase-money, was insolvent, and had attempted, without effect, to sell the estate;[11] where the purchaser approved the title, and prepared a conveyance, * and *1775 then raised objections;[1] where the purchaser had been guilty of *laches* and cut underwood;[2] and even in a case where it appeared, on the face of the abstract, that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser.[3] So where an acceptance of the title was inferred.[4] Again, where time was fixed for the payment of the purchase-money by instalments, and the property was a coal mine.[5]

"If the estate be sold under a decree, and the purchaser enter into possession, he will be compelled to pay his purchase-money into Court, unless he entered with the express consent of the Court.[6]

[3] London & North Western Railway v. Corporation of Lancaster, 16 Beav. 22.

[4] Pp. 229, 231.

[5] Dixon v. Astley, 1 Mer. 133, 378, note (*b*); Burroughs v. Oakley, *ib.* 52, 376, note; Blackburn v. Stace, 6 Mad. 69; Pyke v. Northwood, 1 Beav. 152, where tenant claimed option to purchase.

[6] Clarke v. Wilson, 15 Ves. 317; Smith v. Lloyd, 1 Mad. 83; Morgan v. Shaw, 2 Mer. 138; Wickham v. Evered, 4 Mad. 53.

[7] Smith v. Jackson, 1 Mad. 618; Smith v. Lloyd, *ubi sup.*

[8] Hall v. Jenkinson, 2 V. & B. 125; Clarke v. Lilbut, 1 Mad. 309.

[9] Younge v. Duncombe, Younge, 275.

[10] Gibson v. Clarke, 1 V. & B. 500, and *see* S. C., cited 1 Mad. 607.

[11] Hall v. Jenkinson, *ubi sup.*

[1] Walker v. Upton, Cr. Coop. 92, note; but see Bonner v. Johnston, 1 Mer. 366; Crutchley v. Jerningham, 2 Mer. 502; Lilley v. Allen, 1 W. N. 86; 12 Jur. N. S. 181, V. C. S.; Robertshaw v. Bray, 1 W. N. 87; 12 Jur. N. S. 224, V. C. W.; South Eastern Railway Co. v. London, Brighton, & South Coast Railway Co., 1 W. N. 130, V. C. W.; Cooper v. London, Chatham, & Dover Railway Co., 14 W. R. 985, V. C. K.; Morton v. Great Eastern Railway Co., 1 W. N. 304, M. R.

[2] Burroughs v. Oakley, 1 Mer. 52, 376, note; Dixon v. Astley, *ib.* 133, 378, n. (*b*); Bradshaw v. Bradshaw, 2 Mer. 192.

[3] Brown v. Kelty, L. I. Hall, July, 1816, MS.

[4] Boothby v. Walker, 1 Mad. 197; Smith v. Lloyd, 1 Mad. 83.

[5] Buck v. Lodge, 18 Ves. 450.

[6] Anon., L. I. Hall, 16 July, 1816, MS.; Wilding v. Andrews, 1 C. P. Coop. t. Cott. 380.

"But where the sale is not by the Court, and, upon a parol contract at so much per acre, there is a dispute as to the number, and possession was given without any understanding when the purchase-money was to be paid, and the bill only seeks a performance as to the larger quantity;[7] or the seller has thought proper to put the purchaser into possession, with an understanding between them that he shall not pay his money until he has the title: the purchaser cannot be called upon to pay the money into Court in this summary way;[8] nor can the payment be compelled where the vendor gives possession without stipulation;[9] or the purchaser was in possession under another title before the contract;[10] or the possession was given independently of the contract, and the seller has been guilty of *laches*:[11] although, in such cases, the purchaser, may make himself liable to the demand, by dealing improperly with the estate, *e. g.* cutting trees, or selling it to another person;[12] or even ameliorating it, but changing the tenants.[13] But the purchaser, after a long period, will not be permitted to keep possession of the estate and also withhold the purchase-money: if a title has not been made, he will be put to his election within a reasonable
*1776 * time, *e. g.* two months, to give up the possession or pay the purchase-money."[1]

The same learned author then proceeds to deduce two simple rules from the cases: "1st. Where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate, the cause must take its regular course. But, 2dly, If the possession by the purchaser, without payment of the money, is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership: for example, cutting timber by which the property is lessened in value; or selling the estate, by which the first seller's remedy is complicated without his assent: in such cases, the Court will interpose, and compel the purchaser to pay the purchase-money into Court."[2]

The principle of ordering money into Court upon a trust by implication, has been acted upon in several cases. Thus, the proceeds of a fire policy, upon a freehold house, which had been renewed by an executrix after the death of a testator, were directed to be brought into Court, on the application of the widow, in a suit instituted by her for the administration of the testator's estate: not on the ground that the

[7] Benson *v.* Glastonbury Canal Company, C. P. Coop. 42; 1 C. P. Coop. t. Cott. 350.

[8] Gibson *v.* Clarke, 1 V. & B. 500.

[9] Clarke *v.* Elliott, 1 Mad. 606; and see Northern Counties Union Railway *v.* North Eastern Railway, 6 W. R. 122, V. C. K., where possession was taken by the defendants, under a power given them by the legislature.

[10] Freebody *v.* Perry, G. Coop. 91; Bonner *v.* Johnston, 1 Mer. 366.

[11] Fox *v.* Birch, 1 Mer. 105.

[12] Cutler *v.* Simons, 2 Mer. 103; Bramley *v.* Teal, 3 Mad. 219; Gell *v.* Watson, *ib.* 225; [Pope *v.* Great Eastern R. Co., L. R. 3 Eq. 171].

[13] Bramley *v.* Teal, *ubi sup.*

[1] Tindal *v.* Cobham, 2 M. & K. 385; Fowler *v.* Ward, 6 Jur. 547, M. R.; Adams *v.* Heathcote, 10 Jur. 301, V. C. E.

[2] Sugd V. & P. 281; Pope *v.* Great Eastern Railway Co., 1 W. N. 347, V. C. W.; [L. R. 3 Eq. 171. A non-resident vendee, filing a bill for specific performance, will be required to pay into Court the consideration that was to have been paid at the execution of the deed, though not in possession. Binns *v.* Mount, 1 Stew. Eq. 24].

proceeds of the policy formed part of the personal estate, but because they were affected with a trust for the benefit of the persons interested in the real estate.[3] And where goods had been specifically, and not generally, consigned by a trader abroad to merchants in this country, the proceeds of the consignment were held to be trust money in the hands of the consignees, and, upon a bill filed against them by the representative of the trader for an account, were ordered to be brought into Court.[4]

The practice of the Court with regard to compelling the payment into Court of money constituting partnership property, has been stated[5] in the following manner: "As the rule is, that he who seeks equity must do equity, it seems clear that, where the plaintiff is a private debtor to the partnership, he cannot insist upon an account, without paying the amount of his debt into Court. Thus, in an early case, it is laid down, that if one partner borrows any money out of the partnership trade, his own share shall be answerable for it; and he shall not be permitted to come into Equity, and pray an account, without making satisfaction for *the debt.[1] So, in a case before Lord Nottingham, *1777 one partner having sued the other for money had and received, and the latter having filed his bill for an injunction to stay proceedings at Law and for an account, the Court entertained the suit, and decreed an account: the plaintiff having first paid into Court the money in question.[2] Upon similar principles it should seem, that if the defendant could by any means show that a specific sum is due from the plaintiff to the partnership as a private debt, that sum must be paid into Court by the plaintiff before an account will be decreed. But one partner, whether plaintiff or defendant, may receive partnership money and effects, and insist on not paying in the amount, unless all the other partners will pay in what they have in their hands;[3] and it has been laid down by Lord Eldon, that if a partner, as partner, receives money belonging to the firm, and, admitting that he has received it, insists that there is a balance in his favor, there is no pretence for making him pay it in."[4] If, however, a partner has received partnership money, under circumstances from which it can be inferred that he had agreed not to receive it, and that his receiving it was contrary to good faith, he may be ordered to pay it into Court.[5]

The general rule is, that a partner will not be ordered to pay partner-

[3] Parry *v.* Ashley, 3 Sim. 97.

[4] Leigh *v.* Macaulay, 1 Y. & C. Ex. 260, 267; and see Venning *v.* Loyd, 1 De G., F. & J. 193; 6 Jur. N. S. 81, where the proceeds of a policy of insurance had been assigned, and there was a conflict of jurisdiction.

[5] Collyer on Partnership, 200; and see Lindley, 817.

[1] 16 Vin. Abr. Partners (E), 5; Melton *v.* Royal Exchange Assurance Company, 1 Eq. Ca. Abr. 8, pl. 8.

[2] Gold *v.* Cannam, 2 Swanst. 325, note; 1 Ch. Ca. 311.

[3] Foster *v.* Donald, 1 J. & W. 252.

[4] *Ib.* 252; but see Toulmin *v.* Copland, 3 Y. & C. Ex. 643, where, although payment in was directed, leave was given the defendant to apply for repayment, out of a fund previously paid in, of any sums which he might pay in discharge of the partnership debts.

[5] Per Lord Eldon, in Foster *v.* Donald, *ubi sup.*

ship money into Court, unless there is a clear admission, not only that he has the money, but that he is liable to pay it.[6]

Upon the principle of preserving property pending litigation, a party to an administration suit, who has been found to be a debtor to the estate, and is in insolvent circumstances, will be ordered to pay the amount of the debt immediately, into Court: if the debtor is a stranger to the suit, the usual course is to direct an inquiry as to what should be done.[7]

Although the Court will order trust money, admitted to be in the hands of a party, to be paid in, on interlocutory application, it will not order interest upon such money to be so paid.[8] The only case in which the Court appears to have acted in opposition to this rule is that of *Freeman* v. *Fairlie*;[9] but that was under peculiar circumstances: the defendant having, by his answer, admitted that he had made interest
*1778 to a larger amount than the * sum he was ordered to pay in; and Lord Eldon said, he was very unwilling to carry the practice further than it had been carried.

The same principles which apply to trust moneys, and will induce the Court to order them to be paid into the Bank, to the credit of the cause, will be acted upon in the case of trust stock, or trust money invested in Exchequer bills: which the Court will order the party holding to transfer into the name of the Accountant-General, in trust in the cause, or deposit in the Bank to the credit of the cause. The Court will also, wherever it may be necessary for their protection, order specific chattels to be deposited in the Bank with the privity of the Accountant-General.

A trustee or executor does not, by payment of the trust fund into Court, discharge himself of his office;[1] nor does a payment of money into Court, upon an interlocutory application, alter the rights of the parties interested in the fund.[2] Therefore, if an executor or administrator pays into Court money which he has received from the estate of the deceased, his right to retain a debt due to him from the deceased is not prejudiced;[3] and where the fund in Court is insufficient to discharge the administrator's debt, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied.[4]

[6] Collyer on Partnership, 202; and see Lindley, 817; Richardson *v.* Bank of England, 4 M. & C. 165, 171; 2 Jur. 911; but see Domville *v.* Solly, 2 Russ. 372.

[7] Walker *v.* Simpson, 1 Jur. N. S. 675; not reported on this point, 1 K. & J. 713.

[8] Wood *v.* Downes, 1 V. & B. 50.

[9] 3 Mer. 29, 44.

[1] Thompson *v.* Tomkins, 2 Dr. & Sm. 8.

[2] Noble *v.* Stow, 29 Beav. 409. The only instance in which the payment into Court will affect the right of the parties is, where money due to a wife is paid into Court, in a suit to which the husband and wife are parties; which will have the effect of depriving the wife of her right by survivorship, unless the payment be into the joint names of the husband and wife. See Laprimaudaye *v.* Teissier, 12 Beav. 906; and *ante*, pp. 115, 116.

[3] Langton *v.* Higgs, 5 Sim. 228; and see Hall *v.* Macdonald, 14 Sim. 1; Tipping *v.* Power, 1 Hare, 405, 411; Middleton *v.* Poole, 2 Coll 246.

[4] Chissum *v.* Dewes, 5 Russ. 29; *ante*, p. 1425. Where the amount of the Master's report against a defendant is ordered, for security, to be brought into Court, and invested in stock, pending exceptions by plaintiff, any gain or loss, which may ultimately accrue on the sale of the stock, is to be received or borne by the defendant. Clarkson *v.* Depeyster, 1 Hopk. 505. The payment into Court is a collateral security, and is not to be taken as a payment to the plaintiff. *Ibid.* [Broughton *v.* Pitchford, 6 Mad. 295; Love *v.* Allison, 2 Tenn. Ch. 114. It belongs to the party who may be eventually found entitled. *In re* Keyworth, L. R. 9 Ch. App. 379.]

It has been said, that funds belonging to wards of Court cannot be transferred in the name of the Accountant-General to the credit of the cause, until the accounts have been taken, and the certificate made; this, however, must be understood as meaning merely, not that such a transfer cannot be made, but that it will not operate as a discharge to the trustees until they have passed their accounts.[5]

* Section II. — *How applied for.* *1779

When it is said, that where a Court of Equity traces out trust money in the hands of a person who has not *primâ facie* a right to hold it, that money must be brought into Court,[1] the *dictum* must be understood as implying that the person applying to have it brought in must have an interest in its protection. The general rule may be stated thus: that the plaintiffs must be solely entitled to the fund, or have acquired in the whole fund such an interest, together with others, as entitles them, on their own behalf and the behalf of those others, to have the funds secured in Court.[2]

It seems, however, that where the plaintiff is merely entitled to a portion of a fund, which portion is clear, he will only be permitted to have the portion, to which he is entitled, secured: therefore, where a widow, as administratrix of her husband, was called upon to transfer into Court a sum of Bank Annuities which formed part of the personal estate of her husband, whose debts had all been paid, the Court of Exchequer thought that, as she was clearly entitled to a third of the personalty, they could not keep her out of the possession of that part; and accordingly granted the application only as to two-thirds of the Bank Annuities.[3] If the applicant has a clear interest in one part, and a contingent interest in the remainder of the fund, the whole will be ordered to be paid into Court.[4] If the interest is not clear, the fund will not in general be ordered to be paid in.[5] If the interest is contingent, the fund may be ordered to be paid in: but then, there must be some reason shown for the interference of the Court.[6]

Applications for payment of money or transfer of stock into Court before decree are usually made by summons: which must be served on the party required to make the payment or transfer. If opposed, the summons is frequently adjourned for hearing in Court.[7] Applications of this nature are most commonly made upon admissions contained in the answer; but they may be made upon an admission contained in an

[5] Beneraft v. Rich, 1 Bro. C. C. 56; see *ib.* ed. Belt, n. (1).

[1] *Ante*, p. 1774.

[2] Freeman v. Fairlie, 3 Mer. 29; Wilton v. Hill, 2 De G., M. & G. 807, 809.

[3] Rogers v. Rogers, 1 Anst. 174.

[4] Bartlett v. Bartlett, 4 Hare, 631.

[5] St. Victor v. Devereux, 14 Sim. 641; Stone v. Ford, 7 Beav. 483, 486.

[6] Ross v. Ross, 12 Beav. 89; and see Bartlett v. Bartlett, *ubi supr.*; Marryatt v. Marryatt, 2 W. R. 576, V. C. K.; Richardson v. Scott, 1 W. N. 114, V. C. S.

[7] See Seton, 47. For form of summons, see Vol. III.

affidavit, or in any other proceeding in the suit.[8] At a hearing of a cause, an application may be made for the payment of a fund into Court without previously giving notice.[9]

*1780 To support an application for the payment of money into Court upon the answer, there must be an admission in the answer of the plaintiff's title as stated in the bill; and not merely an admission with reference to the case made by the answer.[1] An absolute admission of title is not required; merely such a probability of title as the Court can safely act on;[2] but if the defendant by his answer merely says he does not know and cannot set forth, as to his belief or otherwise, whether the plaintiff sustains the character he assumes, an order will not be made.[3]

The plaintiff will not be allowed to make use of affidavits to supply any defect in the answer: the rule of the Court being, that the order shall be made upon the defendant's admissions alone.[4] This rule, however, must be understood as applying to proof of the plaintiff's title: for it has frequently been decided that though the Court will not, upon an application of this sort, allow affidavits to be read in support of the plaintiff's title, it will receive affidavits to verify collateral facts. Thus, upon a motion that a purchaser may pay his purchase-money into Court, it will allow affidavits to be read to prove that he has exercised acts of ownership.[5]

As the Court will not order money into Court where there is no admission of the plaintiff's right, still less will it do so where it is denied by the answer: therefore, if a bill is filed, stating a settled account, and by the answer it is denied that the account is just, the plaintiff cannot move that the defendant may pay into Court the money on the account so admitted: as he might, if the account were admitted to be correct.[6]

It must also be admitted, that there is a balance actually in the hands of the defendant.[7] It is not, however, necessary, that the actual amount of the balance should be stated. If the admission is contained in the schedule not cast up, the sums may be cast up; and, on affidavit of the amount of what appears to be due, the order will be made;[8] but

[8] Seton, 62.

[9] Isaacs *v.* Weatherhouse, 10 Hare Ap. 30.

[1] Proudfoot *v.* Hume, 4 Beav. 476; see also Boschetti *v.* Power, 8 Beav. 98; 8 Jur. 1085: Rothwell *v.* Rothwell, 2 S. & S. 217.

[2] M'Hardy *v.* Hitchcock, 11 Beav. 73, 77; Whitmore *v.* Turquand, 1 J. & H. 296.

[3] Dubless *v.* Flint, 4 M. & C. 502; and see Farrer *v.* Hutchinson, 3 Y. & C. Ex. 706; Edwards *v.* Edwards, 10 Hare Ap. 63.

[4] Black *v.* Creighton, 2 Moll. 554; St. Victor *v.* Devereux, 13 Sim. 641; Boschetti *v.* Power, *ubi sup.* [A parol admission proved by affidavit is not sufficient. McTighe *v.* Dean, 7 C. E. Green, 81.]

[5] Bradshaw *v.* Bradshaw, 2 Mer. 492; Crutchley *v.* Jerningham, *ib.* 502; see *ante*, pp. 1774, 1775.

[6] —— *v.* Bailey, 30 July, 1805, 2 Mad. Ch. Pr. p. 400, 2d ed.; p. 523, 3d ed.; see also Richardson *v.* Bank of England, 4 M. & C. 165, 177; but see Domville *v.* Solly, 2 Russ. 372, where, although the plaintiff's title was denied, he was able to show from the case stated in the answer that he had an interest.

[7] With respect to what will be considered as money in the hands of a defendant, see *ante*, pp. 1772, 1773.

[8] Mills *v.* Hanson, 8 Ves. 68; Quarrell *v* Beckford, 14 Ves. 177. For form of affidavit, see Vol. III.

as, in such cases, the admission only is relied upon, no affidavit can be used in support of the application, except that of a calculator or accountant who examines the schedule, and swears to the amount in the hands of the executor appearing therefrom.[9]

*As the application must be founded on an admission, it is *1781 necessary, where the application is founded upon an account appearing in a book, that the book must have been referred to in such a way as to make it part of the admission; and where the defendant has referred to several books, it will not be sufficient to make the application upon the casting up of some of the books; it must be the result of all the books.[1]

The indulgence which is allowed to a plaintiff of verifying the amount of the balance admitted will, in certain cases, be extended to the defendant. Thus, where an executor admits in his answer, that he has received a specific sum belonging to the testator's estate, but adds that he has made payments on account of the estate, the amount of which he does not specify, the Court will allow him to verify the amount of his payments by affidavit, and then will order him to pay the balance into Court.[2]

It may be noticed in this place, that in a case before Sir A. Hart L. C., in Ireland, the question arose whether the executor was entitled to retain enough to answer the probable accruing expenses of suits; and his Lordship upon that occasion observed, that Sir John Leach had always held the opinion that the executor should bring in all; but that when he (Sir A. Hart) was Vice-Chancellor, he had acted on a different principle; and that he thought the Court had no right to cramp any executor who was engaged in suits, by leaving him to carry on those suits with his own funds, and that Lord Eldon had sustained his views in that respect. "I do not mean," his Lordship continues, "merely costs already incurred: there never could be any doubt about them; but probable growing costs. I know it is said, the executor can come to the Court for money to be advanced to him as he wants it; but I do not think he is to be compelled to do that."[3] The opinion of Sir Anthony Hart, however, in the case referred to, appears to be at variance with that of Lord Thurlow in *Yare* v. *Harrison*.[4]

Money or stock may be ordered to be paid or transferred into Court, after decree, on an application by summons: to be served on the party to make the payment or transfer. The application cannot, then, however, be made upon admissions contained in the answer;[5] but must

9 Black *v.* Creighton, 2 Moll. 554; Boschetti *v.* Power, 8 Beav. 98; 8 Jur. 1085; see also Richardson *v.* Bank of England, 4 M. & C. 165, 177, in which the principles upon which money is ordered into Court upon a defendant's admission are very fully reviewed.

1 Mills *v.* Hanson, *ubi sup.*; Roe *v.* Gudgeon, G. Coop. 304.

2 Anon., 4 Sim. 359.

3 Betagh *v.* Concannon, 2 Moll. 559.

4 2 Cox, 377; *ante*, p. 1751.

5 Wright *v.* Lukes, 14 Beav. 107; Binns *v.* Parr, 7 Hare, 288; Burn *v.* Bowes, 6 L. J. Ch. 275, M. R.

be founded upon admissions contained in the accounts brought into Chambers,[6] or upon the Chief Clerk's certificate.[7]

*1782 * The rules which govern applications of this nature, at this stage of the cause, are the same as those which govern applications upon admissions in the answer: with the exception, however, that the party applying need not be the plaintiff in the cause. Indeed, if the plaintiff be the accounting party, the application may be made against him. It is also unnecessary to show the title of the party to make the application, if such title appear from the decree or other proceedings in the cause.

Where the application is made upon the Chief Clerk's certificate, the accounting party will not be ordered to pay the fund into Court until the expiration of the period within which an application to discharge or vary the certificate may be made.[1] Upon the hearing of an application to discharge or vary the Chief Clerk's certificate, it is competent for the Court, although it accedes to the application, and directs the certificate to be reviewed, to order the accounting party to pay a sum of money into Court, without a special application for that purpose. The Court will not do so, however, unless it is satisfied that the probable result of the direction to review the certificate will be the finding such a sum due from the party.[2]

The cases in which the Court would, under the former practice, order money into Court before answer were very rare. In *Jervis* v. *White*,[3] Lord Eldon made such an order upon the ground of fraud; and in doing so stated, that he fastened upon the affidavit of the defendant in answer to that filed by the plaintiff, as Lord Kenyon had done in *Vann* v. *Barnett*;[4] where, though it was held that in general, in such cases, the Court would not act effectively between the parties till the answer comes in, yet, if the defendant answers the affidavit, the Court would look at the affidavit as if it were the answer.

The Court has also, as has been already stated, ordered the purchaser of an estate to pay his purchase-money into Court, before the answer has been put in.[5]

The Governor and Company of the Bank of England have the general custody of the property of the suitors, as the bankers of the Court of Chancery. This property consists of cash, stocks, Exchequer bills, shares in public companies, and other securities, and specific articles deposited.[6] The suitors' cash in the bank forms one common and gen-

[6] Hatch *v.* ——, 19 Ves. 116; and see Wood *v.* Downes, 1 V. & B. 49; Fox *v.* Mackreth, 1 Ves. J. 69; [London Syndicate *v.* Lord, 8 Ch. Div. 84].

[7] Gordon *v.* Rothley, 3 Ves. 572; Creak *v.* Capell, 6 Mad. 114. [Or upon defendant's affidavit filed on an inquiry. Dunne *v.* English, L. R. 18 Eq. 524.]

[1] Douthwaite *v.* Spensley, 18 Beav. 74; see Gordon *v.* Rothley, and Creak *v.* Capell, *ubi sup.*, for the former practice.

[2] Brown *v.* De Tastet, 4 Russ. 126.

[3] 6 Ves. 738; Richardson *v.* Bank of England, 4 M. & C. 165; Dubless *v.* Flint, *ib.* 502.

[4] 2 Bro. C. C. 158.

[5] *Ante*, p. 1774.

[6] For the Bank statement of such property for the year 1863, see Rep. Chan. Funds Com. xxx.

eral fund of cash for the Accountant-General to draw upon. The various amounts belonging to the * suitors, of each of the dif- *1783 ferent stocks, stand in one sum in the name of the Accountant-General, in trust to attend the orders of the Court; and the payment of his drafts, and the various dealings with the stocks and securities standing in his name, form part of the general business of the Bank.[1]

The operations which are performed through the medium of the Accountant-General's department, and recorded in the books of the office, consist of: (1.) Paying money into Court;[2] (2.) Transferring stock into Court, and depositing in Court Exchequer bills and bonds, and other effects of suitors;[3] (3.) Carrying over from one account to another;[4] (4.) Purchasing stock and securities;[5] (5.) Selling stock and securities;[6] (6.) Transferring stock and delivering securities out of Court;[7] (7.) Paying principal money out of Court;[8] and (8.) Paying out interest money and dividends on stock and securities in Court.[9]

In regard to these operations, it is the business of the Accountant-General to issue, at the request of the persons concerned, and in obedience to the orders of the Court, or, in some cases, in pursuance of an Act of Parliament, such directions and drafts as may enable the Bank to receive or deal with the moneys and effects of the suitors, in accordance with the Act or order. The solicitor for the parties interested takes the original order, or an office copy of it[10] (with other necessary documents,[11] if the order is not complete in itself), to the Accountant-General's office, and bespeaks the operation which he desires to have effected. The Accountant-General thereupon acts only upon that part of the order to which his attention is called by the solicitor: although he has necessarily to consider the whole scope of the order.[12] After the particular purpose for which the order was brought in is answered, the order itself is placed in a pigeon-hole in the office, and may be removed by the solicitor.

Every order dealing with funds in Court must describe them as standing to the credit of the account, exactly as it is entitled in * the Accountant-General's books;[1] and where any sums of *1784

[1] Rep. Chan. Funds Com. xvii., xviii.; Ord. I. 14, 15.
[2] *Post*, p. 1786.
[3] *Ib.* p. 1789.
[4] *Ib.* p. 1796.
[5] *Ib.* p. 1789.
[6] *Ib.* p. 1810.
[7] *Ib.* p. 1812.
[8] *Ib.* p. 1805.
[9] *Ib.* p. 1806.
[10] The Accountant-General will act either on the original, or a Registrar's copy (*ante*, p. 1017), of a decree or order; but not upon a Report office copy thereof (*ante*, p. 1018), where he has begun to act upon the order or a Registrar's office copy, unless an affidavit is produced to him that the original or Registrar's office copy is lost, and cannot be found; nor will he act upon the minutes of an order, except under very special circumstances.
[11] Such as, a Taxing Master's or Chief Clerk's certificate, or an affidavit of apportionment, or of computation of interest, or of a party being alive.
[12] Thus, in preparing a direction to pay in purchase-money, the Accountant-General will not, as of course, take official cognizance of a direction in the order that the money when paid in is not to be dealt with without notice to the purchaser; but the order, or an office copy of it, must, in such case, be left with him for the express and avowed purpose of being registered as a Stop Order: *see ante*, p. 1696.
[1] The Chancery Funds Commissioners, in their report, pp. lii., liii., recommend that: (1.) Every decree or order directing the pay-

money, or any securities or other effects, are directed to be paid into or deposited in the Bank, with the privity of the Accountant-General, or to be paid out, or invested in the purchase of stocks, funds, or securities: or where any stocks, funds, or shares are directed to be transferred into the name and with the privity of the Accountant-General, or to be transferred out of Court, carried over, or delivered out: such sums of money, amount of stocks, funds, shares, or securities, or particulars of effects, must be ascertained by the Registrar, and specified in the decree or order, in words written at length: except in the case of residues or shares of residues of money or securities remaining after a portion directed to be applied for particular purposes, the amount of which cannot be ascertained at the time of making the decree or order: in which cases, the amount may be verified by affidavit, without any direction for that purpose in the decree or order, unless such residues or shares have been certified by the Taxing Master: who may certify the same without a direction for that purpose.[2]

Where, also, a residue of cash, stocks, funds, shares, or securities, is directed by any decree or order to be operated upon by the Accountant-General, the exact amount of such residue, where the same can be done, is (required by the Registrar) to be verified by affidavit, to be produced to the Registrar, and is to be expressed in the decree or order in words at length: so that the amount of such residue may appear on the face of the decree or order.[3]

All persons, whether representatives or others, by or to whom any payment or deposit in or transfer into Court, or any payment, delivery, or transfer out, is directed to be made, are (except in the case of bodies corporate, companies, or societies) to be described by name in the decree or order, and not merely as plaintiffs, petitioners, or the like: unless such payments, transfers, or deliveries, are directed to be made to or by representatives, and no probate or letters of administration have been taken out at the time of making the decree or order; *1785 and the Christian names and * surnames or titles of honor of all such persons, and the titles of all such bodies corporate, companies, and societies are to be written at length, and without abbreviations, in the decree or order.[1]

In all decrees or orders directing the payment of interest, dividends,

ment or transfer in, or carrying over, of any funds should have inserted in the body thereof the exact title of the fund, as the same is to be raised in the Accountant-General's books, and not describe the fund by reference to the title of the decree or order. (2.) Every decree or order dealing with a fund in Court should have inserted in the body thereof the title of the fund from the Accountant-General's voluntary certificate, and not describe the same by reference to the title of the order. (3.) In every decree or order dealing with a fund in Court containing the expressions "out of any other cash," and "out of any other Bank Annuities," the source from which the other funds are expected to come should be stated. (4.) In every decree or order directing the computation of interest, the day up to which such interest is to be computed should be named. It is understood that these recommendations are now generally acted upon by the Registrars, in drawing up decrees and orders.

[2] Ord. XXIII. 3; *ante*, p. 1005. For forms, see Seton, 58 *et seq.*

[3] Ord. XXIII. 4; *ante*, p. 1005. For forms, see Seton, 71, 72.

[1] Ord. XXIII. 5; *ante*, p. 1006. For forms, see Seton, 67, 68.

annuities, or other periodical payments, the time when the first of such payments, and when all subsequent periodical payments, are to be made, is to be expressed in words at length.[2]

Every draft, direction, or certificate, issued by the Accountant-General, contains either the whole title of the account to which it relates, or such an abbreviation of the title as can only belong to that particular account, in order that the Bank may enter the transaction properly in their books, and so that the balance of stock and cash on the various accounts in the books of the Chancery office at the Bank may correspond with those of the Accountant-General.[3]

Upon the completion of every operation by the Accountant-General, except that of paying money out of Court, the Accountant-General files, at the Report office, a certificate of such operation; and office copies of these certificates may be obtained from that office,[4] at the expiration of two clear days.[5]

At the request of the solicitor for a person interested, the Accountant-General issues a voluntary certificate, to inform the Court of the state of any account in his books. The certificate is bespoken by the solicitor, and is made out on the second day after bespeaking it: to give time for posting in the office ledger the various transactions of the day on which the certificate is bespoken. These certificates are signed by the Accountant-General's Chief Clerk.[6]

Negative certificates of the Accountant-General are sometimes wanted to prove that particular sums of stock or cash have not been transferred or paid into Court, within the time limited by the order directing the same. To obtain such a certificate, the order and such other papers as would be required on bespeaking a direction for the transfer or payment in must be left with the divisional clerk at the Accountant-General's office. The account * is then examined there; and if the *1786 time for doing the act has expired without its being done, a certificate to that effect is made out, and signed by the Accountant-General. Great care is required in preparing these certificates, as they are taken to be evidence of the fact which they certify, and are used by the proper officer of the Court as the foundation upon which to issue process of attachment.[1]

Transcripts of accounts are frequently required for the information of the solicitors and the Judges' Chief Clerks. Every suitor in each cause or matter is entitled to have furnished to him, in a transcript

[2] Ord. XXIII. 6; *ante*, p. 1006. For forms, see Seton, 205, No. 13.

[3] Rep. Chan. Funds Com. xvii. For the mode of entitling accounts, see Seton, 63; *Re* Jerrolds, 12 Beav. 201; *Re* Tillotson, 9 Hare Ap. 59; and see Salmon *v.* Anderson, 9 Beav. 445; Handley *v.* Metcalfe, *ib.* 456; Lapirmaudave *v.* Tessier, 12 Beav. 201; 14 Jur. 1040; Noble *v.* Stow, 20 Beav. 499. For a collection of forms of headings, see 12 Beav. 240, n.

[4] The charge of 4*d.* per folio: Regul. to Ord. Sched. 4.

[5] Rep. Chan. Funds Com. xviii. By Ord. 12 Feb., 1863, the duty of signing certificates of funds in Court, and of transfers recorded in the Accountant-General's books, is to be performed by the Accountant-General's Chief Clerk.

[6] Ord. 12 Feb., 1861; Rep. Chan. Funds Com. xviii., xxvi. For the form of a voluntary certificate, see *ib.* Ap. 42 J.

[1] Rep. Chan. Funds Com. xxvi.

book, a copy of the account in the books of the office relating to the funds in such cause or matter. The transcripts are taken principally from the office ledger, with such references to the journals as may be necessary to give a clear account of the various receipts and payments, and other transactions which have taken place with regard to the fund on the particular account to which the transcript relates, during the time it has been in Court. Searches will also be made, to supply solicitors with information upon subjects which the books in current use in the office do not enable the clerks to give.[2]

No money can be paid into Court to the credit of any cause or matter, with a few exceptions, without an order for that purpose: which either directs or permits the payment to be made.[3] Where it will be necessary to make future payments into Court, the order may be made prospective, so as to avoid the necessity of obtaining a new order on the occasion of every future payment.[4] The order having been obtained,[5] the solicitor takes it to the Accountant-General's office, and bespeaks a direction, addressed to the Bank, to receive the money mentioned in the order.[6] This direction is thereupon prepared and signed by the Accountant-General, and laid by to await the solicitor's application for it.[7]

*1787 It is usually * ready on the second day after it is bespoken.[1]

The direction and the money have then to be taken to the Bank. If the money is in bank-notes, the person who attends to pay in the money writes his name and address on the right-hand upper corner of one of the notes, and hands them to one of the cashiers in the Hall: who marks, cancels, and returns the notes to him. If there is any sum of cash beside the notes, it is paid in to one of the tellers at the counter in the Hall: who gives a ticket for the amount. The direction, with the cancelled notes and ticket, is then taken, by the person attending to pay in, to the General Cash Book office at the Bank, where a receipt is given: which must next be taken to one of the cashiers in the Hall, for his signature. The receipt so signed is then lodged in the Accountant-General's office, by or on behalf of the person who paid in the money;

[2] Rep. Chan. Funds Com. xxvi. The following are the only fees collected in the office of the Accountant-General, by Chancery fee-fund stamps: For preparing power of attorney with affidavit, exclusive of stamp of duty, 3*s.*; for every application for a search, 5*s.*; and for transcript of accounts, each opening consisting of debtor and creditor sides of the account, 2*s.*; Regul. to Ord. Sched. 4.

[3] Rep. Chan. Funds Com. xviii. The exceptions are confined to cases of payments in, under: (1.) The Legacy Duty Act (36 Geo. III. c. 52, § 32); (2.) The Parliamentary Deposit Act (9 & 10 Vic. c. 20); (3.) The Trustee Relief Act (10 & 11 Vic. c. 96); (4.) The Copyhold Enfranchisement Acts (4 & 5 Vic. c. 35; 15 & 16 Vic. c. 51); (5.) The Lands' Clauses Act (8 & 9 Vic. c. 18); and (6.) Private Estate Acts; see Rep. Chan. Funds Com. xix; Anon., 1 Ves. J. 56; Seton, 61; and see *post*, Chap. XLV., *Statutory Jurisdiction*.

[4] Seton, 62; Hutchinson *v.* Hutchinson, 9 Hare Ap. 84. For form of order in such case, see Seton, 59, No. 3.

[5] For forms of orders, see Seton, 58, 59.

[6] If the precise amount to be paid in cannot be ascertained at the time the order is made, the order points out the mode in which it is to be ascertained; as, by Chief Clerk's certificate, or affidavit; and in such case, the document by which the amount is ascertained must be left with the order, on bespeaking the direction. For form of affidavit, see Vol. III.

[7] For form of direction, see Rep. Chan. Funds Com. Ap. 40 (A. 1).

[1] It seems that, in a pressing case, the direction will be granted *instanter*. Foley *v.* Smith, 13 Beav. 113.

and the Accountant-General annexes to this receipt a certificate that the payment has been made pursuant to the order, and transmits the receipt and certificate to the Report office, to be there filed.[2]

Stock or securities cannot be transferred into or deposited in Court without a special order directing or permitting the same. In the case of stock, on the order[3] being taken by the solicitor to the Accountant-General's office, a transfer ticket is prepared, informing the Bank by whom and to what account, in trust, the transfer is to be made. After the ticket is signed by the Chief Clerk of the Accountant-General, it is sent, with the order and any other papers that may be required, to the division to which the account belongs, and a certificate is made out from the ticket. The ticket is then given to the solicitor, and by him taken to a stock-broker: who makes the necessary arrangements for transferring the stock into the name of the Accountant-General.[4] After the transfer has been made, the Accountant-General, on his next attendance at the Bank,[5] accepts the stock, and signs a notification, addressed to the Chief Accountant, informing him of the acceptance, and the particular account to which the stock is to be placed; and the clerk in the Transfer office signs a certificate of the transfer. This certificate is transmitted to the Accountant-General's office the same evening, and annexed to the certificate previously * made out there, and *1788 both are then filed at the Report office.[1] Where, however, the fund to be transferred into Court consists of stock of any company not transferable at the Bank, a declaration of trust is made in the company's books, and a certificate thereof is given to the Accountant-General by the proper officer of the company. The Accountant-General signs a notification addressed to the Chief Accountant of the Bank, containing the amount and description of the stock accepted, and the title of the account to which it is to be placed, and transmits such notification to the Bank Chancery office.[2]

Exchequer bills or bonds and India debentures are deposited in the Bank under directions issued by the Accountant-General; and are placed to the credit of the cause or matter mentioned in the direction. The process is similar to that employed in paying money into Court.[3]

Where any Exchequer bills, deposited in the Bank with the privity

[2] Rep. Chan. Funds Com. xviii. For form of certificate, see *ib.* Ap. 40 | A. 2. As to obtaining office copies of the receipt and certificate, see *ante*, p. 1785.

[3] For form of order for the transfer of stock, see Seton, 58, No. 2.

[4] A commission of 1*s.* 3*d.* per cent. paid by executors, on transferring stock into Court, to their broker for identifying them, was allowed on taxation. Davenport *v.* Powell, 14 Sim. 275; and see Jones *v.* Powell, 6 Beav. 488, 492.

[5] The Accountant-General attends at the Bank on Tuesdays and Fridays, to accept all stock transferred into his name, and sign his acceptance in the stock book. This acceptance is a declaration of trust that the stock is subject to the orders of the Court, in accordance with the 12 Geo. I. c. 32; and Ord. I. 14; Rep. Chan. Funds Com. xx.

[1] Rep. Chan. Funds Com. xix. For forms of ticket, certificate, and notification, see *ib.* Ap. 40 B. 1, 2, 3.

[2] Rep. Chan. Funds Com. xx.

[3] *Ibid.*; and *ante*, p. 1786. For forms of orders to deposit Exchequer bills, and for investment in Exchequer bills or bonds, see Seton, 59, Nos. 4–6.

of the Accountant-General, are in the course of payment, it is the duty of the Bank, without any further direction from the Accountant-General, to receive the interest due thereon, and to exchange the same for new bills in case new bills are issued, or otherwise to receive the principal and interest due on such of the bills as cannot be exchanged; and to pay the interest, or principal and interest (as the case may be) into the Bank, and to deposit the new bills in the Bank, to be there placed to the credit of the same cause, matter, or account, as that to which the former bills were placed; and after every exchange and receipt of interest, or principal and interest, the numbers, dates, and sums of the Exchequer bills exchanged or paid off, and the cause and account to which they were placed, and also the numbers, dates, and sums of the new bills taken in exchange, and the amount of the interest, or principal and interest (as the case may be) received, are to be certified forthwith by the Bank to the Accountant-General, without any direction from him for that purpose.[4]

Where, also, any money has been directed to be laid out by the Accountant-General in the purchase of Exchequer bills or bonds, or where any Exchequer bills or bonds have been deposited in the Bank, to the credit of any cause, matter, or account, any principal or interest, which may thereafter be received and paid into the Bank in respect of such bills or bonds, or of any bills or bonds to be purchased with *1789 principal or interest, or in respect of any exchanged * bills or bonds, are (unless otherwise directed), from time to time, as the same may be so received and paid into the Bank, to be laid out in the purchase of Exchequer bills or bonds with the privity of the Accountant-General; and such Exchequer bills or bonds, when so purchased, are to be deposited in the Bank with the like privity, and placed to the credit of the same cause, matter, or account, subject to the further order of the Court.[1]

Other effects, such as foreign securities and railway and dock bonds, are placed in a labelled box, in the presence of the solicitor of the parties interested; and the box is deposited in the Bank, under a direction issued by the Accountant-General.[2] A memorandum of the deposit is placed in the Accountant-General's books, and in the books at the Chancery office of the Bank, to the credit of the cause or matter mentioned in the direction. A receipt is given by the cashier of the Bank for the box, without reference to its contents, and a certificate of the Accountant-General to the same effect is annexed to the receipt; and both are filed at the Report office. If a box contains securities to which coupons are attached, the practice is to include in the order under which the box is deposited a direction that the box shall be from time to time

[4] Ord. 28 Aug., 1828; Prel. Ord. I. (3).

[1] Ord. I. 13. Where the amount to be invested is large, it is sometimes directed to be made in parcels of a certain amount. Seton, 65.

[2] For orders to deposit foreign securities, see Seton, 60, No. 7.

delivered out of Court to some person named in the order, to the intent that he may receive the interest; and when the interest becomes payable, it is necessary to bespeak from the Registrar a direction to the Bank to deliver the box out, and from the Accountant-General a direction to re-deposit it afterwards.[3]

A fund which has been paid into Court, or any other cash in Court, whether it has arisen from interest or dividends or otherwise, will not (unless it has been paid in under the Legacy Duty Act,[4] or the Trustee Relief Act),[5] be invested without an order of the Court directing the investment.[6] Usually, when the order for payment in is obtained, application is made by the plaintiff, or person interested in the money, that a direction may be inserted in the order for the investment of the money when paid in; and for the investment and accumulation of the future interest, if not otherwise to be disposed of. If the money has been paid in without an order of the Court, but by statute, or general order, or the general practice of the Court, an investment of it will not be made as of course, or if the order for payment in does not contain a direction for investment, a subsequent order for that purpose may be *obtained, on motion, or by summons at Chambers.[1] The *1790 notice of motion or summons must, in general, be served upon all the other parties to the suit or proceeding who are interested in the fund. Where an order has been made for investment, the Accountant-General will not act upon it until it has been left at his office, together with a request for such investment, signed by the party interested or his solicitor.[2] After an investment has once been made by the Accountant-General in pursuance of an order, he will, if the original request so desires, continue to make like investments of the interest or dividends and accumulations, without further request, until he receives notice of a decree or order to the contrary;[3] and, therefore, as soon as any order is made dealing with the interest, notice thereof should be given to him, in order that the further investment of the interest may be stayed.[4]

A sum of money paid into Court under the Legacy Duty Act,[5] will be invested without any order or request; and the subsequent interest and accumulations will also be invested, unless the Accountant-General receives, on behalf of some person claiming to be entitled, notice in writing of an intended application to the Court, or at Chambers, for disposing of the fund, or for otherwise applying the dividends thereof.[6]

[3] Rep. Chan. Funds Com. xx.; and see Seton, 66. For orders in such case, see *ib.* 60.

[4] 36 Geo. III. c. 52; and 37 Geo. III. c. 135.

[5] Ord. XLI. 3.

[6] See Seton, 64.

[1] Seton, 64. As to applications for investment of funds paid in under the statutory jurisdiction, see *post*, Chap. XLV. For forms of notice of motion and summons, see Vol. III.

[2] Seton, 64.

[3] Ord. I. 12. The smallest sum usually invested by the Accountant-General is 3*l.* 10*s.*; Rep. Chan. Funds Com. Ap. 35; Seton, 64.

[4] Seton, 64.

[5] 36 Geo. III. c. 52; 37 Geo. III. c. 135; *post*, Chap. XLV., *Statutory Jurisdiction (Legacy Duty Act)*.

[6] Ord. I. 11.

If the fund has been paid in under the Trustee Relief Act,[7] it will be invested, and the dividends invested and accumulated, unless the affidavit made by the trustee, on the payment in, contains a statement that the investment is unnecessary; but if, at any time, a request in writing by or on behalf of any party claiming to be entitled is left with the Accountant-General, he is at liberty to cease making any further investment until the Court has made some order in that behalf.[8]

Cash under the control of the Court was formerly, as a general rule, only invested in Consols.[9] It might, however, under special circumstances, as where an annuity had to be paid quarterly out of it, be ordered to be invested in other Government Stocks;[10] but now, it may be invested in Bank Stock, East India Stock, Exchequer bills, or 2*l.* 10*s.* per cent Annuities, or upon mortgage of freehold or copyhold
*1791 estates respectively in England or Wales,[11] as * well as in Consolidated 3*l.* per cent Annuities, Reduced 3*l.* per cent Annuities, or New 3*l.* per cent Annuities; and the Court may make such orders as may be necessary for the conversion of any 3*l.* per cent Bank Annuities standing in the name of the Accountant-General into any of such last-mentioned stocks.[1]

It is discretionary with the Court whether it will direct a fund under its control to be invested in any other security than Consols; and, in the absence of any special circumstances which will make such an investment desirable, it ought not to be directed. The Court, therefore, refused an application for the conversion of a fund, which was invested in Consols, into East India Stock, where the effect would be to increase the income of the tenant for life: which was already ample; and there was no suggestion of any advantage to the person interested in remainder (the children of the tenant for life) from the proposed change.[2] The investment will, however, be changed, whenever the income arising from the fund in its present state of investment is not sufficient to answer its primary purpose.[3] An investment in Bank Stock has been directed on the application of the tenant for life;[4] and where the fund had been settled by the applicant with a partial power of revocation, an investment in East India Stock was allowed.[5] The Court has refused

[7] 10 & 11 Vic. c. 96; 12 & 13 Vic. c. 74; *post*, Chap. XLV., *Statutory Jurisdiction* (*Trustee Relief Acts*).

[8] Ord. XLI. 3.

[9] Darwin *v.* Darwin, 17 Jur. 781, V. C. W.; Butler *v.* Withers, 1 J. & H. 332.

[10] Darwin *v.* Darwin, *ubi sup.*; Hanson *v.* Murray, 1 Jur. N. S. 917, V. C. W.

[11] As to investing on mortgage of estates, see *ante*, pp. 1339–1342.

[1] 23 & 24 Vic. c. 38, § 10; Ord. 1 Feb., 1861, r. 1. As to investing in Exchequer bills, see Ord. 28 Aug., 1828; Ord. I. 13; and *ante*, p. 1788.

[2] Cockburn *v.* Peel, 3 De G., F. & J. 170; 7 Jur. N. S. 810.

[3] Mortimer *v.* Picton, 10 Jur. N. S. 83; 12 W. R. 292, L. C.; Fluid *v.* Fluid, 7 L. T. N. S. 590, V. C. K.; and see Vidler *v.* Parrott, 12 W. R. 976, V. C. K.

[4] Cohen *v.* Waley, 7 Jur. N. S. 937; 9 W. R. 137, V. C. S.; Bishop *v.* Bishop, 9 W. R. 549, V. C. K.; *Re* Langford, 2 J. & H. 458; 8 Jur. N. S. 114. Where the applicant is very poor, the Court will dispense with the provision in the order preventing three dividends being received in one year. *Re* Ingram, 11 W. R. 930, V. C. K.

[5] Equitable Reversionary Interest Society *v.* Fuller, 1 J. & H. 379; 7 Jur. N. S. 307.

to direct an investment in the India Stock created under the 22 & 23 Vic. c. 39.[6] The Act does not apply where the settlor has invested the trust fund in Bank Annuities, and the trustees have no power, independently of the Act, to vary investments.[7]

The application for a conversion of Bank Annuities into other funds or securities is made by petition: which must be served on the trustees (if any) of the fund, and upon such other persons, if any, as the Court thinks fit.[8] Where it sanctions an investment in real security, liberty to apply at Chambers will be given.[9]

The dividends and interest of the several stocks, and other securities in Court, are received by the Bank, as they become due, under a power of attorney from the Accountant-General, and placed to the credit of the causes and accounts to which they respectively * belong. The Bank sends quarterly to the Accountant-General's *1792 office a book called the dividend book, signed by an officer of the Bank: which book contains the amount of the securities and interest moneys belonging to each cause and account, and is countersigned by the Accountant-General, and entered and filed at the Report office.

In the case of an order directing the investment of cash in Court in the purchase of stock, the order is taken to the Accountant-General's office, with a written request, signed by the solicitor, stating the amount of cash to be invested, the account to which it stands, the description of stock to be bought, and the title of the account to which it is to be placed.[1] The request is then examined; and the amount of cash, the description of stock, and the account to which it is to be placed, are written down in a paper of commissions for the broker to execute. A draft is then drawn, intituled in the account on which the cash stands, and made payable to the broker on his causing the stock to be transferred to the Accountant-General's account, in trust in the account to which the stock is to be placed. The commission paper is handed to the broker the next morning, and in the afternoon he sends up a contract note for the next stock day. The draft for the purchase-money is then filled up, and signed by the Accountant-General. The draft and the order are taken to the Registrar, or Master of Reports,[2] in attendance in the signing room: who countersigns the draft, and puts his initials in the margin of the order if it is an investment of principal money. The contract note is taken to the Chief Clerk of the Accountant-General, and the title of the account, and the amount and description of stock, are entered upon a list: which is a notification, addressed to the Chief Accountant of the Bank, of the several amounts of stock

[6] *Re* Colne Valley & Halstead Railway, 1 De G., F. & J. 54; 5 Jur. N. S. 1123, V. C. W.; *Re* Fromow, 8 W. R. 272, V. C. S.

[7] *Re* Wardle, 2 J. & H. 191.

[8] 23 & 24 Vic. c. 38, § 10; Ord. 1 Feb., 1861, r. 2.

[9] Ungless *v.* Tuff, 9 W. R. 729, M. R. As to investing on real security, see *ante*, pp. 1339-1342.

[1] For form of request, see Rep. Chan. Funds Com. Ap. 41 (D. 1).

[2] See 15 & 16 Vic. c. 87, §§ 34, 36; 18 & 19 Vic. c. 134, §§ 5, 9; Ord. 27 July, 1852; Prel. Ord. I. (3).

accepted arising from purchases.[3] The Accountant-General afterwards attends at the Transfer office of the Bank, and signs an acceptance of the stock. When all the amounts entered on the list are accepted, the list is signed by the Accountant-General, and taken to the Bank Chancery office, and forms the authority there for crediting the various accounts with the amounts of stock accepted. The draft for the purchase-money is taken by the broker to the Bank Chancery office for examination, and initialed there, and cashed at the General Cash Book office, on production of the stock receipt. A certificate of the stock having been transferred to the Accountant-General is sent to his office, and another certificate containing full particulars of the pur-
*1793 chase is annexed to it. The latter certificate is signed, * after it has been examined with the broker's note, and both are filed at the Report office. Other securities are purchased in a similar manner.[1]

The order for the payment of money, transfer of stock, or delivery of effects into Court, ought to state a time within which it is to be complied with.[2] If such a direction be omitted, the decree is not thereby rendered ineffectual, but the Court will, upon motion for that purpose, fix a time for the performance of the act.[3] The order having been duly passed and entered, a copy thereof, duly indorsed,[4] must be personally served upon the party required to do the act; and where, as we have seen, the decree or order names a specific day for doing the act, and does not merely limit a time after service for that purpose, it must be served before the day named;[5] or, if the service cannot be effected before that day, an application must be made, by special motion or summons, for an order enlarging the time, or fixing a new period where the time appointed has expired.[6] A copy of such supplemental order must be indorsed and served, in like manner as in the case of an original order.[7] At the expiration of the time limited, the person prosecuting the decree or order is entitled to a writ or writs of attachment against the disobedient person:[8] which will be issued by the Record and Writ Clerk, upon his being satisfied by affidavit of the due service of the decree or order, and by the Accountant-General's negative certificate,[9] that it has not been obeyed.[10]

[3] For form of notification, see Rep. Chan. Funds Com. Ap. 41 (D. 2).

[1] Rep. Chan. Funds Com. xxi. For form of the Accountant-General's certificate, see *ib.* Ap. 41 (D. 3). As to obtaining office copies, see *ante*, p. 1785.

[2] Ord. XXIII. 10; *ante*, p. 1004. For forms, see Seton, 58, Nos. 1, 2.

[3] Needham *v.* Needham, 1 Hare, 633; Morley *v.* Clavering, 30 Beav. 108; *ante*, p. 1044.

[4] Ord. XXIII. 10; *ante*, p. 1043.

[5] Duffield *v.* Elwes, 2 Beav. 268; Braithwaite's Pr. 166; *ante*, p. 1044; and see Adkins *v.* Bliss, 2 De G. & J. 286; 4 Jur. N. S. 1162; *ante*, p. 1044.

[6] For forms of notice of motion and summons, see Vol. III.

[7] Braithwaite's Pr. 135, 167; and see Adkins *v.* Bliss, *ubi sup.* As to the indorsement in the case of a peer, M. P., or corporation aggregate, and as to the mode of service, and obtaining an order for substitutional service, or further time to obey the decree or order, see *ante*, pp. 1043–1045.

[8] Ord. XXIX. 3. As to the process in the case of a privileged person or corporation, see *ante*, pp. 1066, 1067 *et seq.*; and as to writs of *fieri facias* and *elegit*, see *ante*, pp. 1063 *et seq.*

[9] *Ante*, p. 1785.

[10] For the mode of issuing and executing an attachment, see *ante*, pp. 1046 *et seq.*; and for forms of affidavit, attachment, *præcipe*, and Indorsement, see Vol. III.

Where the order for payment, delivery, or transfer is not intended to be compulsory, liberty is thereby given to the person named to do the act;[11] and it is not essential that a time should be limited within which the act is to be done.

[11] Seton, 61.

*1794 * CHAPTER XLI.

PAYMENT OF MONEY AND TRANSFER OF STOCK OUT OF COURT.

When money has been paid, stock transferred, or specific articles deposited in Court, the decree or order at the original hearing, or upon the further consideration of the cause or matter, frequently provides for the payment, transfer, or delivery of the same to the parties then entitled thereto. It, however, often happens that the rights of the parties to the effects in Court, at the time when the decree or order is made, are not such as to enable the Court then to make an order for absolute payment, transfer, or delivery to them. Under such circumstances, where it appears that a certain proportion of the fund in Court, or a precise sum, belongs to any particular party or set of parties, and there is any incumbrance affecting such share, or the interest in it is delayed until the happening of some event: as, for instance, till the party attains the age of twenty-one, or till the death of a previous tenant for life: the Court will, on the hearing, order the share to be carried over in trust in the cause or matter, to a separate account: liberty to apply being, at the same time, given to the parties.[1] The effect of carrying over a fund to a separate account is to release it from the general questions in the cause; and to mark it as being subject only to the questions arising upon the particular matter referred to in the heading of the separate account, so that, in all subsequent dealings with the fund, those parties only need be served who are interested in it. Care must, therefore, be taken in the heading of the account: as from it the Court sees to what extent the fund has been severed from the questions in the cause.[2] The mere carrying over of a fund to the separate account of any person is not, however, equivalent to a decree declaring such party to be absolutely entitled. Any error may, therefore, be corrected by an original bill; and it is not necessary to
*1795 file a * bill of review, nor to have the decree or order directing the carrying over reheard.[1] If the fund has not been dealt with

[1] *Ante*, p. 996.

[2] *Re* Jervoise, 12 Beav. 209; and see Salmon *v.* Anderson, 9 Beav. 445; Handley *v.* Metcalfe, *ib.* 495; Laprimaudaye *v.* Teissier, 12 Beav. 206; *Re* Tillstone, 9 Hare Ap. 59; Noble *v.* Stow, 29 Beav. 409; Seton, 63; see *Ex parte* Van Vorst, 1 Green Ch. 292. For a collection of forms of headings, see 12 Beav. 210, n.

[1] Noble *v.* Stow, 29 Beav. 409; *ante*, p. 1579; and see *Ex parte* Breach, 10 Jur. N. S. 982; 12 W. R. 769, M. R.; and Sheppard *v.* Sheppard, 33 Beav. 129.

for many years, the Court will not order it to be paid out to the personal representative of the person in whose name it is standing, in the absence of the persons beneficially interested;[2] and where the fund has passed by the will of the person entitled to it, it will not be paid out to the legatee, in the absence of the personal representative of the testator.[3]

There are some cases in which, although the interest of a party in the fund is not absolute but subject to a contingency, the Court has not directed the fund to be carried to a separate account, but has ordered it to be paid out at once: the contingency being remote, and the parties receiving the money entering into a recognizance to refund it, in the event of the happening of the contingency. This was done in the case of *Leng* v. *Hodges*,[4] where the right of the parties was subject to the contingency of a female who was then of the age of sixty-nine years having children; and in the case of *Brown* v. *Pringle*,[5] a legacy to a woman for life, with remainder to her children, was paid out of Court on the petition of the mother and children, the children having attained twenty-one, and the mother being sixty-six years of age. In this case, the fund being small, and the contingency remote, Sir James Wigram V. C. only ordered the parties to undertake to account for it as the Court should direct, in case of other children being born; and no recognizances were entered into; and where the contingency was very remote, the fund has been paid out, without even an undertaking to account for it.[6]

Another instance in which the Court used to order money to be carried over to a separate account, occurred when the party entitled to it was a married woman. In such a case, the practice was, notwithstanding her interest in the fund was immediate, for the Court on decree, not to order payment at once, but to direct that the fund be carried to the account of her and her husband.[7] * After the fund *1796 had been thus transferred, a petition was presented by the husband and wife, or such a petition was brought on together with the cause on further directions. The present practice, however, is different, and has been stated in a former part of this work.[1]

Stock or cash in Court is carried over from one account to another,

[2] Edwards *v.* Harvey, 9 Jur. N. S. 453; 11 W. R. 330, M. R.; and see Loy *v.* Duckett, C. & P. 305.

[3] *Re* Acker, 11 W. R. 182, V. C. S.

[4] Jac. 585; see also Fraser *v.* Fraser, *ib.* 586, n.; where the lady was fifty-five and unmarried; Delfis *v.* Goldschmidt, 19 Ves. 566; Payne *v.* Long, cited *ib.* 571; Webber *v.* Webber, 1 S. & S. 311; Lyddon *v.* Ellison, 19 Beav. 565; Edwards *v.* Tuck, 23 Beav. 268; Kennedy *v.* Sedgwick, 3 K. & J. 540; Vidler *v.* Parrott, 12 W. R. 976, V. C. K. But it seems that the Court will not treat a woman as past the age of childbearing until she is fifty; although positive medical evidence that she is past childbearing is adduced. Groves *v.* Groves, 12 W. R. 45, V. C. W.; Haynes *v.* Haynes, 1 W. N. 67; 14 W. R. 361, V. C. K. [See Read *v.* Fite, 8 Humph. 328; Croxton *v.* May, 9 Ch. Div. 388.]

[5] 4 Hare, 124. As to payment out, on presumption of death, see Dowley *v.* Winfield, 14 Sim. 277; Cuthbert *v.* Purrier, 2 Phil. 199; Lamb *v.* Orton, 6 Jur. N. S. 61; 8 W. R. 111, V. C. K.; Dunn *v.* Snowden, 2 Dr. & Sm. 201; Thomas *v.* Thomas, 2 Dr. & Sm. 208; [*Re* Benham, L. R. 4 Eq. 416; *Re* Beasley, L. R. 7 Eq. 498; *Re* Phene, L. R. 5 Ch. App. 139; *Re* Lewes, L. R. 14 Eq. 236].

[6] Miles *v.* Knight, 12 Jur. 666, V. C. E.

[7] Campbell *v.* Harding, 6 Sim. 283.

[1] *Ante*, pp. 92-99, 1574.

under the authority of an order of the Court.[2] The order is taken to the Accountant-General's office by the solicitor: who bespeaks the carrying over. A written request is not necessary, although it is frequently given, and there is a special fee allowed to the solicitor for it.[3] The Accountant-General signs a direction to the Bank to carry over the stock or cash mentioned in the order.[4] As soon as the carrying over has been completed, the Bank sends a certificate thereof to the Accountant-General: who makes a similar carrying over in his ledgers; and signs another certificate that such carrying over has been effected. This certificate is annexed to the Bank certificate, and both are filed at the Report office.[5]

Formerly, whenever a fund had been carried to a separate account, and the title to it was clear, an order for payment might have been obtained by motion;[6] but now, the application should be made by petition:[7] unless the fund is small,[8] or the application is for payment of the dividends or interest of any stock, funds, or securities standing to the credit of any cause or matter depending to the separate account of the applicant: in which cases it may be made by summons.[9]

The petition or summons must be served on all the persons appearing by the heading of the account to be interested therein.[10] In the case, however, of applications where the persons interested were numerous, and, under the circumstances, it must be supposed that they *1797 would be informed of what had been done, service upon * all has been dispensed with.[1] Where a fund bequeathed to one for life, with remainder to a class, the members of which, as well as their shares, had been ascertained by the Master, had been carried to a separate account, the Court, on petition presented after the death of the tenant for life, directed the transfer of one-ninth of the fund to the person who appeared by the Master's Report to be entitled to it, without service of the petition on the persons entitled to the other eight-ninths.[2] If, in consequence of the heading of an account, a person is properly served with notice of the application, but the Court considers

[2] For forms of orders directing the carrying over of stock and cash, see Seton, 70.

[3] The fee is 2*s.* 6*d.* by each scale. Regul. to Ord. Sched. 2. For form of request, see Vol. III.

[4] For form of direction, see Rep. Chan. Funds Com. Ap. 41 (C. 1).

[5] *Ib.* xx. For form of the Accountant-General's certificate, see *ib.* Ap. 41 (C. 2). As to obtaining office copies of the certificates, see *ante*, p. 1785.

[6] Heathcote *v.* Edwards, Jac. 504. Where money is placed in the hands of the Receiver pending the litigation, the Court may, on the decision of the cause, direct its application on motion. Bank of Mobile *v.* Planters' & Merchants' Bank, 1 Ala. 109.

[7] Garratt *v.* Niblock, 5 Beav. 143; Blind School *v.* Goven, 21 L. J. Ch. 144, V. C. Ld. C.; Joad *v.* Ripley, 3 Jur. N. S. 432, V. C. S.; but see Oliver *v.* Burt, 1 Beav. 583; Linford *v.* Cooke, 6 W. R. 5, V. C. K.; see *Ex parte* Van Voorst, 1 Green Ch. 292. For the practice on applications for payment out of funds paid in under the Statutory Jurisdiction, see *post*, Chap. XLV.

[8] Seton, 157; Petty *v.* Petty, 12 Beav. 170; and Winkworth *v.* Winkworth, 32 Beav. 233; 9 Jur. N. S. 61, where leave was given to make future applications at Chambers.

[9] Ord. XXXV. 1 (1). If the application is for the payment of arrears of dividends exceeding 300*l.*, it must be by petition. Joad *v.* Ripley, 3 Jur. N. S. 432, V. C. S. This rule, however, is not adhered to.

[10] Seton, 63; Dallimore *v.* Ogilby, 16 Jur. 443, V. C. K.

[1] *Re* Hodges, 6 W. R. 487, V. C. K.; see also *Re* Midland Railway Company, 11 Jur. 1095, M. R.

[2] Lambert *v.* Newark, 3 De G. & S. 405.

his appearance unnecessary, he may be disallowed his costs.[3] Where the person to whose account the fund has been carried has assigned his interest, he must, generally, be served with notice of any application by the assignee;[4] and if the assignment is disputed, the Court will refuse to order the fund to be paid without a suit to determine the rights of the parties being instituted.[5] If the fund belongs to a charity, the consent of the Charity Commissioners must be obtained.[6]

Unless, upon the hearing of the application, the title of the applicant to the immediate payment of the fund is made clear by the Chief Clerk's certificate, or by the previous orders of the Court, it must be supported by evidence of all the facts necessary to establish the title. The same mode of proof is necessary as that required to prove similar facts upon other occasions. Applications should also be made to the Accountant-General for a certificate of the amount of the fund sought to be affected, as well for the purpose of stating correctly the description of the fund, as also for the sake of ascertaining whether the fund is affected by any stop order;[7] and this certificate must be left with the Registrar when the order is bespoken.[8]

If the applicant is one of a class among which the fund is divisible, he should also ask that the shares of the others may be carried to their separate accounts, in order to save expense on the occasion of future applications.[9]

* A prospective order for the payment of interest on funds to *1798
be subsequently paid into Court may be made;[1] but the Court has refused to make any order dealing prospectively with the purchase-money of an estate contracted to be sold, but not paid for.[2]

The Court will not, in general, order payment out of the principal or interest of a fund except on the responsibility of the executors, until it has ascertained, by taking the accounts, that the fund is clear.[3]

Where any person is absolutely entitled to the fund, the Court will not, as a general rule, permit the fund to remain in Court, and make an order directing payment of the interest only;[4] but the Court will not direct a trust fund to be paid out to a sole trustee, except on the con-

[3] *Re* Justices of Coventry, 19 Beav. 158.

[4] Briant *v.* Dennett, 4 Drew. 550; 5 Jur. N. S. 563.

[5] Wastell *v.* Leslie, 15 Sim. 453, n.; Thorndike *v.* Hunt, 3 De G. & J. 563; 5 Jur. N. S. 879.

[6] *Re* Faversham Charities, 10 W. R. 291, V. C. W.; and *post*, Chap. XLV., *Statutory Jurisdiction (Charity Acts)*.

[7] As to stop orders, see *ante*, pp. 1694 *et seq.*

[8] Reg. Regul. 15 March, 1860, r. 16; *ante*, p. 1699. In all cases of special applications for orders to pay out money brought into Court, the party applying must produce the certificate of the Registrar or clerk, with whom the money was deposited, showing the amount of the fund, and the way in which it is invested, and the claims, if any, which have been made thereon, so that an order may be entered to enable the applicant to obtain the fund. Hulbert *v.* McKay, 8 Paige, 652.

[9] *Re* Hawke, 18 Jur. 33, V. C. K.; see also *Re* Tillstone, 9 Hare Ap. 59.

[1] *Re* Chamberlain, 22 Beav. 286.

[2] *Re* Bowes, 12 W. R. 569, V. C. K.

[3] Ably *v.* Gilford, 11 Beav. 28; see also Digby *v.* Boycott, 4 Hare, 444; Knight *v.* Knight, 16 Beav. 358; *Re* Wright, 15 Beav. 367; see 15 & 16 Vic. c. 86, § 57. [And see, as to provision for keeping down annuity out of income and capital: Lambie *v.* Lambie, 9 Hare Ap. 84.]

[4] Isaac *v.* Gompertz, 1 Ves. J. 44.

sent of parties beneficially interested;[5] and where the person entitled was deaf, dumb, and blind, the Court declined to order a transfer of stock into such person's name, but directed the interest to be paid to two persons for the benefit of such person: they undertaking so to apply it, and to account as the Court should direct.[6] Where an infant domiciled in Prussia was, under the limitations of her mother's marriage settlement, entitled to a sum of 2000*l.*, the Court ordered it to be paid to her father: there being no trustees of the settlement, and it being proved that, according to Prussian Law, he was entitled, in the capacity of her guardian, to receive and administer, during her minority, the property coming to her under the settlement.[7]

Where an order is made, on an application in an administration suit, for the payment of income to a tenant for life, the costs of all parties must be paid out of the income.[8] The sum of 10*l.* (without taxation) is usually allowed by the Master of the Rolls for the costs of a petition for the payment out of Court of a fund standing to a separate account, and in which no one but the petitioner is interested.[9]

A considerable interval of time frequently occurs, after the hearing of a cause, before any person acquires such an interest in the fund in Court as to be entitled to obtain an order for payment. In many cases, *1799 therefore, when the period arrives, the cause will * have become abated. It seems clear, however, that the mere abatement of the suit will not be considered a reason for refusing to pay money out of Court to persons whose rights to the money arise out of the decree.[1] Thus, in *Roundell* v. *Currer*,[2] where the fund had been carried to the separate account of the plaintiff, and after his death a petition was presented by his personal representative for payment of the fund, his right to which was clear, but there was a doubt whether an order could be made in a cause after an entire abatement by the death of the plaintiff, Lord Eldon, after consideration, made the order. In *Legard* v. *Hodges*,[3] a petition was presented in a very old cause,[4] and from the title of the petition it appeared that all the plaintiffs and defendants were then dead. By the decree, liberty to apply had been reserved upon the death of a certain tenant for life: whose death gave the petitioner a right to the fund. Notwithstanding the complete abatement of the cause, Sir Lancelot Shadwell V. C., in the first instance, directed an inquiry, and afterwards made an order for the payment of the fund out of Court.

[5] *Re* Roberts, 7 Jur. N. S. 818; 9 W. R. 758, V. C. K.; Grant *v.* Grant, 6 N. R. 347, M. R.

[6] *Re* Biddulph, 5 De G. & S. 469.

[7] *Re* Brown, 13 W. R. 677, V. C. W.; but see *Re* Hellman, L. R. 2 Eq. 363, M. R., where the fund was ordered to be retained in Court until the infant attained his majority, either by English law or the law of his domicile, whichever should happen first.

[8] Eady *v.* Watson, 33 Beav. 481; 10 Jur. N. S. 982; *secus*, in applications under the Trustee Relief Acts; see *post*, Chap. XLV., *Statutory Jurisdiction* (*Trustee Relief Acts*).

[9] Gover *v.* Stilwell, 21 Beav. 182; Seton, 94; Morgan & Davey, 46.

[1] Finch *v.* Lord Winchelsea, 1 Eq. Ca. Ab. 2, pl. 7; and see *ante*, p. 1544.

[2] 6 Ves. 250; see also Lord Shipbrooke *v.* Lord Hinchingbrook, 13 Ves. 387; Beard *v.* Earl of Powis, 2 Ves. S. 399.

[3] V. C. of England, 26 July, 1844, *ex relatione* Mr. Tripp.

[4] Reported on the hearing, 4 Bro. C. C. 421.

The mere dismissal of the bill also is not a reason for refusing to pay the fund out of Court to the persons entitled;[5] and where a sum has been paid into Court by the plaintiff, to abide the result of certain proceedings at Law sought to be restrained by the suit, it will not be kept in Court, after the dismissal of the bill with costs, for the purpose of answering the defendant's costs.[6]

Where there are several persons entitled for life in succession to a fund in Court, the Court usually directs the interest to be paid to the first tenant during his life, and a further order must be obtained on his death;[7] but where a husband and his wife are so entitled, payment will be directed to them in succession, and the payment will be continued to the survivor, on proof by affidavit to the Accountant-General of the death of the other.[8]

In the case, also, of a corporation sole, the interest will be ordered to be paid to the holder of the office for the time being.[9]

Payment of interest will also be directed to the trustees of charities and their successors; and if trustees are more than two in number it will be directed to be paid to them, or any two of * them;[1] *1800 and if there are two only, it will be ordered to be paid to them or either of them;[2] and this is a convenient form of order: for, if the whole number of trustees join in a power of attorney, the Accountant-General will pay, upon proof that any two are living: whereas, if the order directs the payment to be made to the trustees and the survivors or survivor of them, the death of any who may have died since the last payment, and the survivorship of the rest, must be proved, before payment will be made.[3]

A fund payable to the Crown will be ordered to be paid to such persons as the sovereign may, by sign-manual, appoint.[4]

A fund payable to a married woman, as the personal representative of a deceased person, will be directed to be paid to her as such personal representative; but her husband will be required also to sign the Accountant-General's book.[5]

A fund belonging to a corporation aggregate will be ordered to be paid to any person named in the petition, if the petition is sealed with the common seal; and no power of attorney or verification of the seal

[5] Wright v. Mitchell, 18 Ves. 293; Taylor v. Waters, 1 M. & C. 266, 271.

[6] Flockton v. Peake, 12 W. R. 789, V. C. W.

[7] Seton, 70; but see *Re* Brent, 8 W. R. 270, M. R., where the order was extended to a successive tenant for life.

[8] *Re* How, 15 Jur. 266, V. C. K. B.

[9] Seton, 70. For form of order, see *ib.* 68, No. 3; see also Attorney-General v. Brandreth, 1 Y. & C. C. C. 200, 203; *Ex parte* Archbishop of Canterbury, 2 De G. & S. 365; Attorney-General v. Vint, 3 De G. & S. 704; *Re* Pearce, 24 Beav. 491.

[1] Attorney-General v. Brickdale, 8 Beav. 223.

[2] *Re* Clinton, 6 Jur. N. S. 601; 8 W. R. 492, V. C. W.

[3] Seton, 69; and see Jefferys v. Smith, 11 W. R. 479, V. C. K., *Re* Clinton, *ubi sup.*; Bradford v. Nettleship, 10 W. R. 264, V. C. S., where mortgage money was, on their petition, directed to be paid out of Court to the mortgagees or one of them, though trustees only of the fund. For form of order, see Seton, 67, No. 2; and see *Ex parte* Shrewsbury Hospital, 9 Hare Ap. 45.

[4] Tomkins v. Lane, 2 W. R. 340, V. C. S.

[5] Seton, 662; see *post*, p. 1806.

is necessary.[6] If there is any officer of the corporation to whom the fund is properly payable, it will be ordered to be paid to such officer for the time being, on proof by affidavit that he sustains that character.[7]

As a general rule, the Court will not make an order for the payment out of a fund to any other person than the person or persons entitled thereto. Where, however, the fund is small in amount, or has to be divided amongst so many that the share of each would be small, and consequently the expense attendant upon each separate receipt would be important, the Court will order payment to the solicitor having the conduct of the proceedings,[8] or to one of the parties, upon his undertaking to distribute the fund among the persons entitled;[9] but a written authority, signed by the persons interested, must be produced stating that they consent to the fund being so paid;[10] and the signatures *1801 to * the authority should be verified by affidavit.[1] In the case of persons out of the jurisdiction, this last requirement has, however, been dispensed with.[2] If the amount payable to each person exceeds 10*l.*, such an order will be refused, except under very special circumstances.[3]

Where a regular power of attorney, authorizing a particular person specifically to receive the fund in question, has been duly executed, the Court will, however large the amount, upon proof of the due execution of the power, and that the same is still in force, order payment to the person so authorized.[4] In such a case, perhaps, strictly, the application ought to be by the attorney, as well as by the party.[5]

[6] *Ex parte* London and Chatham Railway Company, 8 W. R. 636, V. C. W.; *Re* Dartmouth & Torbay Railway Company, 9 W. R. 609, V. C. K.; Seton, 1074.

[7] Seton, 70. For form of order, see *ib.* 68, No. 5.

[8] Where the fund was clear, and the rights of the respective parties ascertained, the Court directed, pending the account, a part of the money to be paid to the solicitor of infant plaintiffs, towards further defraying the past and future expenses of the suit, and the interest on the residue of the portion coming to such infants, to be paid, as it accrued, to their mother, for their necessary maintenance and education. Meth. Epis. Church *v.* Jaques, 3 John. Ch. 1.

[9] For form of order, see Seton, 142, No. 4.

[10] Brandling *v.* Humble, Jac. 48; Kelsall *v.* Minton, 2 Beav. 361; Armstrong *v.* Stockham, 11 Jur. 97, V. C. K. B.; Bear *v.* Smith, 5 De G. & S. 92; Anon., 5 Jur. N. S. 385, V. C. W.; Thomas *v.* Jones, 1 Dr. & Sm. 134; Rep. Chan. Funds Com. xxv.; but see Mansfield *v.* Green, 1 W. N. 220, M. R., where consent was not required. The amount appears to have been limited to 10*l.* so as not to interfere with the stamp duties on powers of attorney. See Brandling *v.* Humble, *ubi sup.*; Seton, 145. The duty has recently been much reduced; see *post*, p. 1810, n. (1).

[1] Downing *v.* Picken, Kay Ap. 1.

[2] Staines *v.* Giffard, 20 Beav. 484. Where a fund only amounted to 35*l.*, the Court, on the solicitor personally undertaking duly to apply it, dispensed with the verification of the signature of a foreign notary, before whom an affidavit had been sworn abroad. Mayne *v.* Butter, 13 W. R. 128, V. C. K.; and see *ante*, p. 892.

[3] Brandling *v.* Humble, *ubi sup.*; Hawkins *v.* Dod, 1 Hare, 146; *Re* Morrison, 15 Sim. 42; 11 Jur. 984; Middleton *v.* Younger, 17 Jur. 664, V. C. W.

[4] Hill *v.* Chapman, 11 Ves. 239; Bailey *v.* Collett, 18 Beav. 179; *Ex parte* De Beaumont, 13 Jur. 354, V. C. E.: see also Kiddill *v.* Farnell, 3 Sm. & G. 428; 3 Jur. N. S. 786; and 22 & 23 Vic. c. 35, § 26. For a case where payment was ordered to a person holding a general power of attorney, see Carr *v.* Eastabrook, 2 Cox, 390. For necessary evidence, when the affidavits are sworn abroad, see *ante*, pp. 892, 893; Seton, 20. As to verification of a power when executed abroad, see *Re* Gass, Liddall *v.* Nicholson, 1 W. N. 256; 12 Jur. N. S. 595, V. C. W.

[5] Fell *v.* Jones, 17 Beav. 521; Hill *v.* Chapman, 11 Ves. 239. Money may, upon the production of the proper vouchers, be paid out of Court to the attorney in fact of the party. Hoge *v.* Penn, 1 Bland, 40. But it will not be paid out to a guardian *ad litem* of an infant party. Corrie *v.* Clarke, 1 Bland, 35. After a sale to effect a division,

A general written authority by a party out of the jurisdiction, to a solicitor in England, to take any proceedings in a suit in Chancery that might become necessary for obtaining, out of Court, his share of the fund in the suit, was held not to entitle the solicitor to apply by petition for payment of the share to him;[6] but a general written authority, by a foreigner and his wife resident abroad, to a solicitor in this country, to take all necessary measures for obtaining payment to the wife of a legacy, which had been paid into Court under the Legacy Duty Act, was held, upon the petition of the husband and wife, to authorize payment to the solicitor.[7]

The Lord Chancellor is authorized to empower, in any case, the Accountant-General to act upon a power of attorney granted by any person to whom any sum may have been ordered to be paid, *authorizing the attorney to receive, not only such sum, but *1802 also any further or other sums which may thereafter be ordered to be paid to such person, out of any fund then or thereafter standing to the credit of the same cause or matter, or any cause or matter connected therewith;[1] but no general order has been issued by the Lord Chancellor to carry this enactment into effect; and consequently, if dividends on a larger amount of stock than that mentioned in the power, or any additional sum, are ordered to be paid to the person by whom the power is given, a fresh power must be obtained.[2]

A fund in Court which has been produced by the sale of a settled estate may be ordered to be paid out to a tenant in tail, without his being required to execute a disentailing deed previously:[3] he must, however, make an affidavit that there are no incumbrances.[4] In like manner, a fund in Court representing the real estate of a married woman may be paid out, without her executing an acknowledged deed.[5]

Where after a decree for the dissolution of a marriage, an order had been made by the Judge Ordinary, that a settled fund should be held in trust for the persons who would be entitled if the wife was dead, the income was on the petition of the husband, who was entitled for life in remainder, after her, to be paid to him for his life.[6]

however, the share awarded to the infant may be paid to the mother, on her giving bond to account as guardian. Spurrier *v.* Spurrier, 1 Bland, 477.

[6] Waddilove *v.* Taylor, 13 Jur. 1023, V. C. W.

[7] *Ex parte*, De Beaumont, *ib.* 354, V. C. E.

[1] 16 & 17 Vic. c. 98, § 7; Attorney-General *v.* Earl Lonsdale, V. C. S., 11 Dec., 1854, cited Seton, 19.

[2] Rep. Chan. Funds Com. xxv.

[3] *Re* Stewart, 1 Sm. & G. 32; Sowry *v.* Sowry, 6 Jur. N. S. 337; 8 W. R. 349, V. C. S.; *Re* South Eastern Railway Company, 30 Beav. 215; *Re* Holden, 1 H. & M. 445; *Re* Holden, 10 Jur. N. S. 308, V. C. S.; Nottley *v.* Palmer, 11 Jur. N. S. 968; 14 W. R. 170; V. C. K.; L. R. 1 Eq. 241, V. C. W. In *Re* Watson, 10 Jur. N. S. 1011, although the Lords Justices made the order, they expressed some doubts whether the practice was consistent with the Fines and Recoveries Abolition Act (3 & 4 Will. IV. c. 74); see also *Re* Tylden, 9 Jur. N. S. 942; 11 W. R. 869, V. C. K.; and *ante*, p. 99 n.

[4] Thornhill *v.* Milbank, 12 W. R. 523, V. C. K.; and see Ord. XXXIV. 3; and form of order, Seton, 524, No. 6.

[5] *Ex parte* Ellison, 2 Y. & C. Ex. 528; *Re* Worthington, Seton, 1079; *Re* Hayes, 9 W. R. 769, V. C. K.; Pollack *v.* Birmingham, Wolverhampton, and Stour Valley Railway Company, *Re* Clarke, 11 Jur. N. S. 7; 13 W. R. 401, V. C. S.; and *ante*, p. 99.

[6] Pratt *v.* Jenner, L. R. 1 Ch. Ap. 493; 12 Jur. N. S. 557, L. JJ.

A fund will not be ordered to be paid out to an administrator *ad litem*.[7]

Where a person entitled to a sum not exceeding 20*l.* had died intestate, it was ordered to be paid out to the person who would have been entitled to take out letters of administration, without requiring them to have been actually granted.[8]

Under special circumstances, an infant's legacy of small amount has been ordered to be paid to its father.[9]

Orders for the payment or transfer of any fund out of Court *1803 are * drawn up by the Registrar, and passed and entered in the same manner as other orders.[1] In addition to the documents usually required to be left with the Registrar on bespeaking the order,[2] there must also be left with him the Accountant-General's certificate of the fund in Court, and, if the funds are restrained by any order, the restraining order, or an office copy thereof;[3] and if the payment is ordered to legal personal representatives, the probate or letters of administration, stamped for a sufficient amount;[4] and if the order deals with any purchase-money, a consent brief for the purchaser, or an affidavit of notice to him of the intended application, and that the conveyance has been executed and delivered to him;[5] and if the order deals with any money paid into Court by the promoters of any public undertaking to the credit of such undertaking, not standing to any separate account, the Accountant-General's certificate of the payment into Court of the sum sought to be dealt with, and also his certificate of the fund in Court to the credit of the undertaking; and if, in the last-mentioned case, the order directs the carrying over of the money to a separate account, or payment of the same out of Court, an affidavit of the petitioner verifying the petition, and negativing any adverse right or claim.[6]

An order for the payment or transfer of a fund out of Court should always be entitled in the cause or matter to the credit of which the fund stands; and the title of the cause or matter, and the account, as stated or referred to in the order, must agree with the Accountant-General's certificate.[7]

A fund may be ordered to be transferred from one cause to another, upon a petition or summons entitled only in the former cause.[8] An order to pay over a fund to certain persons who are named therein, is incidentally a determination that other persons who are not named are not entitled.[9]

[7] Williams *v.* Allen, 32 Beav. 650; *ante*, p. 198.

[8] Callendar *v.* Teasdale, 3 W. R. 289, V. C. K.; King *v.* Isaacson, 9 W. R. 369, V. C. S.; *Re* Cabel, 3 W. R. 280, L. JJ.; Hinings *v.* Hinings, 2 H. & M. 32; *Re* Jones, 1 W. N. 65, M. R., where payment of a sum not exceeding 50*l.* was so directed.

[9] Walsh *v.* Walsh, 1 Drew. 64.

[1] See *ante*, p. 1008 *et seq.*

[2] See *ante*, p. 1009.

[3] Reg. Regul., 15 March, 1860, r. 16, *ante*, p. 1009.

[4] *Ib.* r. 17.

[5] *Ib.* r. 30, *ante*, pp. 1011, 1372.

[6] *Ib.* r. 34; Ord. XXXIV. 3; *Re* Bray, 9 Hare Ap. 7. The affidavit is not necessary, if the order only deals with the income. *Ibid.* For form of affidavit, see Vol. III.

[7] Seton, 73; and see *ante*, pp. 1783, 1784, n. (1).

[8] Weeding *v.* Weeding, 1 J. & H. 424.

[9] Sheppard *v.* Sheppard, 33 Beav. 129.

Where stock is to be transferred to the credit of a cause in the Court of Chancery of Ireland, it will be directed to be transferred into the names of the brokers of the Accountant-General in England, and of the Accountant-General in Ireland: to be transferred by them to the credit of the cause in Ireland.[10]

Where, upon the death of any person to whom any interest or dividends of any stocks, funds, shares, or securities standing in the name of the Accountant-General, were payable for life, an order * is made for the sale, transfer, or delivery of such stocks, *1804 funds, shares, or securities, or for payment of the interest or dividends to accrue due thereon subsequently to the death of such person, the same order is also to provide for the payment to the legal personal representatives of such person, of such proportion of the interest or dividends on such stocks, funds, shares, or securities, as may have accrued between the last period of payment, and the day of his death, unless the Court or Judge is of opinion that such legal personal representatives are not entitled thereto, or for any other reason otherwise directs.[1]

Whenever any suit is pending in any Court for the administration of any property chargeable with duty under the Succession[2] or Legacy[3] Duty Acts, the Court is to provide, out of any property which may be in its possession or control, for the payment of duty to the Commissioners.[4] In order to carry out these provisions, it is ordered that if any duty is payable under the Legacy or Succession Duty Acts, in respect of any fund or part of a fund directed to be paid or transferred, the decree or order, unless it expressly provides for the payment of the duty, should direct the Accountant-General to have regard to the circumstance that such duty is payable; and where any fund in respect of which any such duty may be payable is directed to be carried over to a separate account, the words "subject to legacy duty," or "subject to succession duty," as the case may be, are to be added to the title of the account;[5] and if the Accountant-General receives notice from the proper officer that any duty is payable out of any fund in Court, he is to cause a memorandum to be made in his books in conformity with such notice; and before executing any such decree or order directing the payment or transfer of any fund, or part of a fund, in respect of which any such duty may be payable, he is to require the production of the official receipt for the duty, or a certificate from the proper officer of the payment of the duty.[6]

[10] *Re* Lord Macnaghten, 12 W. R. 1095, M. R.

[1] Ord. XXIII. 8. As to the mode in which a fund to be paid or transferred in or out of Court, and the persons to make or receive the payments or transfers, must be described in the order, see Ord. XXIII. 3–6, *ante*, pp. 1005, 1006.

[2] 16 & 17 Vic. c. 51; 24 & 25 Vic. c. 92; and see 28 & 29 Vic. c. 104.

[3] 36 Geo. III. c. 52; 37 Geo. III. c. 135; 39 Geo. III. c. 73; 42 Geo. III. c. 99; 45 Geo. III. c. 28; 55 Geo. III. c. 184; 8 & 9 Vic. c. 76; and see 28 & 29 Vic. c. 104.

[4] 16 & 17 Vic. c. 51, § 53.

[5] The words ordinarily used are "subject to duty."

[6] Ord. XXIII. 9; *ante*, p. 1007; Trevor's Taxes on Succession, 244. For forms of orders providing for payment of legacy or succession duty, see Seton, 82.

Where the decree or order provides for the payment of the duty, the amount is directed to be paid to the Receiver-General of the Inland Revenue; where, however, the amount is small, it is sometimes ordered to be paid to the solicitor of the party having the conduct of the proceedings, on his undertaking duly to apply it.[7] Where the duty
*1805 is payable at a future time, the better course * is to commute it by a present payment, and not to retain a fund in Court to provide for the payment when it becomes due.[1]

The amount of the duty may be directed to be verified by affidavit, or specified in the decree or order. In the latter case, a certificate of the correct amount must be obtained from the Inland Revenue office, and produced to the Registrar,[2] or, where the application is made at Chambers, to the Chief Clerk. The stamped receipt of the Inland Revenue office is the proper evidence of payment of the duty;[3] but a copy of the entry from the official books will be sufficient, if duly proved,[4] or a certificate signed by the Controller.[5] Where the duty has been paid, the evidence of payment should be produced and entered as read in the decree or order.[6]

If a fund is improperly paid out of Court without providing for the payment of duty, the person chargeable with the duty may, on the petition of the Attorney-General, be ordered to pay the amount.[7]

The Registrar, where it appears to him more convenient so to do, may state the amount of any stocks, funds, shares, securities, or money, directed to be divided, transferred, delivered, or paid out of Court to or among several persons, or to be carried over to separate accounts, in a schedule at the foot of the decree or order; and it is sufficient to refer to the schedule in the mandatory part of the decree or order: but in every such case, the total amount of the stocks, funds, shares, securities, or money, to be dealt with in the schedule, is to be stated in words at length in the mandatory part of the decree or order.[8]

When the order directing a payment out of Court has been duly passed and entered, the solicitor having the conduct of the proceedings should leave it at the Accountant-General's office, with the first or the second clerk of the division to which the account to be operated upon belongs, and bespeak checks for the persons to whom the payments are to be made. If the payments are to be made to persons named in a Taxing Master's or Chief Clerk's certificate, or an affidavit, an office copy of it must also be left.[9] For each sum of money directed to be

[7] Seton, 84; and *ib.* 82, No. 2; *ante*, p. 1007.

[1] Bailey *v.* Tindall, 18 Jur. 668, V. C. K.

[2] Reg. Regul., 15 March, 1860, r. 18.

[3] 36 Geo. III. c. 52, § 27, as to legacy duty; and see 16 & 17 Vic. c. 51, §§ 51, 52.

[4] Harrison *v.* Borwell, 10 Sim. 380; 4 Jur. 246; 36 Geo. III. c. 52, § 27; and see 14 & 15 Vic. c. 99, § 14; *ante*, p. 864.

[5] Trevor's Taxes on Succession, 246. An affidavit by the applicant's solicitor of payment of the duty is, it seems, insufficient. *Re* Marsham, 12 W. R. 45, V. C. W.

[6] Seton, 85.

[7] Bryan *v.* Mansion, 3 Jur. N. S. 473, L. C.

[8] Ord. XXIII. 7. For form of order in such case, see Seton, 72, No. 7.

[9] See *ante*, p. 1783, n. (12). The solicitor cannot refuse to produce the order, certificate, or affidavit. See *post*, p. 1806, n. (6).

paid out, the Accountant-General (without any direction for that purpose in the decree or order),[10] draws on the Bank by a check under his * hand, intituled in the particular account as described *1806 in the order, and made payable to the order of the person to whom the payment is to be made.[1] At the time the check is signed by him, the Accountant-General also puts his initials in the margin of the order, certificate, or affidavit, opposite the amount, for the purpose of showing what checks have been drawn.[2]

At the foot of the check there is a proviso, that if not paid within a month it is void.[3] Accordingly, where a check was alleged to have been accidentally destroyed, the Court, though not satisfied with the evidence of its destruction, directed a new check to issue: as the former being out of time would not have been paid, if presented;[4] and in general, a new check will be drawn by the Accountant-General to replace one which is alleged to have been lost, if an affidavit of the loss, and of the lapse of time, is produced.

The check is generally ready one clear day after it has been bespoken; and where any decree or order is made for payments by the Accountant-General to creditors, the party whose duty it is to prosecute such decree or order is to send to each such creditor, or his solicitor (if any) a notice that the checks may be received from the Accountant-General; and such party is, when required, to produce such decree or order, and any other papers necessary to enable such creditors to receive their checks and get them passed.[5] The check must be indorsed by the person in whose favor it is drawn; and before it will be given to him, he must sign an entry of the delivery to him in the office receipt book; if he is not known in the office, he must be identified by some solicitor of the Court known there: who, in that case, must attest his signature. After the check is delivered, it must, together with the order, and the Taxing Master's or Chief Clerk's certificate; or the affidavit (if any), be taken to the signing room, where it is countersigned by the Registrar, or the Master of Reports, in attendance:[6] who, at the same time, puts his initials opposite the amount in the order, certificate, or affidavit. It is then taken to the Chancery office at the Bank, where, if it is found that there is cash enough to meet it on the particular account upon which it is drawn, it is * initialed by one of the clerks; it is next *1807 taken to the General Cash Book office in the Bank, and exchanged for a ticket: which ticket is carried to the Public Drawing office; and on

[10] Ord. I. 15.

[1] 12 Geo. I. c. 32; Ord. 26 May, and 4 Nov., 1725. Exp. Chan. Fund. Com. xxiii. For form of check, see *ib.* Ap. 41 (I. 4). The check is exempt from stamp duty. 23 & 24 Vict. c. 15, s. 5 cl. 4.

[2] Lechmere v. Brazier, 1 Russ. 72, 76; Rep. Chan. Fund. Com. xxiii.

[3] See form *ib.* Ap. 41 (I. 4).

[4] Taylor v. Sanvenoa, 1 Beav. 571.

[5] Ord. 27 May, 1805, r. 12. The notice may be sent by the post, prepaid. *Ib.* r. 13. For form of notice, see *ib.* Sched. 2, No. 7; and for the costs, see *ib.* Sched. 1, and see Vol. III.

[6] *Ante*, p. 1630. The solicitor conducting the proceedings will (if necessary) be ordered to attend and produce the order. Benyon v. Amphlett, 8 Jur. N. S. 759, M. R.; and see Lechmere v. Brazier, 1 Russ. 72, 76; Mawhood v. Milbanke, 15 Beav. 36; and Ord. 27 May, 1805, r. 12, *ubi sup.*

the bearer writing his address on the back of the ticket, the amount of the check will be paid to him, in notes or cash at his option.[1]

As the whole of each description of stock in Court stands in the books of the various funds at the bank, and in the books of the various public companies, in the sole name of the Accountant-General, the dividends upon each kind of stock are placed to the credit of his account at the Bank in one sum. Previously to each dividend becoming due, a list is made out in his office, containing the titles of the several accounts to the credit of which any amount of the particular kind of stock upon which the dividend is going to be received may be standing, the amount of stock remaining upon each such account, and the dividend (less income tax) that will become due thereon. The accounts on which the stock is standing for the first time, or on which the amount of stock has been altered since the last dividend, are marked in the margin, and the list is sent in duplicate to the Chancery office at the Bank, to be checked. When this has been done, one copy of the list is kept at the Bank, as the authority for posting the dividends in the ledgers of the Bank Chancery office; the other is sent to the Accountant-General, in the form of a certificate of the amount of dividend received, and placed to the various accounts. It is examined in the different divisions at the office of the Accountant-General, and then filed in the Report office.[2]

The mode of paying the first dividend on stock is similar to that adopted in paying principal money.[3]

Checks for dividends and other periodical payments, as annuities and maintenance, after the first payment, are drawn without being bespoken. They become "Regular interest drafts;" and the production of the order directing the payment is not required, either by the Accountant-General or the countersigning Registrar or Master of Reports. When the check for the first payment has been examined, a "model" of it is made, containing full particulars, and showing the dates when the subsequent payments will become due. If there is a power of attorney to receive the continuing payments, the number of the power and the name of the attorney are written upon the model. The regular interest checks are drawn from these models. The delivery of the checks to the suitors does not commence until the day after the Bank begins paying the dividend. Many of them contain conditions to be *1808 * fulfilled before payment can be made: thus, the payment may depend upon the existence of some life or lives other than that of the payee, the minority of an infant, continuance of widowhood, the tenure of an office, and a variety of other circumstances. In every case, evidence is required, generally by affidavit, to show that the condition, whatever it may be, has been fulfilled; and if the check is to be received under a power of attorney, the existence of the payee's life has to be proved also. This is done by a request signed by the party, ac-

1 Rep. Chan. Funds Com. xxiii.
2 *Ibid.*
3 *Ib.* xxiv.; and *ante*, p. 1805.

companied by a certificate from the minister and one of the churchwardens of the parish, or by an affidavit.[1]

Where any money is directed to be paid out of Court to any persons named or to be named in a Chief Clerk's certificate, and such money is certified to be due to them as partners, the same may be paid to any one or more of such partners;[2] and where any money is directed to be paid out of Court to persons to be named in a Chief Clerk's certificate, and a sum is certified to be due to any persons as legal personal representatives, the same or any portion thereof for the time being remaining unpaid, may, upon proof to the Accountant-General of the death of any of them, be paid to the survivors or survivor of them;[3] and where any money is directed to be paid out of Court to the legal personal representatives of any person, or to any persons as legal personal representatives, the same or any portion thereof for the time being remaining unpaid, may, upon proof to the Accountant-General of the death of any of such legal personal representatives, whether before, on, or after the day of the date of the decree or order, be paid to the survivors or survivor of them.[4]

Where any money is directed to be paid out of Court to any person named in the decree or order, or named or to be named in any certificate, or his legal personal representatives (a form of order which is usually now adopted, whenever the person is absolutely entitled to the money),[5] the same or any portion thereof for the time being remaining unpaid, may, on proof to the Accountant-General of the death of such person, whether before, on, or after the day of the date of the decree or order, be paid to such legal personal representatives or the survivors or survivor of them.[6]

If, however, the order is made for payment to a party without introducing the words "or his personal representatives," or words * of a similar effect, the Accountant-General will not act upon *1809 the order after the death of the party; but an application to the Court, or Judge at Chambers, is necessary.[1]

The Accountant-General requires the same proof of death and representation as is required by the Court, or a Judge at Chambers: that is, the production of the probate or letters of administration, or an official copy of the grant thereof, and of an affidavit, to which the probate or letters, or office copy, together with a properly signed certificate of the party's death or burial, are made exhibits, and which identifies him as the person named therein, and in the decree, order, Taxing Master's or Chief Clerk's certificate, affidavit, or other document under which the payment is to be made.[2]

[1] Rep. Chan. Funds Com. xxiv. For forms of request and certificate, see *ib.* Ap. 42 G.; and Vol. III.; and for form of affidavit, see *ibid.*

[2] Ord. I. 10.

[3] Ord. I. 4.

[4] Ord. I. 5.

[5] Seton, 76.

[6] Ord. I. 6. For former practice, in case of death of one of the personal representatives, see Moodie *v.* Bambridge, 6 Mad. 107.

[1] See Gates *v.* Gates, 12 Jur. 510, V. C. E.

[2] The practice stated in Clayton *v.* Gresham, 10 Ves. 288, is not now followed. For form of affidavit, see Vol. III.

No principal sum of money will be paid out of Court to the legal personal representative of any person, under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years from the day of the date of the decree or order;[3] and no interest or dividend will be paid out of Court to the legal personal representatives of any person, under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years after the day of the date of the decree or order directing the payment, or after the last receipt of the interest or dividends under the decree or order, which shall last happen.[4]

Payment will not be ordered to a personal representative constituted under a foreign probate;[5] nor to a person appointed to represent the estate under the Chancery Amendment Act;[6] but the Court of Probate has power to grant letters of administration limited to receive the particular fund.[7]

Where the party entitled to receive principal money or interest or dividends under an order is unable to attend in person to receive the Accountant-General's draft, he is required to authorize some one to act for him by a special power of attorney: which is prepared in the Accountant-General's office. The solicitor who bespeaks the power signs a written request for it, in a form which may be obtained *1810 at that office.[8] The request is headed with the * short title of the cause or matter, and the title of the account, if any; and sets forth the names, addresses, and descriptions of the intended grantor and grantee, the date of the order under which the draft is drawn, and the amount to be received. The solicitor who signs the request certifies that the intended grantor is the person named in the order, and that the grantee is well known to him. The request and the order are left at the Accountant-General's office, and on the second day following, the required power with the form of an affidavit of verification or due execution of the power annexed, may be obtained. The power authorizes the attorney to receive the draft (which it describes either by its amount, or as being the dividend on a certain amount of stock, as the case may be) to indorse the grantor's name on the draft, and to receive the money from the Bank.[1] The power must be attested by two witnesses: who must subscribe their names, residences, and business or occupation in

[3] Ord. I. 8.

[4] Ord. I. 9.

[5] Lasseur *v.* Tyrconnel, 10 Beav. 28.

[6] 15 & 16 Vic. c. 86, § 44; Byam *v.* Sutton, 19 Beav. 646; Rawlins *v.* M'Mahon, 1 Drew. 225; 9 Hare Ap. 82; Jones *v.* Foulkes, 10 W. R. 55, V. C. K.

[7] *Re* Dodgson, 5 Jur. N. S. 252, Prob. For the practice as to payment prior to the abolition of the Ecclesiastical Courts, see Docker *v.* Horner, 3 Bro. C. C. 240; Newman *v.* Hodgson, 7 Ves. 409; Thomas *v.* Davies, 12 Ves. 417; Jones *v.* Howells, 2 Hare, 342; Cope *v.* Cope, 14 Beav. 649; *Re* Knowles, 1 De G., M. & G. 60; 15 Jur. 1163; *Re* Spencer, 1 De G., M. & G. 311; 16 Jur. 233; Druce *v.* Denison, 12 Jur. 254, L. C.

[8] The request must be signed by the solicitor himself, who bespeaks the power, or, if bespoken by a firm, by one of the firm with his own name on behalf of the firm. Rep. Chan. Funds Com. Ap. 42 (H. 1).

[1] A fee of 3*s.* is payable in a fee-fund stamp at the Accountant-General's office for preparing each power, exclusive of stamp duty. Regul. to Ord. Sched. 4. 6*d.* is charged by the stationer for each form of an inland power, including the affidavit of execution; and 2*d.* for each form of power to be executed abroad. The stamp duty is: (1) On

life; one of them must be a house-keeper, and be so described; and one of them must make an affidavit of the due execution of the power before a commissioner authorized to administer oaths in Chancery;[2] but if the power is executed in those parts of Scotland or Ireland where no such officers are appointed, the affidavit may be sworn before the chief magistrate of the place, or other person lawfully authorized to administer oaths.[3] If the power is executed abroad, the execution must be certified by some notary or other official authorized to authenticate such instruments, and his seal and signature must be properly verified. If executed in the Queen's dominions abroad, and in the presence of some person lawfully authorized to administer oaths in such place, the seal and signature of the official need not be verified.[4]

Where an order directs the sale or transfer of stock in Court, the order is taken by the solicitor to the Order of Course Clerk in the Registrar's office, and a direction bespoken for the sale or transfer. If the order deals with stock which is to be transferred into Court or carried over subsequently to the date of the decree or * order, *1811 the office copy of the Accountant-General's certificate of the transfer in or carrying over must be produced to the Registrar's clerk, on bespeaking the direction.[1] The direction is examined and marked by the Registrar's clerk at the order of course seat before it is signed by the Registrar;[2] and the Registrar, when he signs it, marks with his initials, in the margin of the decree or order, a memorandum of the issuing.[3]

The decree or order and the Registrar's direction are then left at the proper division of the Accountant-General's office, and the sale or transfer will be completed.[4] If the stock is to be transferred out of Court, the solicitor having the conduct of the proceedings should sign, at the foot of the Registrar's direction, a memorandum stating the name and address of the person into whose name the fund is to be transferred.

In the case of a sale, the Accountant-General's clerk checks the calculations, and makes up, in the margin of the direction, a statement of the amount of stock to be sold, or of the money to be raised. The title of the account, the description of stock, and the amount of stock to be sold, or of money to be raised, as the case may be, are then entered on the commission paper for the broker. On the following

a power to receive principal money, 30s., if the amount exceeds 20*l*., and 5s. if it does not; 12 (3) a power to receive a single payment of interest, 1s.; 13 On a power to receive more than one such payment, or for periodical payments, 5s., where the yearly dividend exceeds 3*l*.; but no duty is payable where the yearly dividend is under 3*l*. See 27 & 28 Vict. c. 18, § 1; and Sched. (1) (1 & 2 c. 55, § 3; 2 c. 99. Where the power is to be executed abroad, the duty is not imposed till the return of the power. For forms of request, power, and affidavit, see Rep. Chan. Funds Com. Ap. 42 (II. 1, 2); and Vol. III.

[2] *Ante*, pp. 743, 744, 801.

[3] Rep. Chan. Funds Com. Ap. 42 (II. 2).

[4] Seton, 19, 20; *ante*, p. 744. Instructions as to the mode of execution are issued with the power.

[1] Seton, 78.

[2] Reg. Regul., 15 March, 1860, r. 39.

[3] Seton, 78; Rep. Chan. Funds Com. xxi. For forms of certificates, see *ibid.* Seton, 79-82; and Vol. III.

[4] See Ord. I. 16.

morning, the broker takes the Registrar's direction to the Bank Chancery office, where the amount of stock is written in the margin of the direction, and initialed by one of the clerks. The direction is then returned to the broker, who proceeds to make the sale. After the sale is made, the contract note, which, as in the case of a purchase, is for a future day, is sent, with the Registrar's direction, to the Accountant-General's office. The principal clerk in the division to which the account belongs writes in the margin of the order, opposite the direction to sell, a memorandum of the amount of stock sold, and of the money produced by the sale. The contract note and Registrar's direction are then taken to the Chief Clerk, and a certificate is made out in the form of a notification to the Bank Chancery office, and the contract note is sent to the division of the office to which it belongs, and entered in the direction book there. On the day of sale, the notification and the money raised by the sale are taken by the broker into the General Cash Book office of the Bank, and a receipt, which is an echo of the notification, is given to him for the money. The receipt and the Registrar's direction are taken to the Transfer office, and placed in the book in which the transfer of the stock for the Accountant-General to *1812 sign is entered. The Accountant-General * on attending at the Bank,[1] signs the entry, and the usual receipt for the money, and at the same time he signs the notification: which is then taken back to the Cash Book office. From that office it is sent to the Bank Chancery office, and becomes the authority there for debiting the particular account with the amount of stock sold, and crediting it with the money arising by the sale. A certificate is afterwards made out at the Accountant-General's office, containing all the particulars of the sale, and annexed to the receipt sent from the Bank. The certificate is afterwards compared with the contract note by the Chief Clerk, and then signed by the Accountant-General, and filed at the Report office.[2]

The process gone through in the case of a transfer out of Court is very similar. After the Registrar's direction has been examined and initialed at the Bank Chancery office, it is returned to the Accountant-General. A transfer ticket is then drawn, containing the title of the account, the amount and description of the stock, and the names and addresses of the persons to whom the transfer is to be made. A certificate is made out, from the Registrar's direction, dated the day on which the transfer will be made, containing the date of the order, the name of the Registrar who signed the direction, and other particulars in full. The Registrar's direction and the transfer ticket are then sent to the Chief Clerk of the Accountant-General, and particulars of all the transfers for the day of the transfer belonging to the same division are

1 See *ante*, p. 1787, note (5).

2 Rep. Chan. Funds Com. xxii. For forms of notification and certificate, see *ib.* Ap. 41 (E. 1, 2). As to obtaining an office copy of the certificate, see *ante* p. 1785.

entered in a list, in the form of a notification addressed to the Chief Accountant at the Bank. On the morning of the transfer day, the transfer tickets and Registrar's directions are taken by the broker to the Bank, and the proper entries are made in the transfer books for the Accountant-General to sign. When he has signed, he adds his signature to the list of transfers: which is then taken to the Bank Chancery office, and is the authority there for debiting the various accounts with the sums transferred. The certificate of transfer taken from the Registrar's direction is signed, and then filed in the Report office.[3]

Exchequer bills and bonds, and boxes containing suitors' effects, are delivered out of Court, under directions similar to those issued in the case of sales and transfers of stock. The person to whom the delivery is to be made attends at the Accountant-General's office, and is identified there. He signs a receipt for the direction, and takes it to the Bank: where he is required to indorse it, * before the article *1813 mentioned in it is delivered to him. If he cannot attend personally, he must give a power of attorney to some one else to receive the direction from the Accountant-General, to give a receipt for it, and to receive the article mentioned in it from the Bank. A certificate of the delivery signed and filed in the Report office.[1]

If the stocks, funds, shares, or securities are directed to be transferred or delivered out of Court to the legal personal representatives of any person, or to any persons as legal personal representatives of any person, the Registrar may, upon proof of the death of any such representatives, whether before, on, or after the day of the date of the decree or order, issue a certificate authorizing the transfer or delivery of such stocks, funds, shares, or securities to the survivors or survivor of them: and if any stocks, funds, shares, or securities are directed to be transferred or delivered out of Court to any person, or his legal personal representatives, the Registrar may, upon proof of the death of such person, whether before, on, or after the day of the date of the decree or order, issue a certificate authorizing the transfer or delivery of such stocks, funds, shares, or securities, to such legal personal representatives, or the survivors or survivor of them;[2] but no stocks, funds, shares, or securities are to be transferred or delivered out of Court to the legal personal representatives of any person, under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years from the day of the date of the decree or order.[3]

Previously to issuing, in such a case, certificates for the transfer or delivery of stocks, funds, shares, or securities, the Registrar requires

[3] Rep. Chan. Funds Com. xxii. For forms of transfer ticket, notification, and certificate of transfer, see *ib.* Ap. 41 C. F. 1-3. As to obtaining an office copy of the certificate, see *ante*, p. 1785.

[1] Rep. Chan. Funds Com. xxii. As to obtaining an office copy, see *ante*, p. 1785.

[2] Ord. I. 7.

[3] Ord. I. 8.

the following evidence to be produced: (1.) If the order directs such transfer or delivery to the legal personal representatives of a deceased person named in the order, but without naming such representatives in the order, and any of such representatives are dead, leaving survivors, or a survivor: the probate or letters of administration of the deceased person named in the order, a certificate of the burial of the deceased representative, or an official extract from the register of deaths,[4] of his death, and an affidavit of his identity. (2.) If the order direct such transfer or delivery to any persons named in the order, as the legal personal representatives of a deceased person, and any of such representatives are dead, leaving survivors, or a survivor: a certificate of the burial of such deceased representative, or an official extract from the register *1814 * of deaths [1] of his death, and an affidavit of his identity. (3.) If the order directs such transfer or delivery to any person named in the order, or his legal personal representatives, and such person is dead: the probate or letters of administration, a certificate of the burial of such deceased person, or an official extract from the register of deaths [2] of his death, and an affidavit of his identity; and if any of the legal personal representatives are also dead, leaving survivors, or a survivor, the further evidence required in the first-mentioned case.[3]

Under the Acts relating to pauper lunatics, the treasurer of a county, guardians of the poor, or overseers of a parish are enabled, if the pauper is interested in a fund in Court, to apply for payment thereout of the expenses they may have incurred or may incur in future, in providing for his maintenance; the application is made by petition, or, where there is otherwise jurisdiction at Chambers to deal with the fund, by summons.[4]

When an order for payment of money out of Court has been made, an appeal will not stop the execution of the order;[5] but the Accountant-General is justified in not complying with an order for payment until there has been sufficient time for the appellant to make special application to the Court below for a stay of proceedings,[6] and, in practice, whenever an order has been made for the payment or transfer of a fund out of Court, the Accountant-General allows a short time to elapse before acting on the order, so as to afford any one interested an opportunity of applying for a stop order, or making such an application as he may be advised;[7] and if the Accountant-General is served with

[4] Under the seal of the General Register Office. See *ante*, p. 865.

[1] *Ante*, p. 865.

[2] *Ibid.*

[3] Reg. Regul., 15 March, 1860, r. 40. The affidavits must not be made by or before one of the executors or administrators. *Ib.* n. For forms of affidavits, see *ibid.*; and Vol. III.

[4] 7 & 8 Vic. c. 101, § 27; and see 8 & 9 Vic. c. 100, § 95; 12 & 13 Vic. c. 103, § 16; 16 & 17 Vic. c. 97, §§ 94–104; and see *Re* Upfull, 3 M. & G. 281; *Re* Ward, 2 W. R. 406, V. C. W.; *Re* Drewery, *ib.* 436, V. C. K.; *Re* Buckley, Johns. 700; *Re* Coleman, 1 W. N. 209, V. C. S. The order may be made by a V. C. For form of order, see Seton, 1109; and as to the evidence in support, see *ib.* 1110. As to the general course of proceeding by petition, see *ante*, p. 1603 *et seq.* For forms of petition and summons, see Vol. III.

[5] *Ante*, pp. 1467–1471.

[6] Ferguson *v.* Tadman, 1 R. & M. 331.

[7] Collett *v.* Maule, 13 Jur. 672, V. C. E.

notice of an appeal from an order for the payment or transfer of a fund out of Court, or of any application for a stop order, he will then delay making the payment or transfer.[8]

Where a fund had been paid out in consequence of a fraudulent representation that one of the parties interested was dead, the Court, on the discovery of the fraud, permitted the person to whom the fund had been paid, and who was clearly no party to the fraud, to retain the money, upon his giving security to refund * it, in case it *1815 should be required, or that he would deal with it as the Court might, at any time afterwards, direct.[1]

The Act for the further relief of suitors[2] empowered the Lord Chancellor to cause an investigation to be made into the several accounts standing in the name of the Accountant-General to the credit of any cause or matter, the dividends of which should not have been dealt with for fifteen years or upwards; and if and when he should be of opinion that it was not probable that any claim would be made for the same, to make orders for the appropriation of the future dividends to accrue due on such stock, or such part of such dividends as he should be of opinion might safely and properly be so appropriated, for the benefit of the suitors of the Court, and for carrying the same over to "The Suitors Unclaimed Dividend Account;" and for the carrying, from time to time, such part of the cash standing to the last-mentioned account as he might think fit, over to the credit of "The Suitors Fee-fund Account;" and that such dividends, when so carried over, should thereupon become part of the fund standing to such account.[3] The Act also provided, that the rights of the suitors to the dividends so carried over, or to the stock itself, should not be affected, but that the claims should be satisfied out of the "Suitors Unclaimed Dividend Account," or the "Suitors Fee-fund Account," or either of them;[4] and that a similar investigation should be made at the expiration of every five years from the first investigation, and a similar course pursued thereupon.[5] Under this Act, the first investigation was made as to stock standing on the 1st May, 1854, upon accounts not dealt with for fifteen years. In the following year, a list containing the title of such accounts, but not stating the amounts standing thereon, was printed and exhibited in the Chancery offices: in consequence of which, many persons preferred their claims, and about one-half of the stock supposed to be unclaimed was transferred out of Court to successful claimants. In the year 1860, a second investigation was made, and a list published: which included the titles of such of the accounts comprised in the first list as had not been the subject of successful claims.[6]

Accounts upon which stock is standing, the dividends of which are

[8] *Ante*, p. 1471.

[1] Foster v. M'Gregor, 9 L. T. N. S. 473, V. C. K.; and *see Ex-parte* Breach, 12 W. R. 769, M. R.; 10 Jur. N. S. 982.

[2] 16 & 17 Vic. c. 98.

[3] 16 & 17 Vic. c. 98, § 1.

[4] *Ib.* § 2.

[5] *Ib.* § 3.

[6] Rep. Chan. Funds Com. xxxiii.

regularly invested and accumulated by the Accountant-General, are not considered to be within the provisions of the above-mentioned Act; *1816 and no orders have as yet been made for the appropriation * of any portion of the dividends of the stocks standing upon the accounts which have been the subject of the above-mentioned investigation, and which have remained unclaimed.[1]

[1] Rep. Chan. Funds Com. xxxiii. As to the funds of the Court of Chancery, including moneys and securities of individual suitors, the suitors fund, the suitors fee fund, and surplus fee fund, the charges thereon, and the provisions for their custody and management; see *ib.* xxxi. *et seq.*; and see The Courts of Justice Building Act, 1865 (28 & 29 Vic. c. 48).

*CHAPTER XLII. *1817

PRODUCTION OF DOCUMENTS.

It is the Practice of the Court of Chancery to allow a party to apply before the hearing of a suit, for the production of documents, relevant to the matters in question, which are in the possession or power of the opposite party.[1] This power to order the production of documents arises out of that general jurisdiction for the purpose of discovery which, in all proceedings in Equity, constitutes an important feature; and, in some instances, forms, as it were, the very foundation for the interference of the Court. So far as this jurisdiction relates to what is required to be stated fully upon an answer, and to the disclosure of facts within the defendant's knowledge, the subject has been already discussed;[2] but it still remains to inquire, briefly, into such principles relative to discovery as may serve to explain the right to inspect deeds and writings, and the rules of practice regulating applications for their production.

As the plaintiff's privilege to apply for the production of documents is a part of his general right to discovery, it may be convenient to state the proposition in which this right is accurately expressed. According to Sir James Wigram, in his Treatise upon the subject: "It is the right, as a general rule, of a plaintiff in Equity to exact from the defendant a discovery, upon oath, as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit."[3] It is obvious, from the terms in which this proposition is worded, that the right to discovery is not unlimited. In order to explain fully the extent to which it applies, it is necessary to investigate: what, upon any given state of the pleadings, are material facts to the plaintiff's case about to come on for trial; when a fact may be said to be well pleaded; and what the defendant, in every case, admits by his *form of pleading? Many of these subjects have *1818
been discussed in former parts of this Treatise;[1] and will be found fully explained in Sir James Wigram's work upon the subject.

[1] See Warrick v. Queen's College, Oxford, L. R. 3 Eq. 914.

[2] Ante, pp. 564 et seq.; 570 et seq.; 745.

[3] Wigram on Disc. p. 46 et seq.; see also Attorney-General v. Davenport, 8 Hare, 106.

[1] See ante, pp. 545, 622, 720.

It is sufficient here to state, that the general principles relative to discovery apply, as well to applications for the production of documents, as to the direct disclosure of facts by an answer.

The right of the plaintiff to obtain a knowledge of the contents of documents in the defendant's possession was formerly exercised by the bill being so framed as to call upon the defendant to set forth the short contents of the deeds in question, or to produce them. If, then, upon the coming in of the answer, the defendant admitted the possession of certain deeds, and described them so that they could be identified, the Court, unless sufficient disclosure had been made of their contents by the answer, would have ordered them to be produced.[2] The expense of setting out the contents of a deed in the answer in some respects modified this practice; and it became the custom for the plaintiff to charge generally in his bill, that the defendant had deeds and documents relating to the matters in question in his possession. Upon this charge, interrogatories more or less searching, according to the nature of the case, were usually founded: so as to extort from the defendant a clear admission of the possession of the required documents; and if such an admission were obtained, it became competent for the plaintiff to apply for an order that the defendant might produce the required documents.[3]

Under the present practice, however, the Court may, upon the application of the plaintiff, in any suit: whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents: make an order for the production by any defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.[4] It is, therefore, no longer necessary that the defendant should admit

*1819 the possession of documents in * his answer, before production can be obtained; and, although production can still be obtained on an admission in the answer, exceptions thereto, on the ground that the defendant has not fully answered the interrogatory as to documents, will be discouraged.[1]

[2] Atkyns *v.* Wright, 14 Ves. 211, 213; Lord Eldon, in Princess of Wales *v.* Earl of Liverpool, 1 Swanst. 123; and see Somerville *v.* Mackay, 16 Ves. 382, 387; Unsworth *v.* Woodcock, 3 Mad. 432.

[3] Bettison *v.* Farringdon, 3 P. Wms. 363; Tyler *v.* Drayton, 2 S. & S. 309; Evans *v.* Richard, 1 Swanst. 7. In a bill for discovery and production of deeds, it is absolutely necessary to charge that the deeds have come to, or are in the hands of, the defendant. Hough *v.* Martin, 2 Dev. & Bat. Eq. 226. When the plaintiff alleges that he has never seen the original deed against which he seeks relief, and prays that the same may be produced for his inspection, the defendant is not bound to make the deed part of his answer, or annex it to it. The plaintiff must, in such case, obtain an order from the Court for the production of the deed; which order, if disobeyed, will put the defendant in contempt, and by consequence prevent him from making any motion in the cause. Smith *v.* Thomas, 2 Dev. & Bat. Eq. 126.

[4] 15 & 16 Vic. c. 86, § 18.

[1] Rochdale Canal Company *v.* King, 15 Beav. 11; 9 Hare Ap. 49, n.; Law *v.* London Indisputable Company, 10 Hare Ap. 20; Barnard *v.* Hunter, 1 Jur. N. S. 1065, V. C. S.; Kidger *v.* Worswick, 5 Jur. N. S. 37, V. C. W.; Piffard *v.* Beeby, 1 W. N. 18; 14 W. R. 303, V. C. K.; L. R. 1 Eq. 623; 12 Jur. N. S. 117; but see Hudson *v.* Grenfell, 3 Giff. 388; 8 Jur. N. S. 878.

Where discovery from the plaintiff, either concerning matters of fact, or the contents of documents, was necessary to a defendant for the purpose of enabling him to complete his defence to the case sought to be established against him, he could, in general, only obtain such discovery by means of a cross-bill.[2] Upon such a bill being filed, the plaintiff in the original suit, in his character of defendant to the cross-bill, became liable to the application of the same rules, concerning the production of documents, as a defendant in any other case. An answer to a cross-bill cannot, however, in general be obtained until the original bill has been fully answered: and, not only must a full answer in the ordinary sense of the term be placed upon the record, before an answer to the cross-bill can be enforced, but the plaintiff in the original suit will be allowed time to answer the cross-bill until after the defendant has complied with an order for production of deeds made in the original suit.[3]

Under the present practice, the Court may, upon the application of any defendant in any suit: but, where the defendant is required to answer the plaintiff's bill, not until he has put in a full and sufficient answer to the bill, unless the Court shall order to the contrary: make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or * power relating to *1820 the matters in question in the suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.[1]

If the defendant is not required to answer the bill, he may obtain production of documents, as well before as after he puts in a voluntary answer:[2] but where he is required to answer, it is not the practice of the Court to order production before answer: for, if the Court were to compel the plaintiff to produce the evidence on which he founds his charge, before the defendant puts in his answer, the defendant would be enabled to shape his defence according to the evidence which he knows to be in the plaintiff's possession.[3]

[2] See Potter v. Potter, 3 Atk. 719; Pickering v. Ripley, 18 Ves. 484; Princess of Wales v. Lord Liverpool, 1 Swanst. 114, 123; City of London v. Thomson, 3 Swanst. 265, n. (a); Micklethwait v. Moore, 3 Mer. 292, 296; Shepherd v. Morris, 1 Beav. 175; 3 Jur. 184; Taylor v. Heming, 4 Beav. 275; 5 Jur. 746; Bate v. Bate, 7 Beav. 528, 537, 8 Jur. 2, 2; *ante*, p. 1348 *et seq.*

Where the books or documents of the plaintiff are material for the defendant's defence of the suit, the defendant must file a cross-bill against the plaintiff for a discovery of them. Kelly v. Lockford, 5 Paige, 548.

In ordinary cases the plaintiff cannot be compelled, upon motion to dismiss his bill or other preliminary evidence in his possession to the production of the defendant, to enable the latter to answer the bill, and make his defence to the suit. But if the plaintiff, on request, refuses to permit the defendant to inspect such books or documents, he cannot afterwards object that the answer is insufficient in not stating their contents. Kelly v. Lockford, 5 Paige, 548; see Jenning v. Smith, 3 John. Ch. 409.

But in cases of partnership, where the partnership books and papers are in the hands of one of the copartners, or of his assignees or representatives, upon the application of the other party, in any stage of the suit, the party so having them in his possession, or under his control, will be compelled to deposit them in the hands of an officer of the Court, for the inspection of the party making such application, and that such party may take copies thereof, if necessary. Kelly v. Lockford, 5 Paige, 548.

[1] Holmes v. Baddeley, 7 Beav. 93; *ante*, p. 1350; and see Taylor v. Heming, *ubi sup.*

[1] 15 & 16 Vict. c. 86, § 20.

[2] Bailey v. Dunleavy, 6 W. R. 835, V. C. K.

[3] Halliday v. Temple, 8 Jur. G., M. & G.

The application for production is made by summons :[4] which must be served on the opposite party, in the usual manner.[5] If the application is founded on an answer, the common order directs, either that the admitted documents[6] be left with the Record and Writ Clerk, and that the plaintiff, his solicitors and agents, be at liberty to inspect them, and to take copies, at his expense ;[7] or else that, without being so left, they be at liberty to inspect and take copies of the documents at the office of the defendant's solicitor, or other convenient place.[8] If, however, the application is made without reference to the answer, then the common order directs the party within a limited time to file an affidavit, stating what documents he has or has had in his possession or power relating to the matters in question ;[9] and either to leave with the Record and Writ Clerk such of the documents admitted by him as he may not by the affidavit object to produce : in which case, leave to inspect and take copies is given to the opposite party ;[10] or else, that the opposite party be at liberty to make such inspection and take such copies at the office of the deponent's solicitor, or other specified place.[11] The summons is, therefore, framed according to the form of order which the applicant seeks to obtain.[12]

*1821 * Where production is sought from a corporation aggregate, the affidavit is directed to be made by their clerk or secretary, or some other officer acquainted with their documents.[1] Where the clerk of a company, who was made a defendant, as such, for purposes of discovery, swore that the documents were in the custody of the governing body of the corporation, and were not accessible without their leave, but did not state that leave had been refused him, the affidavit was held to be insufficient.[2]

If the plaintiff has interrogated the defendant as to documents, but such interrogatory has not been answered, he may obtain, on summons, the common order for an affidavit and production or inspection, on condition that he accepts the affidavit as an answer to the interrogatory, in so far as it may be an answer thereto ; and the order will be worded accordingly.

96, 99 ; Turner *v.* Burkinshaw, 4 Giff. 399 ; 9 Jur. N. S. 866 ; and see Bate *v.* Bate, 7 Beav. 528, 538 ; 8 Jur. 232.

[4] 15 & 16 Vic. c. 80, § 26, *ante*, p. 1323.

[5] *Ante*, p. 1335.

[6] The word "documents" is, in practice, considered to comprise all written evidence.

[7] See form of order, Seton, 1040, No. 1.

[8] *Ib.* No. 2 ; and see *post*, p. 1837.

[9] Where the application is made by or against a claimant coming in under a decree, the discovery required by the affidavit is usually confined to documents relating to his claim ; see *ante*, pp. 1085, 1115 ; and see Newland *v.* Steer, 11 Jur. N. S. 596 ; 13 W. R. 1014, V. C. K. ; and Seton, 1043, No. 9.

[10] Seton, 1040, No. 3.

[11] *Ib.* 1041, No. 4.

[12] There is no objection to include in one summons applications against several defendants : though represented by separate solicitors ; and though production of documents admitted by answer is sought from some of them, and an affidavit from others. See Seton, 1041, No. 5 ; 1042, No. 6. For various forms of summons, see Vol. III.

[1] Seton, 1048 ; and see Law *v.* London Indisputable Company, 10 Hare Ap. 20 ; Ranger *v.* Great Western Railway Company, 4 De G. & J. 74 ; 5 Jur. N. S. 1191 ; Clinch *v.* Financial Corporation, L. R. 2 Eq. 271 ; 12 Jur. N. S. 484, V. C. W. ; Acomb *v.* Landed Estate Co., 1 W. N. 87 ; 14 W. R. 387, V. C. W. For form of order, see Seton, 1042, No. 7 ; and for form of summons, see Vol. III.

[2] Attorney-General *v.* Mercers' Company, 9 W. R. 83, V. C. W.

A defendant may, if the Court thinks fit, be required to make an affidavit as to documents, although he has already set them out in his answer.[3]

The plaintiff will not waive the application by obtaining, in the interval between the service of the summons and the day of hearing it, an order to amend his bill:[4] and where an application for the production of documents is made upon the answer, it does not operate as an admission of the sufficiency of the answer: so that the plaintiff may, after such an application, still file exceptions.[5]

An answer is considered full and sufficient until it is successfully excepted to:[6] therefore, the defendant, where he is required to answer, may apply for an affidavit to be made by the plaintiff, as soon as he has filed his answer, and need not wait until the expiration of the time allowed for filing exceptions;[7] but, in such a case, the hearing of the application will, if necessary, be adjourned for a limited period, in order to afford the plaintiff time to consider whether the answer is sufficient.[8] Where the answer had been found insufficient, but the plaintiff gave notice of motion for a decree, he was held to have waived his right to a further answer: and was ordered to produce the documents in his possession to the defendant.[9]

* Where the application is founded on an answer, it must be *1822 shown by an office copy of the answer, and schedules thereto, if any, that the plaintiff is entitled to the production or inspection he claims,[1] unless the application is consented to: but no evidence is ordinarily required in support of an application for an affidavit of documents and consequential production.

The applicant will not be prejudiced by delay in making the application;[2] and his own statement of his case will be assumed to be true for the purposes of it.[3]

The Judges have settled the form of the affidavit to be made in answer to the common order;[4] and it should be adhered to, and only varied in so far as may be necessary to meet the circumstances of the case.[5] All the plaintiffs required by the order to make the affidavit must, as a general rule, join in it.[6]

Any objections or reasons against the production should be clearly and distinctly stated in the answer or affidavit;[7] which must also de-

[3] Hamlip v. Kitton, 1 De G., J. & S. 440; 9 Jur. N. S. 482.

[4] Chalwin v. Pebble, 6 Beav. 264; S. C. nom. Charlwich v. Pebble, 7 Jur. 204; and see note, pp. 424, 425.

[5] Lane v. Paul, 3 Beav. 66.

[6] Latané v. Falkland Islands Company, 2 K. & J. 270; Sibbald v. Lewis, cited 5 Sim. 277, note.

[7] As to exceptions, see *ante*, p. 758 *et seq.*

[8] Walker v. Kennedy, 3 Jur. N. S. 481; 5 W. R. 590, V. C. K.

[9] Bayne v. Cassell, 18 Jur. 779, V. C. W.

[1] And see p. 425.

[2] Rochdale Canal Company v. King, 15 Beav. 11; 9 Hare Ap. 49, note; Parkinson v. Chambers, 1 K. & J. 72; but see Duke of Beaufort v. Taylor, 2 Hare, 245.

[3] Gresley v. Mousley, 2 K. & J. 288; 2 Jur. N. S. 156.

[4] Regul. 8 Aug., 1857, r. 24, and Sched. No. 3; and see Vol. III.

[5] Rochdale Canal Company v. King, *ubi sup.*; Mansell v. Feeney (No. 2), 2 J. & H. 320, 323; Woodhatch v. Freeland, 11 W. R. 598, V. C. K.; Bloxam, 46.

[6] Walker v. Kennedy, 5 W. R. 590, V. C. K.

[7] Rochdale Canal Company v. King, *ubi sup.*; and see Hardman v. Ellames, 2 M. & K. 732, 745; Bloxam, 46, and forms of affidavit, Regul. 8 Aug., 1857, Sched. No. 3; and Vol. III.

scribe the documents with sufficient distinctness to enable the Court to order production, if the objections should be overruled ;[8] and the affidavit must be made, although the defendant has good reasons against the production.[9]

If required, an extension of the time for making the affidavit may be obtained upon summons at Chambers: which must be served on the party seeking production.[10]

The party ordered to make the affidavit must seek the necessary information from his present or former agents.[11] A statement as to the purport and effect of the documents, made on the faith of information received from other persons, will not protect them from production.[12]

Where the party filing the answer or affidavit claims thereby to protect documents from production, and the opposite party considers he is entitled to have them produced, the proper mode of raising the question is by taking out a summons for their production, and not, in the *1823 case of an affidavit, by a summons to consider * the sufficiency of the affidavit.[1] On the hearing of the application, the Judge will, if necessary, inspect the documents, himself, and determine whether any of them should be produced.[2]

If the affidavit is considered to be informal, or insufficient, from any cause: such as, not containing a clear admission or denial of the possession of documents ; or such a description of them that the Court can enforce its order: a further summons to consider the sufficiency of the affidavit should be taken out ;[3] and if the affidavit is held to be informal or insufficient, the party seeking production may obtain at Chambers an order, expressing that the Judge is of opinion that the affidavit is insufficient ;[4] and upon production of such order to the Record and Writ Clerk, together with the order directing the affidavit to be made, and an affidavit of due service thereof, before the affidavit as to documents was filed,[5] he will seal an attachment or other process for disobedience to the order, as if no affidavit had been filed.[6] It is usual, however, for the Judge, on holding an affidavit to be insufficient, to give the deponent a few days' further time to file a full and sufficient affida-

[8] Lazarus *v.* Mozley, 5 Jur. N. S. 1119, V. C. S. ; and see Atkyns *v.* Wright, 14 Ves. 213.

[9] Rumbold *v.* Forteath, 3 K. & J. 44; Lazarus *v.* Mozley, *ubi sup.* ; Quinn *v.* Ratcliff, 6 Jur. N. S. 1327; 9 W. R. 65, V. C. S.; Seton, 1047.

[10] For form of summons, see Vol. III.

[11] Earl of Glengall *v.* Frazer, 2 Hare, 99; 6 Jur. 1081; M'Intosh *v.* Great Western Railway, 4 De G. & S. 544; and see Gabbett *v.* Cavendish, 3 Swanst. 267, note.

[12] Manby *v.* Bewicke (No. 3), 8 De G., M. & G. 476; 2 Jur. N. S. 671.

[1] Nicholl *v.* Jones, 13 W. R. 451, V. C. W.; 2 H. & M. 588. For form of summons, see Vol. III.

[2] For form of order in such case, see Seton, 1042, No. 8.

[3] For form of summons, see Vol. III.

[4] The order need not be served. For form of order, see Seton, 1043, No. 10; and Vol. III.

[5] As to service, see *ante*, p. 1042 *et seq.* ; and as to enforcing production of documents, see *post*, p. 1839.

[6] Where the order directing the affidavit to be made has not been duly served, the further order holding the affidavit to be insufficient should also repeat the directions of the former order as to filing a full and sufficient affidavit, and depositing the documents in Court, within a limited time, or directing their production out of Court ; and must, in such case, be indorsed, served, and disobeyed, and an affidavit of such service and disobedience be produced to the Record and Writ Clerk, before process of contempt can be issued.

vit: in which case, a clause to that effect is inserted in the order;[7] and such time may be further extended, on his special application by summons.[8] Where time is thus given, process of contempt cannot be issued till such time has expired; nor, if the deponent files a further affidavit, till the insufficiency thereof has been determined by the Judge. Where a further affidavit is filed, the same course may be repeated till a sufficient affidavit is made; but where the Judge is of opinion that the deponent is wilfully evading the order, he may refuse him further time, and thereby leave him in peril of process of contempt for his disobedience.

The party from whom production is sought cannot be cross-examined on his affidavit or answer;[9] and no other evidence as to his possession of the documents can be received;[10] although it is *suggested that a document had been fraudulently omitted from the schedule;[1] but he may be required to make a further affidavit, stating specifically whether he has or has had a particular document in his possession, and what he has done with it.[2] *1824

Where the application is founded on an answer, which, taken by itself, would have shown a sufficient admission of possession, the party has been permitted to show by affidavit that the documents in question are so circumstanced as not to be in his possession, custody, or power,[3] or that the required documents come within some of the special grounds of exemption.[4]

The party ordered to produce the documents may conceal, by sealing up, such portions of the documents as he may by his affidavit swear to be privileged from production;[5] and the order for production will, on his application, be qualified in this manner, as well where it is founded on an answer,[6] as where it is not. Where the right to seal up is omitted to be claimed in this manner, a special application for leave to seal up may be made by summons.[7] In a case of this kind, even though there

[7] See Seton, 1043, No. 10; and Vol. III.

[8] For form of summons, see Vol. III.

[9] Manby *v.* Bewicke (No. 2), 8 De G., M. & G. 470; 2 Jur. N. S. 672, overruling Kay *v.* Smith, 3 W. R. 622, L. JJ.; 20 Beav. 566; Underwood *v.* Secretary of State for India, 1 W. N. 95, V. C. W.; 12 Jur. N. S. 321; 14 W. R. 551, V. C. W. & L. JJ.

[10] Addis *v.* Campbell, 1 Beav. 258, 261; Edwards *v.* Jones, 1 Phil. 501; Lamb *v.* Orton, 1 Drew. 414; Richards *v.* Watkins, 6 Jur. N. S. 168, V. C. W.; and see Mansell *v.* Feeney (No. 2), 2 J. & H. 320; Underwood *v.* Secretary of State for India, *ubi supra*.

[1] Reynell *v.* Sprye, 1 De G., M. & G. 656; 15 Jur. 1046.

[2] Richards *v.* Watkins, 6 Jur. N. S. 168; V. C. W.; Willett *v.* Thiselton, 1 N. R. 42, M. R.; Nind *v.* Nind, 1 De G., J. & S. 468, 9 Jur. N. S. 589; Westminster & Brymbo Colliery Company *v.* Clayton, 12 W. R. 123, V. C. W. For form of summons in such case, see Vol. III. When the application has been made by a defendant, and the affidavit is insufficient, he should file a concise statement, with interrogatories. Newall *v.* Telegraph Construction Co., L. R. 2 Eq. 756, V. C. W.

[3] Morrice *v.* Swaby, 2 Beav. 500; Smith *v.* Massie, 4 Beav. 417; Gardner *v.* Dangerfield, 5 Beav. 389; Burbidge *v.* Robinson, 2 M. N. & G. 244.

[4] Tyler *v.* Drayton, 2 S. & S. 309, 311; Hughes *v.* Biddulph, 4 Russ. 190; Parsons *v.* Robertson, 2 Keen, 605; Llewellyn *v.* Badeley, 1 Hare, 527, 530; 6 Jur. 705; Curd *v.* Curd, 1 Hare, 274; 6 Jur. 307, L. C.; Blenkinsop *v.* Blenkinsop, 10 Beav. 143.

[5] Gerard *v.* Penswick, 1 Swanst. 533; Curd *v.* Curd, *ubi sup.*; Mansell *v.* Feeney (No. 2), 2 J. & H. 320; Talbot *v.* Marshfield, 1 Law Rep. Eq. 6; 11 Jur. N. S. 901, V. C. K.

[6] *Ibid.* For form of order, see Seton, 1040, No. 2.

[7] Talbot *v.* Marshfield, *ubi sup.* For form of order, see Seton, 1043, No. 9. As to the costs of the application, see *ibid.*; and for form of summons, see Vol. III.

are strong grounds for suspecting that the party has sealed up matter that ought to have been disclosed, the Court is concluded by the oath of the party from giving further discovery.[8] If, however, his affidavit contains statements at variance with each other, or if the document itself shows a discrepancy in his statements, it seems that it would be quite consistent with the rules of the Court to get at the truth, by compelling him to give discovery;[9] and in such a case, the Court will, if necessary, unseal the documents and examine them, in order to see whether the applicant is entitled to inspect the portions sealed up.[10]

A defendant cannot compel the production of documents by the *1825 * next friend of the plaintiff;[1] nor can he, before decree, obtain the production of documents in the possession of a co-defendant:[2] although, after decree, he may do so.[3]

Where the defendant to an information requires the production of documents in the possession of the relators, he must apply to the Attorney-General.[4]

The course of procedure for obtaining the production of documents after the hearing, is the same as that already described for obtaining their production before the hearing;[5] and a party who has made a full discovery of documents before the hearing, may be ordered to make a further discovery after the hearing.[6]

A claimant coming in under a decree can, in the same manner, obtain production from the parties to the cause of the documents material to his case which are in their possession;[7] and may, conversely, be ordered to produce all the documents in his custody, possession, or power relating to his claim.[8]

It is not necessary that the documents should be in the actual corporeal possession of the party ordered to produce them: it is sufficient if he has the right to deal with them;[9] and, therefore, where they are in possession of his agent, production will be ordered; the principle of the Court being, that the possession of the agent is the possession of

[8] Sheffield Canal Company *v.* Sheffield & Rotherham Railway Company, 1 Phil. 484.

[9] Bowes *v.* Fernie, 3 M. & C. 632; Greenwood *v.* Greenwood, 6 W. R. 119, V. C. K.; and see Westminster & Brymbo Colliery Company *v.* Clayton, *ubi sup.*

[10] Caton *v.* Lewis, 22 L. J. Ch. 946, M. R.; Lafone *v.* Falkland Islands Company, 27 L. J. Ch. 25, V. C. W.

[1] Hardwick *v.* Wright, 11 Jur. N. S. 297; 13 W. R. 560, V. C. S. [But it has recently been held that a defendant is entitled to affidavit of documents from the next friend of a lunatic plaintiff. Higginson *v.* Hall, 10 Ch. Div. 235.]

[2] Attorney-General *v.* Clapham, 10 Hare Ap. 68; Hardwick *v.* Wright, *ubi sup.*; and see Wynne *v.* Humberston, 27 Beav. 421; 5 Jur. N. S. 5.

[3] Hart *v.* Montefiore, 30 Beav. 280; 8 Jur. N. S. 350; Bowen *v.* Pearson, 9 Jur. N. S. 789; 11 W. R. 819, V. C. S.

[4] Attorney-General *v.* Clapham, 10 Hare Ap. 68, 70; and see Attorney-General *v.* Payne, M. R., in Chambers, 25 March, 1859, Reg. Lib. 1858, A. 1255, where the affidavit was directed to be made by the relators or one of them, or the informant's solicitor, he consenting.

[5] Ord. XLII. 4; *ante*, p. 1084.

[6] Hanslip *v.* Kitton, 1 De G., J. & S. 440; 9 Jur. N. S. 482.

[7] *Ante*, pp. 1209, note (2), 1820, note (9); *Re* M'Veagh, M'Veagh *v.* Croall, 1 De G., J. & S. 399; 9 Jur. N. S. 240; and see Newland *v.* Steer, 11 Jur. N. S. 596; 13 W. R. 1014, V. C. K.; Dent *v.* Dent, 1 Law Rep. Eq. 186, M. R.

[8] *Ante*, p. 1209, note (2), *Re* Pine, Pine *v.* Ellis, M. R., in Chambers, 18 Nov., 1863, Reg. L. *ib.* B. 2267.

[9] Reid *v.* Langlois, 1 M'N. & G. 627, 636; 14 Jur. 467, 469.

the party himself.[10] It seems, however, necessary, that the person in whose custody the documents are, should hold them exclusively for the party against whom the application is made: for, according to Lord Cottenham, when documents are in the possession of A., B., and C., you cannot order that A. shall produce them; and that for the best possible reason, namely, that he could not produce them;[11] and, upon the same * principle, where the person who holds them is *1826 the agent of other persons as well as the party against whom the motion is made, it seems that no order can be made for the production of such documents.[1] This principle, however, does not extend, so as to exonerate a party from making a discovery, by answer, of any knowledge he may be able to obtain by inspecting documents in the joint possession of himself and others: for a party is bound to inspect, and answer as to the contents of, all documents that are in his possession or power: and all which he has a right to inspect, provided he can enforce that right, are in his power.[2]

The difference between ordering a party to produce a document in which he has only a joint possession with others, and ordering him to disclose the result of his inspection of documents, which, though not in his exclusive possession, he is still entitled to peruse, has been very clearly pointed out by Lord Cottenham, in the case of *Taylor* v. *Rundell*.[3] In that case he says: "It is true that the rule of the Court, adopted from necessity, with reference to the production of documents, is, that if a defendant has a joint possession of a document with somebody else who is not before the Court, the Court will not order him to produce it; and that for two reasons: one is, that a party will not be ordered to do that which he cannot or may not be able to do;[4] the other is, that another party, not present, has an interest in the document which the Court cannot deal with. But that rule does not apply to discovery; in which the only question is, whether, as between the plaintiff and the defendant, the plaintiff is entitled to an answer to the question he asks: for, if he is, the defendant is bound to answer it satisfactorily, or, at least, show the Court that he has done so as far his means of information will permit."[5] Where, however, the party has the benefit of a covenant for the

[10] Murray v. Walter, C. & P. 114, 125; 3 Jur. 719; Morrice v. Swabey, 2 Beav. 500; Wright v. Mayer, 6 Ves. 280, 281; Denwick v. Reed, 1 Mer. 114, 123; M'Cann v. Beere, 1 Hogan, 120; and see Palmer v. Wright, 10 Beav. 234; Colyer v. Colyer, 9 W. R. 452, V. C. K.; Bishop of Winchester v. Beaker, 29 Beav. 479; Earl of Eglinton v. Lamb, 12 Jur. N. S. 45; 14 W. R. 170, V. C. K.; Lager v. Worsall, 2 Page, 369; Glyn v. Caulfield, 3 M'N. & G. 463.

[11] Murray v. Walter, C. & P. 114, 124; 3 Jur. 719; see Gibbard v. Lord de Manley, 13 Jur. 442, V. C. K. B.; Read v. Langlois, 1 M'N. & G. 627; 14 Jur. 457. Murrell v. Wootten, 13 Beav. 105; 15 Jur. 419; Richards v. Watkins, 6 Jur. N. S. 168, V. C. W.

[1] Lopez v. Deacon, 6 Beav. 254, 258; Airey v. Hall, 2 De G. & S. 489; 12 Jur. 1046; Edmonds v. Lord Foley, 30 Beav. 282; 8 Jur. N. S. 552; see, however, Wadurn v. Ingilby, 1 M. & K. 61, 78, 79; and the observations of Lord Cottenham thereon, in Murray v. Walter, C. & P. 125.

[2] Taylor v. Rundell, 1 Phil. 222, 226; and see S. C., 11 Sim. 391; 1 Y. & C. C. C. 128; C. & P. 104; Glyn v. Caulfield, 3 M'N. & G. 463; 15 Jur. 807; Penny v. Goode, 1 Drew. 171; Church v. Financial Corporation, L. R. 1 Eq. 623; 12 Jur. N. S. 484, V. C. W. [See Boyd v. Cowan, L. R. 5 C. P. Ap. 495.]

[3] C. & P. 104; but see Wadurn v. Ingilby, 1 M. & K. 61, 79.

[4] Princess of Wales v. Earl of Liverpool, 1 Swanst. 123; 1 Wils. 113.

[5] C. & P. 111.

production of documents, for the purpose of manifesting his own title, he cannot be compelled to obtain an inspection, and disclose their contents, or obtain their production, in order to establish a claim set up against himself, in a suit to which the covenantor is not a party.[6]

If the exclusive right to the possession is only prevented by the document being retained by any agent or solicitor, the Court will *1827 *order production by the party: taking care to give him sufficient time to compel the delivery from the person wrongfully retaining it.[1] The consequence of this rule is, that it is not usually necessary to make a solicitor a party to a suit because he has the title deeds of the party in his possession: although cases may arise to render such a proceeding advisable: as if the solicitor withholds the deeds in his possession, and will not deliver them to his client on his applying for them.[2] Where the solicitor merely claims the ordinary lien on the documents, they must be produced;[3] and the Court will not, in order to facilitate their production, direct the party to pay the costs of the solicitor claiming the lien.[4]

Documents not belonging to the party, but alleged to have been lent to him by a person not a party to the suit, have been ordered to be produced. Thus, in a suit for tithes in the Exchequer, the plaintiff was ordered to produce documents in his possession, the property of the vicar, though he was not a party: they being required for the purposes of the examination of the vicar, from whom the plaintiff had obtained them;[5] and a party has been ordered to produce documents which he has obtained from a third party, and holds subject to an undertaking not to part with their possession;[6] but a defendant cannot require the plaintiff to produce a document which has been furnished to him by another defendant, in the absence of the latter defendant: although it seems that, where a covenant has been obtained for a specific limited purpose, production cannot be withheld on the ground of an implied confidence that it will not be used for any other purpose.[7]

In a suit for an account of a partnership between two solicitors, it was held to be no objection to an application for the production of documents that the clients of the firm had an interest in them;[8] but when

[6] Bethell *v.* Casson, 12 W. R. 200, V. C. W.

[1] Taylor *v.* Rundell, C. & P. 104, 113; 1 Phil. 222, 225.

[2] Fenwick *v.* Reed, 1 Mer. 114, 123; see *ante*, p. 299. [But it is not consistent with the practice of the Court to make an order for production of documents on the solicitor of a party against whom discovery is sought. Cashin *v.* Craddock, 2 Ch. Div. 140.]

[3] *Ex parte* Shaw, Jac. 272; Hope *v.* Liddell, 20 Beav. 438; 7 De G., M. & G. 331; 1 Jur. N. S. 665; Lockett *v.* Cary, 10 Jur. N. S. 144, M. R.; and see Fencott *v.* Clarke, 6 Sim. 8.

[4] Wroughton *v.* Barclay, 11 Jur. 274, V. C. K. B.; see also Rodick *v.* Gandell, 10 Beav. 270; Burbidge *v.* Robinson, 2 M'N. & G. 244.

[5] Foreman *v.* Cooper, 11 Pri. 515.

[6] Penkethman *v.* White, 2 W. R. 380 M. R.

[7] Reynolds *v.* Godlee, 4 K. & J. 88. [A party to a suit cannot be compelled to produce documents relating to the compromise of a dispute between himself and a person not a party to the suit. Warrick *v.* Queen's College, L. R. 4 Eq. 254.]

[8] Brown *v.* Perkins, 2 Hare, 540; 8 Jur. 186; see also Richardson *v.* Hastings, 7 Beav. 354.

the documents were in possession of trustees, production of them was refused in the absence of the *cestui que trusts*.[9]

A party will not be ordered to produce documents, with the possession of which he has parted since the filing of the bill, but before the time of making the application.[10]

The mere circumstance of the documents being abroad, is no answer to an application for their production; but, in such a case, *reasonable time will be given the party to bring them to this *1828 country; and if he does not comply with the order, the Court will consider it the same as if he had had them here in the first instance, and had refused to produce them.[1]

Where the possession of the documents is admitted, but the party claims to be exempted from producing them on the ground that, under the particular circumstances of the case, he is unable to do so, he must satisfy the Court, by evidence, that he cannot obtain access to them: and a mere statement to that effect in his answer or affidavit is insufficient.[2]

Where the application is founded on an answer, the plaintiff must, as a general rule, be able to read from the answer an admission that the documents are in the defendant's possession,[3] at the time the application is made;[4] and that they relate to the contents of the bill as it then stands.[5] Although the admission must be contained in the answer, a plaintiff has been allowed to verify by affidavit documents, neither admitted nor denied by the answer, which tended to establish the plaintiff's right to production.[6]

The applicant having shown that the answer contains a sufficient admission of the possession of documents, must also show that they are sufficiently described to enable the Court to specify which are to be produced.[7]

Besides the reasons against the production of documents which have been considered, there are also objections to their production, arising out of the general principles which regulate the right to discovery in Equity.[8]

The general rule is, that when once it is admitted that the documents relate to the matters in question in the suit, they must be produced: unless they manifestly can have no bearing upon the issue. Upon the question of relevancy, the Court accepts the statement on oath of the

[9] Ford *v.* Dolphin, 1 Drew. 222.

[10] Burbidge *v.* Robinson, 2 M'N. & G. 244; and see Penney *v.* Goode, 1 Drew. 474; 17 Jur. 82.

[1] Lechmere *v.* Balfour, 1 S. & L. 190; Freeman *v.* Fairlie, 3 Mer. 44; and see *ante*, p. 726.

[2] Mertens *v.* Haigh, 11 W. R. 792, L. JJ.

[3] Dare *v.* Clarke, 5 Ves. 183; Erskine *v.* Bate, 2 Cox, 330; Gibbons *v.* Ogden, Hall. Dig. 174. A reference to documents is not sufficient without an admission that they are in the custody or power of the defendant. Gibbons *v.* Ogden, *supra*; Watson *v.* Renwick, 4 John. Ch. 383.

[4] Freeman *v.* Midland, 4 Mad. 391. Where the defendant had died since filing his answer, it was held that a new admission must be procured from his representatives, before production could be obtained against them. Scott *v.* Wheeler, 12 Beav. 566; and see Robertson *v.* Shewell, 15 Beav. 277.

[5] Haverfield *v.* Pymar, 2 Phil. 202, and see Attorney General *v.* Thompson, 8 Hare, 118; Reynell *v.* Sprye, 11 Beav. 618.

[6] Addis *v.* Campbell, 1 Beav. 258, 261.

[7] See Atkyns *v.* Wright, 14 Ves. 213; Gibbons *v.* Ogden, Hall. Dig. 174; Watson *v.* Renwick, 4 John. Ch. 383.

[8] See *ante*, p. 562 *et seq.*

party against whom production is sought; but it does not accept his assertion upon the point whether they will or will not establish the applicant's case: that question being one upon which the appli-
*1829 cant has a right to the opportunity * of judging for himself.[1]

The party admitting the relevancy is, therefore, bound to produce the documents, although he denies that they tend to prove the applicant's title,[2] or he sets up a defence which denies the applicant's whole title.[3] This rule has been considered to be impugned, by the decision of Lord Cottenham in *Adams* v. *Fisher*;[4] but that case seems to have been decided on the ground that the documents did not appear to be material for the purpose of the decree.[5]

If it clearly appears that the documents, although relevant, are not material to the applicant's case,[6] or that they are not necessary or material to the question to be decided at the hearing,[7] production will not be ordered; and it may be mentioned here, that if the plaintiff amends his bill, and thereby alters the issue, production will not be ordered upon an admission of relevancy made previously to the amendment.[8]

Interlocutory orders for production are only made upon two principles: security pending litigation; and discovery for the purposes of the suit;[9] and will, therefore, be refused, where the order would be equivalent to a decree in favor of the plaintiff. Thus, where the whole object of the suit was, that the plaintiff might be declared entitled to a copy of a certain book for the purposes of his trade, a motion for the production of the book was refused, on the ground that the application sought an anticipated decree.[10] Where, however, the suit was instituted for the delivery up of certain documents, it was held that it was necessary that they should be produced, for the purpose of ascertaining

[1] Mansell *v.* Feeney (No. 2), 2 J. & H. 320; and see Tyler *v.* Drayton, 2 S. & S. 309, 310; Smith *v.* Duke of Beaufort, 1 Hare, 507; Affirmed, 1 Phil. 209; 7 Jur. 1095; Attorney-General *v.* Thompson, 8 Hare, 106; Jenkins *v.* Bushby, 1 W. N. 92, V. C. K.

[2] Mansell *v.* Feeney, *ubi sup.*

[3] Wigram on Disc. 89 *et seq.*; Shaw *v.* Ching, 11 Ves. 303; Somerville *v.* Mackay, 16 Ves. 382; Unsworth *v.* Woodcock, 3 Mad. 432; Hue *v.* Richards, 2 Beav. 305, 307; Edwards *v.* Jones, 1 Phi.. 501, 506; Marquis of Bute *v.* Glamorganshire Canal Company, *ib.* 681, 685; 9 Jur. 1063; Ord *v.* Fawcett, 14 Jur. 456, V. C. W.; Attorney-General *v.* Corporation of London, 2 M'N. & G. 247, 256; 14 Jur. 205; Goodall *v.* Little, 1 Sim. N. S. 155, 161; 15 Jur. 309; Bugden *v.* South, 3 Jur. N. S. 783, M. R.; and see Rigby *v.* Rigby, 15 Sim. 90; 10 Jur. 126.

[4] 3 M. & C. 526, 546; and see Turney *v.* Bayley, 12 W. R. 633, L. JJ.

[5] See observations of Lord Lyndhurst, in Marquis of Bute *v.* Glamorganshire Canal Company, 1 Phil. 681; and in Lancaster *v.* Evors, *ib.* 352; and of Sir John Romilly, M. R., in Bishop of Winchester *v.* Bowker, 29 Beav. 479.

[6] Smith *v.* Dowling, 10 Jur. 63, V. C. E.; M'Hardy *v.* Hitchcock, 11 Beav. 73, 77; Harford *v.* Rees, 15 Jur. 663, V. C. Ld. C.; Mansell *v.* Feeney, *ubi sup.*; Forbes *v.* Tanner, 9 Jur. N. S. 455; 11 W. R. 414, V. C. K. [Where the plaintiffs claimed to be owners in fee of land, and the defendant alleged that they were freehold tenants of a manor of which he was lord, and had only customary rights, and the plaintiffs applied for inspection of the Court Rolls of the manor, it was held that they were not entitled to inspection. Owen *v.* Wynn, 9 Ch. Div. 29.]

[7] Turney *v.* Bayley, *ubi sup.*

[8] Haverfield *v.* Pyman, 2 Phil. 202; Attorney-General *v.* Thompson, 8 Hare, 118; Reynell *v.* Sprye, 11 Beav. 618.

[9] See Watts *v.* Lawrence, 3 Paige, 159; Chichester *v.* Marquis of Donegal, L. R. 4 Ch. Ap. 416, 419.

[10] Lingen *v.* Simpson, 6 Mad. 290; Chichester *v.* Marquis of Donegal, L. R. 4 Ch. Ap. 416, 419.

whether they were of such a character that the plaintiff was entitled to have them delivered up at the hearing of the cause.[11]

*In suits to set aside deeds or legal instruments, upon the *1830 ground of fraud or other equitable circumstances, the plaintiff is not, from reasons founded on the object of the suit alone, entitled to the production of the instrument impeached by the bill:[1] for if he was, a plaintiff, by merely filing a bill purporting to impeach a deed, might, without more, exact production of it.[2] Cases of this class must, it is conceived, be governed by the general rules of the Court; and not by any rules peculiar to the cases themselves. Where the deed sought to be set aside is alleged by the plaintiff to contain, on the face of it, evidence of the fraud or other fact upon which it is sought to be set aside, then, unless the defendant, by his answer or affidavit, expressly denies that the deed does exhibit such evidence, it seems that an order will be made for its production.[3]

Another case, in which the plaintiff is not entitled to production of the documents, exists when the required documents are not wanted for the purpose of proving the plaintiff's right to a decree, but for the purpose of carrying into effect the decree sought to be obtained. Cases of this kind must be distinguished from those where the documents are required for a subordinate point in the decree, but still for a point in the decree. In the cases now considered, the discovery is supposed to be, not for the purpose of determining in any respect what the decree is to be, but for the purpose of enabling the plaintiff to carry it into execution. Under these circumstances, there is clearly no reason why the plaintiff should inspect the documents before the hearing of the cause.[4] The case of *The Attorney-General* v. *Ellison*,[5] seems to be somewhat at variance with the foregoing principles. There, the general object of the suit was to set aside two leases; and a motion was made for the production of four deeds, relating to the leases, admitted to be in the possession of the defendants, and by the description of them appearing to be assignments of the leases sought to be set aside. Sir Lancelot Shadwell V. C. ordered production: saying, "If the Attorney-General succeeds, every portion of the legal estate in the terms for 999 years must be assigned or surrendered, so that the leases may be no longer set up; he, therefore, has a direct interest in the deeds in the defendant's possession. They do not *relate solely to any *1831

[11] Lady Berkeley v. Driver, 14 Beav. 387; and see Bishop of Winchester v. Bewker, 29 Beav. 479.

[1] Beckford v. Wildman, 16 Ves. 438; Belch v. Symes, T. & R. 87; Tyler v. Drayton, 2 S. & S. 309; Bamford v. Blakeley, 6 Beav. 131; Deady v. Cross, 11 Beav. 91. It is the practice of the Court to order deeds and papers contended as false and fraudulent to be brought into Court for inspection. Apthorpe v. Comstock, 1 Hopk. Ch. 144; S. C., 8 Cowen, 259.

[2] See Crisp v. Platel, 8 Beav. 62.

[3] Kennedy v. Green, 6 Sim. 6; and see Neate v. Latimer, 2 Y. & C. Ex. 257; S. C. nom. Latimer v. Neate, 11 Bligh N. S. 112; 4 Cl. & F. 570; and see observations of Lord Cottenham thereon, Glover v. Hall, 2 Phil. 484, 490.

[4] Wigram on Disc. 211; and see Turney v. Bayley, 12 W. R. 643, L. JJ.

[5] 4 Sim. 238.

separate and independent title of the defendant, and therefore they must be produced."[1] This case is criticised by Sir James Wigram, upon the ground that the plaintiff could not be entitled to know the contents of the derivative leases, until, by proving his right to rescind the original leases (a purpose for which it was not suggested that the derivative leases could assist him), he had established an interest in the leases also.[2]

In many cases, the extent of discovery to which a plaintiff, at any particular period of the cause, is entitled, depends upon the state of the pleadings.[3] Thus, if a demurrer to the whole bill is put in: as such a state of the record in itself is an admission of every fact properly pleaded in the bill, the plaintiff has no right to any discovery; consequently, no application for the production of documents can be obtained.[4] So, also, if the defendant pleads a pure affirmative plea, that is, if the defendant admits the whole case made by the bill, but states some fact, not in any manner denied by the bill, as a defence of the whole case, then the plaintiff has no right to discovery.[5] The effect of the state of the pleadings upon the right to discovery has already been discussed;[6] and it need now only be stated that, when discovery as to documents can be compelled, an application for their production can be made.[7] Where the defendant pleads to part of the bill and answers the remainder, the application for production is often ordered to stand over until the plea is argued.[8]

Another objection to the production of documents is, that they relate exclusively to the case of the party objecting to the production: if they relate to the case of both parties, they must be produced;[9] but liberty will be given to seal up those parts which do not relate to the common ground.[10]

If the party against whom production is sought makes no case of his own, but simply denies the applicant's title, he cannot escape production on the ground that the documents only evidence his own *1832 case;[11] and the mere use of the word title — the mere *allegation that the documents relate exclusively to the title of the party resisting production — is of no avail, if that conclusion is opposed by

[1] 4 Sim. 241.

[2] Wigram on Disc. 214.

[3] As to the effect of amendment, see *ante*, p. 423 *et seq.*; *ante*, p. 1829.

[4] See *ante*, p. 546 *et seq.*; and cases collected, Seton, 1052.

[5] See *ante*, p. 621 *et seq.*; and cases collected, Seton, 1054.

[6] See *ante*, p. 621 *et seq.*

[7] Parkinson *v.* Chambers, 1 K. & J. 72.

[8] Buchanan *v.* Hodgson, 11 Beav. 368.

[9] *Ante*, p. 579 *et seq.*; Smith *v.* Duke of Beaufort, 1 Hare, 507, 520; Affd., 1 Phil. 209; 7 Jur. 1095; and see Bolton *v.* Corporation of Liverpool, 1 M. & K. 88, 91; Burrell *v.* Nicholson, *ib.* 680; Wright *v.* Vernon, 1 Drew. 344; Lloyd *v.* Purves, 6 W. R. 421, V. C. W.; Hunt *v.* Elmes, 27 Beav. 62; 5 Jur. N. S. 645. As to the form of affidavit, see Manby *v.* Bewicke (No. 3), 8 De G., M. & G. 476; 2 Jur. N. S. 671. As to the right of a disinherited heir-at-law to production, see Lady Shaftesbury *v.* Arrowsmith, 4 Ves. 66; Bennett *v.* Glossop, 3 Hare, 578; Wright *v.* Vernon, *ubi sup.*; Rumbold *v.* Forteith, 3 K. & J. 44, 748; 3 Jur. N. S. 657; Quin *v.* Ratcliff, 6 Jur. N. S. 1327; 9 W. R. 65, V. C. S.

[10] Earp *v.* Lloyd, 3 K. & J. 549; Lind *v.* Isle of Wight Ferry Company, 8 W. R. 540, V. C. W.

[11] Attorney-General *v.* Corporation of London, 2 M'N. & G. 247, 259; 14 Jur. 205.

the character of the documents, or if it is not supported by specific averments excluding all probability that the documents would furnish evidence in support of the applicant's case: in such a case, the Court exercises its own judgment as to the effect which the evidence may have.[1] In order to resist the production of documents which have been obtained for the purposes of the defence to the suit, it must be stated, and must appear, looking at the schedule and the nature of the documents, that they do not relate to or tend to show, not only the title of the plaintiff to the property to be recovered, but the title to the relief prayed by the bill.[2]

The result of the cases on this subject has been thus stated: "If it be, with distinctness and positiveness, stated in an answer that a document forms or supports the defendant's title, and is intended to be, or may be, used by him in evidence accordingly, and does not contain anything impeaching his defence, or forming or supporting the plaintiff's title, or the plaintiff's case, that document is, I conceive, protected from production, unless the Court sees, upon the answer itself, that the defendant erroneously represents or misconceives its nature. But where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then, I apprehend, the document is not protected; nor, I apprehend, is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness."[3]

A mere statement in the answer, of a document which the party is not bound to produce,[4] or a mere reference to a document relating exclusively to the defendant's title,[5] will not entitle the applicant to its production; but where a party states the effect of a document relating to his own title, which he has in his possession, * and *1833 craves leave to refer to it for greater certainty, it has been held that he is bound to produce it.[1] This decision is criticised by Sir James

[1] Harris v. Harris, 4 Hare, 179, 184; 9 Jur. 89; and see Marquis of Bute v. Glamorganshire Canal Company, 1 Phil. 681; 9 Jur. 1064; Prince of Wales v. Lambe, 11 Beav. 213; Greenwood v. Greenwood, 6 W. R. 119, V. C. K.

[2] Felkin v. Lord Herbert, 9 W. R. 756, V. C. K.; and see Gandee v. Stansfield, 4 De G. & J. 4; 5 Jur. N. S. 778.

[3] Per Sir J. L. Knight Bruce V. C. in Combe v. Corporation of London, 1 Y. & C. C. C. 631, 651; 6 Jur. 371; see also S. C., before L. C., 10 Jur. 57; and 4 Y. & C. Ex. 179; Baumatyne v. Leader, 10 Sim. 220, 235; Prince of Wales v. Lambe, 11 Beav. 213; Attorney-General v. Corporation of London, 2 M M. & G. 247; 14 Jur. 286; Stainton v. Chadwick, 3 M N. & G. 575, 584; 15 Jur. 1159; Curnock v. Jackson, 1 Drew. 197; Smith v. Barnes, 1 Law Rep. Eq. 65, 11 Jur. N. S. 924, V. C. W.; Patch v. Ward, 14 W. R. 166, V. C. S.; L. R. 1 Eq. 436; 12 Jur. N. S. 2; Ferrer v. Atwood, 12 Jur. N. S. 365; 14 W. R. 597, L. JJ.; 16. 582, V. C. W. As to the necessity of distinctness, see Wastney v. Tempest, 9 Beav. 407; Peile v. Stoddart, 1 M N. & G. 192, 195; 13 Jur. 373; Hunt v. Hunt, 27 Beav. 62, 64; 5 Jur. N. S. 645; [Mittel v. Morgan, L. R. 8 Ch. App. 361; Corporation of Hastings v. Ivall, L. R. 8 C. App. 1017; Smith v. Daniell, L. R. 12 Eq. 649.]

[4] Glover v. Hall, 2 Phil. 484.

[5] Atkyns v. Wright, 14 Ves. 211.

[1] Hardman v. Ellames, 2 M & K. 745; see also Bettison v. Farrington, 3 P. Wms. 364; Atkyns v. Wright, 14 Ves. 211, 214; Lyons v. Richard, 1 Swanst. 7, 8; Lord Lisle in the Princess of Wales v. The Earl of Liverpool, 1 Swanst. 114, 121; Wilford v.

Wigram, on the ground of the conclusive effect given to the reference in the answer: to the exclusion of those considerations which, in other cases, are of the essence of the question between the parties: namely, the nature of the document, and the case appearing upon the whole record;[2] and, with reference to it, Lord Cottenham has remarked: "It was certainly no new decision, and I was very much surprised to hear any one treat it as such; and when I came to look into the doctrines laid down in the books, I felt no doubt upon the subject. Where a party has thought proper to put his defence upon a particular document, he himself having introduced it and put it forward, he cannot be permitted to make any representation of it, however unfounded, which he pleases; but the plaintiff is entitled to see whether the defendant has rightly stated it. It is because the defendant chooses to make it part of his answer that the plaintiff is entitled to see it: not because the plaintiff has an interest in it. The principle is, that a defendant shall not avail himself of that mode of concealing his defence."[3]

A further objection to the production of documents arises out of the privilege extended to professional communications. This subject has been already considered with reference to the right of a defendant to demur to discovery sought from him,[4] or to decline giving it by answer.[5] There does not seem to be any difference whether the question arises upon applications for the production of documents, or upon exceptions to an answer, or a demurrer to discovery; and it appears that all letters written, and cases stated for the opinion of counsel, by a party or his solicitor, are privileged from production in any suit respecting the same subject-matter, and involving the question to which such letters and cases relate: although, at the time they were sent or stated, no litigation had arisen, or they were sent or stated with refer-
*1834 ence to a previous litigation *between other persons relating to the same subject-matter.[1] Where the client and solicitor were

Stainthorpe, 2 Beav. 587; Belsham *v.* Percival, 10 Jur. 722, V. C. W.; M'Intosh *v.* Great Western Railway, 1 M'N. & G. 73; 13 Jur. 179; Glover *v.* Hall, 2 Phil. 484; Latimer *v.* Neate, 11 Bligh N. S. 112; 4 Cl. & F. 570, and observations of Lord Cottenham thereon, 2 Phil. 490.

[2] Wigram on Disc. 302; and see Howard *v.* Robinson, 4 Drew. 522; 5 Jur. N. S. 136.

[3] Adams *v.* Fisher, 3 M. & C. 526, 548; see also M'Intosh *v.* Great Western Railway, 1 M'N. & G. 73; 13 Jur. 179. The mere statement of a document in the answer which the defendant is not bound to produce, will not entitle the plaintiff to production. Glover *v.* Hall, 2 Ph. 484; Story Eq. Pl. §§ 859, 860, 860 *a*, and notes. It is a matter of course to allow the plaintiff to inspect the books and papers of the defendant referred to in his answer, and thus made a part thereof. And the defendant may be compelled to produce them within a reasonable time, although they are in the hands of his agent in a foreign country. Eager *v.* Wiswall, 2 Paige, 369.

[4] *Ante*, p. 570 *et seq.*

[5] *Ante*, p. 716.

[1] Bolton *v.* Corporation of Liverpool, 1 M. & K. 88, 91; Greenough *v.* Gaskell, *ib.* 98, 101; Flight *v.* Robinson, 8 Beav. 22, 33; 8 Jur. 888; Reece *v.* Trye, 9 Beav. 316; Calley *v.* Richards, 19 Beav. 401; Combe *v.* Corporation of London, 1 Y. & C. C. C. 631; 6 Jur. 571; Clagett *v.* Phillips, 2 Y. & C. C. C. 82; 7 Jur. 31; Lord Walsingham *v.* Goodricke, 3 Hare, 122, 124; Russell *v.* Jackson, 9 Hare 387; Herring *v.* Clobery, 1 Phil. 91; Holmes *v.* Baddeley, *ib.* 476, 480; 9 Jur. 289; Pearse *v.* Pearse, 1 De G. & S. 12, 18; Glyn *v.* Caulfeild, 3 M'N. & G. 463, 471; 15 Jur. 807; Hawkins *v.* Gathercole, 1 Sim. N. S. 150; 15 Jur. 186; Enthoven *v.* Cobb, 2 De G., M. & G. 632; 17 Jur. 81; Thompson *v.* Falk, 1 Drew. 21; Manser *v.* Dix, 1 K. & J. 451; 1 Jur. N. S. 466; Lafone *v.* Falkland Islands Co. (No. 1), 4 K. & J. 34; Bluck *v.* Galsworthy, 2 Giff. 453, 456; 7 Jur. N. S. 91; Ford *v.* De Pontes, 5 Jur. N. S. 993; 7 W. R. 299, M. R.; Charlton *v.* Coombes, 4 Giff.

both defendants, and the solicitor claimed the privilege but the client did not object to the production, the documents were ordered to be produced.[2]

Cases and letters in which the plaintiff and defendant are jointly interested must be produced;[3] and so, in a suit by a *cestui que trust*, must cases and opinions taken by the trustee for his guidance in the administration of the trust, and not for the purpose of his own defence;[4] but a mere claimant is not entitled to the production of cases or opinions taken by the trustee for the purpose of enabling him to choose between different classes of claimants, under the trust instrument.[5] The privilege also extends to communications between the solicitor of the party and a third person, which refer to the subject-matter in dispute, and are written in anticipation of or pending the suit;[6] and also to communications between the party or his solicitor and an unprofessional agent, if the circumstances of the case have rendered the employment of the agent necessary,[7] and to all notes and observations of counsel on their briefs; but the briefs themselves, so far as they consist of matter which is *publici juris*, and counsel's indorsement or note of any order made by the Court, are not privileged.[8]

In order to avail himself of this objection, the party objecting must distinctly swear that he believes the communications to be *privileged; and it is not sufficient for him to say that he is *1835 advised, and insists that they are so.[1]

Where a solicitor is charged with fraud, the privilege does not attach to documents in his possession relating to the subject-matter of the suit;[2] and where a solicitor was charged with having been a party to a fraud committed by a deceased client, of whom there was no personal representative, he was ordered to produce all documents relating to the transaction, whether his own or those of his deceased client.[3]

372; 9 Jur. N. S. 534; Mornington *v.* Mornington, 2 J. & H. 697; Feaver *v.* Williams, 11 Jur. N. S. 902, V. C. S.; Jenkins *v.* Bushby, L. R. 2 Eq. 547; 12 Jur. N. S. 558, V. C. K.; [Wilson *v.* Northampton, &c. R. Co., L. R. 14 Eq. 477; McFarlan *v.* Rolt, L. R. 14 Eq. 539;] and cases collected, Seton, 1059; but see Goodall *v.* Little, 1 Sim. N. S. 155; 15 Jur. 309. The privilege exists in the case of a foreign legal adviser. Banbury *v.* Banbury, 2 Beav. 173; Lawrence *v.* Campbell, 4 Drew. 485; 5 Jur. N. S. 1071; *ante*, p. 577; and also where the professional adviser had, at the time of the communication, without the client's knowledge ceased to practise. Calley *v.* Richards, 19 Beav. 401.

[2] Garnett *v.* Chambers [No. 2, 26 Beav. 304; and see Bloodworth *v.* Bloodworth, 2 Phil. 607; Reg. *v.* ——, 11 Beav. 131; 11 Jur. 721.

[3] Attorney-General *v.* Berkeley, 2 J. & W. 294; Russell *v.* Smyth, 10 Beav. 54, 55; Wardle *v.* Wardle, 3 M. N. & G. 365; 15 Jur. 759.

[4] Wynne *v.* Humberston, 27 Beav. 421; 5 Jur. N. S. 5; and see Woods *v.* Woods, 4 Hare, 83, 86; 9 Jur. 615; Brown *v.* Oakshott, 12 Beav. 252; Devaynes *v.* Robinson, 20 Beav. 42; Talbot *v.* Marshfield, 13 W. R. 885, V. C. K.; and also Tugwell *v.* Hooper, 10 Beav. 348.

[5] Wynne *v.* Humberston, *ubi sup.*

[6] Simpson *v.* Brown, 33 Beav. 482.

[7] Reid *v.* Langlois, 1 M. N. & G. 627, 638; 14 Jur. 467; Steele *v.* Stewart, 1 Phil. 471; Carpmael *v.* Powis, *ib.* 687; Lafone *v.* Falkland Islands Co. [No. 1], 4 K. & J. 34; Hooper *v.* Gumm, 2 J. & H. 602; Walsham *v.* Stainton, 2 H. & M. 1; *ante*, p. 577; and see Chorton *v.* Frewen, 2 Dr. & Sm. 390. [A letter from an agent to the party in answer to a telegram, after litigation had become probable, to send full particulars, is not privileged, and must be produced. Anderson *v.* Bank, 2 Ch. Div. 644.]

[8] Walsham *v.* Stainton, *ubi sup.*; Nicholl *v.* Jones, 13 W. R. 451, V. C. W.; 2 H. & M. 588.

[1] Bulguy *v.* Broadhurst, 1 Sim. N. S. 111; and see *ante*, pp. 716, 717.

[2] See *ante*, p. 577.

[3] Feaver *v.* Williams, 11 Jur. N. S. 902, V. C. S.

A party may also object to the production of documents on the ground that their production would tend to involve him in a criminal charge;[4] or to subject him to a penalty or forfeiture.[5] Objections of this kind are governed by the same rules, whether made to the production of documents upon a demurrer to discovery, or upon exceptions to an answer; and have already been considered.[6]

In an ordinary suit for redemption, where there is no dispute concerning the fact of the mortgage, the Court will not, before decree, allow the plaintiff to inspect the mortgage deed. Where, however, the defendant does not submit to be redeemed, but denies that he is a mortgagee, he cannot assert the right of a mortgagee, and claim, upon that ground, to withhold production of the deeds until payment has been made.[7] Where the only question in dispute was the amount the plaintiff had to pay, production of the indorsement upon the mortgage deed, which was stated to afford evidence on that point, was directed.[8]

A mortgagee cannot refuse production of the mortgage deeds of the persons interested in the mortgage money on the ground that the mortgagor may possibly be injured by the production.[9] Where a person was mortgagee and also executor and trustee of the testator in the cause: although he was allowed to withhold production of his mortgage deed, and other deeds relating to the mortgaged estate, he *1836 was compelled to produce certain accounts and writings * relating thereto, which it was stated might affect the testator's general estate.[1]

Where any documents are ordered to be left or deposited, whether for safe custody, or for the purpose of an inquiry in Chambers, the same are to be left or deposited in the Record and Writ Clerks' office; and are subject to such directions as may be given for the production thereof;[2] and it would appear that it is not the course of the Court to order production at any other place, except upon the consent of the party in whose possession they are.[3] Upon the application, however, of such party, the Court will frequently order production at some other place,

[4] Rice *v.* Gordon, 13 Sim. 580; 7 Jur. 1076; Waters *v.* Earl of Shaftesbury, 12 Jur. N. S. 3; 14 W. R. 259, V. C. S.

[5] A party cannot decline to make the usual affidavit as to documents on the ground that he is liable to penalties under the 13 Eliz. c. 5 (Act as to fraudulent conveyances). Bunn *v.* Bunn, 12 W. R. 561, L. JJ.

[6] *Ante*, pp. 562–568, 680, 715, 716.

[7] See Wigram on Disc. 287; and see Neate *v.* Latimer, 2 Y. & C. Ex. 257; S. C., Latimer *v.* Neate, 11 Bligh N. S. 149; 4 Cl. & F. 570; and see 2 Phil. 490; Gill *v.* Eyton, 7 Beav. 155; Greenwood *v.* Rothwell, *ib.* 291; Crisp *v.* Platel, 8 Beav. 62; Browne *v.* Lockhart, 10 Sim. 421; 4 Jur. 167; Johnson *v.* Tucker, 11 Jur. 382, V. C. E.; Cannock *v.* Jauncey, 1 Drew. 497; Jones *v.* Jones, Kay Ap. 6; Lewis *v* Davies, 17 Jur. 253, V. C S.; Howard *v.* Robinson, 4 Drew. 522; 5 Jur. N. S. 136; Bridgewater *v.* De Winton, 9 Jur. N. S. 1270; 12 W. R. 40, V. C. K.; Freeman *v.* Butler, 33 Beav. 289; Smith *v.* Barnes, 1 Law Rep. Eq. 65; 11 Jur. N. S. 924, M. R.; Patch *v.* Ward, 12 Jur. N. S. 2; 14 W. R. 166, V. C. S.; L. R. 1 Eq. 436; 12 Jur. N. S. 2. For cases of impeached documents, see *ante*, p. 1830.

[8] Phillips *v.* Evans, 2 Y. & C. C. C. 647.

[9] Gough *v.* Offley, 5 De G. & S. 653.

[1] Freeman *v.* Butler, *ubi sup.*; and see Gibson *v.* Hewett, 9 Beav. 293.

[2] Ord. XLII. 3. For forms of order, see Seton, 1040 *et seq.* As to deposit and production of documents in proceedings by Special Case, see 13 & 14 Vic. c. 35, § 18.

[3] Maund *v.* Allies, 4 M. & C. 503, 507; 3 Jur. 309.

for the sake of convenience.[4] And where the party states that the books and papers are in constant use in his business, and necessary for that purpose, and that the deposit of them in Court will be productive of injury to him, the Court will, in the first instance, give credit to that statement, and order that they be produced at the place of business at which they are in use; and if the applicant does not obtain a satisfactory inspection of them there, it is open to him to apply for a further order.[5] Acting upon this principle, the Court now usually orders the production at the place of business of the party's solicitors;[6] but as such an order is made for the party's convenience, the Court will not allow his solicitors to make any charge against the applicant for the inspection;[7] and where, at the request of the applicant, they make any copies he may require and is entitled to take, they are only entitled to the usual law-stationer's charges.[8]

Where an order for production at a solicitor's office has once been made, production at the same place will, in the absence of special circumstances, be directed by all subsequent orders.[9]

The order directs production to the party, his solicitor, and agents;[10] but it seems that these words mean, his solicitors in the cause, and some person professionally connected with them, or his general agents; and, accordingly, do not authorize production to * an accountant *1837 or agent specially employed for the particular purpose of inspecting the documents;[1] but if required by the circumstances of the case, an order directing the production to such a special agent will be made.[2]

Where an undertaking to produce the documents to a party has been given, the production must be made to his solicitors and agents, unless that is guarded against, and so expressed.[3]

The documents are usually directed by the order to be produced at any examination of witnesses, and at the hearing of the cause.[4]

The effect of the order for the production of documents is only to give

[4] The rule adopted by the Master of the Rolls is always to order production out of Court, unless some special grounds are shown by the party seeking production for ordering the documents to be deposited in Court.

[5] Grane *v.* Cooper, 4 M. & C. 263; Gardner *v.* Dangerfield, 5 Beav. 389; Prentice *v.* Phillips, 2 Hare, 152; Mayor of Berwick *v.* Murray, 1 M'N. & G. 530; 13 Jur. 1063; Carew *v.* Davis, 21 Beav. 213; Talbot *v.* Marshfield, 1 Law Rep. Eq. 6; 11 Jur. N. S. 901, V. C. K.; Mertens *v.* Haigh, Johns. 735; Hooper *v.* Gumm, 2 J. & H. 602. For form of summons, see Vol. III.

[6] For forms of orders, see Seton, 1040-1042.

[7] Woodroffe *v.* Daniel, 10 Sim. 126; Flockton *v.* Peake, 12 W. R. 1023, V. C. W.

[8] Kennedy *v.* George, 6 W. R. 218, V. C. S.; and see Prentice *v.* Phillips, 2 Hare, 152.

[9] Groves *v.* Groves, 2 W. R. 86, V. C. W.; and see Mertens *v.* Haigh, *ubi sup.*

[10] See forms of orders, Seton, 1040 *et seq.*

[1] Bartley *v.* Bartley, 1 Drew. 233; 16 Jur. 1062; Summerfield *v.* Prichard, 17 Beav. 9; 19 Hare Ap. 68; 17 Jur. 361; Coleman *v.* West Hartlepool Railway Co., 5 L. T. N. S. 266, V. C. W.; Draper *v.* Manchester & Sheffield Railway Co., 3 De G., F. & J. 23; 7 Jur. N. S. 86.

[2] Bonnardet *v.* Taylor, 1 J. & H. 383; 7 Jur. N. S. 328; Swansea Vale Railway Co. *v.* Budd, L. R. 2 Eq. 274; 12 Jur. N. S. 561, V. C. W.

[3] Williams *v.* Prince of Wales Life Co., 23 Beav. 338; 3 Jur. N. S. 55.

[4] See Wheat *v.* Graham, 7 Sim. 61; and forms of orders, Seton, 1040 *et seq.* [Pending an appeal from order, production not required. Kelly *v.* Hutton, 15 W. R. 946.]

the applicant the power of inspecting and taking copies of them. It does not make the documents evidence in the cause, unless the mere circumstance of their coming out of the custody of the party would, in itself, render them admissible evidence. Where the documents have been deposited with the Record and Writ Clerk, the order for production, in itself, establishes that the documents came out of the party's custody: so that it is not necessary to enter into any evidence for the purpose of proving that fact.[5]

A party, who has obtained inspection and production of documents, under an order of the Court, has no right to make public the information so obtained; and will, if necessary, be restrained by injunction from so doing;[6] nor will he be permitted to make use of the information for purposes collateral to the suit.[7]

If the documents are ordered to be deposited at the Record and Writ Clerks' office, the original order should, if possible, be produced; and, in every case, a copy of the order and a schedule of the documents must be left at the time the deposit is made.[8]

*1838 * Inspection of documents so deposited will be refused, as well to the party depositing them, as to a plaintiff or defendant, unless he is either suing or defending in person, or is introduced by his solicitor.[1] Where liberty to inspect is given in the ordinary form, the party entitled to inspect may do so in the absence of the party depositing the documents: where, therefore, it is desired that this practice should be modified, the order should be qualified accordingly.[2] A defendant is not allowed to inspect documents deposited by a co-defendant, unless expressly authorized so to do by order, or the inspection is sanctioned by such co-defendant, or by the plaintiff.[3]

Copies of, or extracts from, documents inspected may be taken by the person making the inspection, without payment of any fee; and any

5 Taylor *v.* Salmon, 3 M. & C. 422.

6 Williams *v.* Prince of Wales Life Co. *ubi sup.*

7 Richardson *v.* Hastings, 7 Beav. 354; and see Tagg *v.* South Devon Railway Co., 12 Beav. 151; Reynolds *v.* Godlee, 4 K. & J. 88. A defendant cannot refuse to produce private and confidential letters from a stranger on the ground that the writer forbids their production. But the plaintiff will be put upon an undertaking not to use them for any collateral object. Hopkinson *v.* Lord Burghley, L. R. 2 Ch. Ap. 447.

8 Braithwaite's Pr. 506. The documents must be made up in a parcel, or enclosed in a wooden or tin box; and the short title of the cause, and the name and address of the solicitor or party making the deposit, must be written on the parcel or box. Strong brown or cartridge paper should be used for the parcel. Where the parcel would exceed about twelve inches in length and width, and ten in depth, or fifteen in length, twelve in width, and six in depth, a box will in general be required. The box must have a lock and key; and the key should have a parchment label, with the short title of the cause, and the name of the solicitor or party, written thereon. *Ibid.*

1 Braithwaite's Pr. 509. No fee is payable by a party inspecting his own documents; but the following fees are payable on inspection by other parties: If occupied not more than one hour, 5*s.*; and if more than one hour, *per diem*, 10*s.*; Regul. to Ord. Sched. 4; Braithwaite's Pr. 508. The fee is not charged, where the inspection is merely made to select a document on bespeaking a copy of it. See *ibid.* The fee is payable in Chancery fee-fund stamps, impressed on, or affixed to, a memorandum of inspection. For form of memorandum, see Vol. III.

2 Braithwaite's Pr. 909.

3 See *ibid.*

such copies or extracts may be obtained by him from the Record and Writ Clerks' office.[4]

If documents deposited in Court are afterwards required to be produced at any examination of witnesses in the cause, or in Court, or at any of the offices of the Court, the Record and Writ Clerk will attend with them on request, on a memorandum bespeaking the attendance being left with him, and on payment of the proper fee;[5] but if the production is required at any place out of the Court of Chancery, or its offices, an order must be procured for the Record and Writ Clerk to attend with the required documents: as the usual order only authorizes the production at any examination of witnesses in the cause or at the rehearing.[6] This order may be obtained on motion of course, or on petition of course at the Rolls, supported by an affidavit that the production of the documents is necessary for the purposes of evidence.[7]

In the absence of any special case being made, documents deposited in Court will not be ordered to be taken out of the jurisdiction, for the purpose of being produced at an examination of witnesses.[8]

When the purpose for which the documents have been deposited in Court is satisfied, the person who has produced them is entitled * to have them delivered out to him.[1] An order is, however, *1839 necessary: which may be obtained on motion or summons with notice; or, by consent, on petition of course at the Rolls.[2] A copy of the order, or of so much thereof as directs the delivery out, with a receipt signed by the person to whom the delivery out is directed to be made, and witnessed, must be left, and the original order must be produced, at the Record and Writ Clerks' office, at the time the application for the delivery out is made.[3]

An order for the production of documents is enforced by attachment, or other process of contempt, in the usual manner.[4] The attachment will be sealed, on proof by affidavit of due service of the order, and of the default in producing the documents.[5] If, however, the documents have been ordered to be left at the Record and Writ Clerks' office, no

[4] *Ibid.* The charge is 4*d.* per folio, payable in fee fund stamps, affixed to the copies or extracts. Regul. to Ord. Sched. 4.

[5] Braithwaite's Pr. 506, 512. For the fee payable, see *ante*, p. 872 note (6); and for form of memorandum, see Vol. III.

[6] See forms of orders, Seton, 1049, Nos. 1, 3; 1041, No. 5.

[7] Braithwaite's Pr. 506, 514; and *ante*, p. 872. For the fee payable, see *ib.* n. (e); and for forms of motion paper, petition, and memorandum bespeaking attendance, see Vol. III.

[8] Lafone *v.* Falkland Islands Co. (No. 2), 4 K. & J. 39.

[1] Dann *v.* Dann, 3 Drew. 17; 18 Jur. 1068; 7 De G., M. & G. 25; 1 Jur. N. S. 122, and see Jenner *v.* Morris, L. R. 1 Ch. Ap. 603.

[2] Braithwaite's Pr. 507. For form of order, see Seton, 1062; and for forms of notice of motion, summons, and petition, see Vol. III.

[3] Braithwaite's Pr. 507. Where the person entitled attends in person, he signs a receipt prepared in the office, on the documents being delivered to him. For form of receipt, see Vol. III.

[4] *Ante*, p. 1042 *et seq.* As to the power of sequestrators to seize documents ordered to be deposited, see *ante*, p. 1056; and as to enforcing an affidavit as to documents, see *ante*, p. 1825 *et seq.*

[5] Braithwaite's Pr. 505. For forms of attachment, indorsement, *præcipe*, and affidavits, see Vol. III.

affidavit of default in making the deposit will be required, as that will sufficiently appear from the office books.[6] Where the plaintiff was shown a document, inspection of which was refused until counsel's opinion had been taken whether it was privileged, and subsequently the defendant declared that he had lost it, an attachment was ordered to issue.[7]

[6] Braithwaite's Pr. 171.

[7] Lord Mornington *v.* Keane, 4 W. R. 793, V. C. W.

*CHAPTER XLIII. *1840

SOLICITORS.

SECTION I. — *Summary Jurisdiction.*

FORMERLY, the sworn clerks were the only recognized agents of parties prosecuting causes in Chancery: but, as the business of the Court increased, their number became insufficient to enable them to conduct throughout the suits of all the claimants. Consequently, the practice arose of confining the duty of the sworn clerks to the performance of a certain portion of the business in every suit; and the remainder was performed by solicitors duly admitted as officers of the Court. Upon the abolition of the Six Clerks' office,[1] the duties performed by the six clerks, and the sworn clerks, were divided between the Clerks of Records and Writs and the solicitors of the Court.[2] The former body were intrusted with the custody of the records of the Court, and generally with that part of the duties of the six clerks and sworn clerks in which they acted as confidential officers of the Court:[3] whilst the solicitors, in addition to their former duties, have now to perform such portions of the business of the sworn clerks as had reference more exclusively to the suitor, and was transacted by them as his agents.[4]

Solicitors have always been considered and treated as authorized officers of the Court; and, as a consequence of their position, the Court has always exercised a summary jurisdiction over them. Thus, if a solicitor is guilty of gross professional misconduct, and the facts are established by evidence, the Court will, upon motion or petition, order his name to be struck off the rolls of solicitors entitled to practise in the Court.[5] The Court will also, under * its general *1841

[1] By 5 & 6 Vic. c. 103.

[2] As to the admission of solicitors and attorneys, and generally as to their duties and liabilities, see 6 & 7 Vic. c. 73, as amended by 7 & 8 Vic. c. 86; 14 & 15 Vic. c. 83; 23 & 24 Vic. c. 127; Chitty's Arch. 24-155; Coxe's Terms, 1-37; and Pulling's Law of Attorneys, *passim*. [See, as to authority of solicitor to settle claims upon a general retainer, and the power of the Court to set aside his action in a pending suit, Picket *v.* Merchants' Bank, 32 Ark. 346.]

[3] See now Ord. I. 35-53.

[4] See Ord. III. 1.

[5] 2 Atk. 173; *Re* Martin, 4 Beav. 367; Wheatley *v.* Bastow, *Re* Collins, 7 De G., M. & G. 261, 558; 1 Jur. N. S. 1125; *Re* Chandler, 22 Beav. 253; 2 Jur. N. S. 366; *Re* Hall, 2 Jur. N. S. 633, V. C. S.; Thorndike *v.* Hunt, 5 Jur. N. S. 879, 882, L. JJ. For forms of orders, see Seton, 865, 866; and see cases referred to in note, *ib.* 866; and see Pulling, 461 *et seq.*; and Chitty's Arch. 144 *et seq.*, for the practice.

[See, as to conduct of a solicitor which will authorize the Court to act, People *v.* Good-

jurisdiction, order a solicitor to pay over money which he has received on behalf of a client, but retains in his own hands.[1] This general jurisdiction will, however, only be exercised in respect of acts done for the applicant in the character of a solicitor, and not in respect of acts done in a different character, or as the solicitor for another person.[2]

Before the 6 & 7 Vic. c. 73, the summary jurisdiction of the Court was usually put in force, where a person applied for aid in gaining possession of deeds and documents retained by his solicitor: and as the Court would not order the solicitor to deliver up the deeds of his client without providing for the payment of what was due for professional charges to the solicitor, the Court extended its summary jurisdiction by making orders upon petition for the delivery and taxation of the solicitor's bill, and by putting the client making the application upon terms which insured payment.[3] Upon a similar principle, if a solicitor retained money received by him in his character of solicitor for the use of his client, his bill was taxable:[4] though it contained no charges for business of such a kind as would have rendered it taxable under the provisions of any statute previous to the 6 & 7 Vic. c. 73. Where the application

rick, 79 Ill. 148; Matter of Niles, 5 Daly, 465; Watson *v.* Citizens' Savings Bank, 5 S. C. 159; Matter of Browne, 2 Col. T. 553; Matter of Kelly, 62 N. Y. 198. Indulgence in vices, affecting the moral character to some extent, but not the personal or professional integrity, is not a sufficient ground: Baker *v.* Commonwealth, 10 Bush, 592; but erasing the word "not" in a letter from a Circuit to a County Judge, advising the latter *not* to allow bail to one indicted for murder, is sufficient: *Id.*; so is changing an affidavit: People *v.* Leary, 84 Ill. 190; or failing to pay over on demand money collected: People *v.* Cole, 84 Ill. 327. As to lapse of time and vagueness of charge, see People *v.* Allison, 68 Ill. 151. As to mode of procedure, Matter of Wool, 36 Mich. 299; Matter of Brewster, 19 N. Y. Sup. Crt. 109; Foster *v.* Townsend, 68 N. Y. 203. And see, as to disbarring by a United States Court, *Ex parte* Robinson, 19 Wall. 505. The investigation of charges of fraudulent conduct in transactions between client and solicitor belongs peculiarly to equity. Broyles *v.* Arnold, 11 Heisk. 484.

The general rule recognized in this country is, that an attorney is liable for the want of such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise; and whether given facts amount to actionable negligence is a question of law for the Court. Gambert *v.* Hart, 44 Cal. 542. And see, on this subject, Caverly *v.* McOwen, 123 Mass. 574; Walker *v.* Stevens, 79 Ill. 193; Chase *v.* Heaney, 70 Ill. 268 (citing 23 Ill. 385; 40 Ill. 210; 16 How. 469; 34 Mo. 429); Hawkins *v.* Smith, 56 Ga. 571; Ryan *v.* Ashton, 42 Iowa, 365; Campbell *v.* Brown, 2 Woods, 349; Bowling Green, &c. *v.* Todd, 52 N. Y. 489. The law imputes to an attorney knowledge of defects in legal proceedings for the sale of property taken under his direction. Galpin *v.* Page, 18 Wall. 350. And see Brent *v.* Maryland, 18 Wall. 430. But a bill will not lie against a solicitor for negligence in investigating a title, the remedy being at Law. British Mutual Investment Co. *v.* Cobbold, L. R. 19 Eq. 627; nor for an accounting against a solicitor for investing in a worthless security, where the transaction was isolated: Mare *v.* Lewis, 4 Ir. Eq. 219; see McDaniels *v.* Cutler, 3 Brewst. 57; Dixon *v.* Wilkinson, 4 De G. & J. 508.]

[1] Mawhood *v.* Milbanke, 15 Beav. 36; *Re* Becke, 18 Beav. 462; *Re* Lawrence, 2 Sm. & G. 367; 18 Jur. 742; *Re* Cullen, 27 Beav. 51; *Re* Garrold, 1 W. N. 300, L. JJ.

[2] Dixon *v.* Wilkinson, 4 Drew. 614; 4 De G. & J. 508; 5 Jur. N. S. 1063; *Re* Harvey, 27 Beav. 330; *Re* Blanchard, 3 De G., F. & J. 131; 7 Jur. N. S. 505; and see Pulling, 429. As to the summary jurisdiction against agents, see *ib.* 448. This jurisdiction is very special, and will not be exercised on a summons for taxation. *Re* Forsyth, 2 De G., J. & S. 509; 11 Jur. N. S. 615; *ib.* 213; 34 Beav. 140. [The Court refuses to sanction contracts between solicitor and client, except upon full notice and good faith. See Watson *v.* Rodwell, 7 Ch. Div. 625, for a case where settled accounts between solicitor and client were opened. And McPherson *v.* Watt, 3 Ap. Cas. 254, where a purchase by a solicitor from a client was set aside solely on the want of notice.]

[3] *Ex parte* Earl of Uxbridge, 6 Ves. 425; *Re* Murray, 1 Russ. 519; *Re* Rice, 2 Keen, 181.

[4] *Re* Barker, 6 Sim. 476; and see Wilson *v.* Gutteridge, 3 B. & C. 157; Dagley *v.* Kentish, 2 B. & Ad. 411.

for taxation of a solicitor's bill was not made until after payment, the Court exercised a discretionary power in determining whether such taxation should be ordered. It was necessary, however, to make a strong case when a client applied for taxation of his solicitor's bill after payment and due opportunity for investigating the items: although the Court would give relief, after any length of time, if a case of fraud or improper conduct were proved against the solicitor. It seems also, that when there was an application to open a solicitor's bill upon the ground of improper charges, the respondent was as much entitled to have the particular items stated in the petition, as a defendant to a bill filed for the purpose of opening a settled account is entitled to have the particular items on which the plaintiff intends to rely stated in the bill.[5]

It is impossible to state clearly the circumstances under which the Court will make orders for the delivery up by a solicitor * of the deeds of his client without first investigating the nature *1842 and extent of the lien which he possesses in respect of his bills for professional charges. This lien extends as well to deeds or documents of the client which may chance to be in the solicitor's hands in the course of business, as to any fund recovered in a suit conducted by him. There is, however, a material distinction between the lien upon a fund realized in a cause, and the lien which a solicitor has upon papers deposited in his hands by a client. The lien upon such a fund extends only to the costs of the particular suit under which the fund arises; but to this limited extent the solicitor is entitled actively to enforce it: whereas the right of a solicitor to retain possession of the deeds and papers of a client extends to all professional costs,[1] but cannot be actively enforced.[2] The lien of a solicitor exists only between the solicitor on the one side, and the client, or persons claiming under him, on the other: it is not allowed to prejudice the rights or equities of the persons claiming adversely and paramount to the client: even where the papers have come into the solicitor's hands without notice of such rights and equities.[3] The solicitor must, therefore, produce documents in his possession in order that they may be used in evidence between third parties;[4] and where an infant, on coming of age, repudiates a suit brought in his name, the solicitor for the next friend cannot claim a lien on the title deeds of the infant's estate.[5]

[5] Horlock *v.* Smith, 2 M. & C. 495, 522; Waters *v.* Taylor, 2 *ib.* 526, 555; *ante*, p. 871.

[1] *Ex parte* Sterling, 16 Ves. 258; *Ex parte* Lancaster, 18 Ves. 232; Worrall *v.* Johnson, 2 J. & W. 214, 218.

[2] Bevan *v.* Bellard, 4 M. & C. 354; 4 Jur. 764; [*In re* Snell, 6 Ch. Div. 105].

[3] Molesworth *v.* Robbins, 2 Jo. & Lat. 338; Barrow *v.* Waters, 2 Keen, 713, 717; Baker *v.* Henderson, 4 Sim. 27; Bell *v.* Taylor, 8 Sim. 216; Hiller *v.* Jones, 2 Y. & C. C. 124; Cattell *v.* Simons, 6 Beav. 304; Pelly *v.* Wathen, 1 De G., M. & G. 16, 16 Jur. 47; Francis *v.* Francis, 2 De G., M. & G. 73; 5 *ib.* 108; Verity *v.* Wylde, 4 Drew. 427; *Re* Mathew, 7 W. R. 351, V. C. K.; Turner *v.* Lette, 20 Beav. 185; 1 Jur. N. S. 486; 7 De G., M. & G. 243; 1 Jur. N. S. 1057. [See Delaney *v.* French, L. R. 9 Ch. Ap. 918; Farhall *v.* Farhall, L. R. 7 Eq. 286.]

[4] Hope *v.* Liddell, 7 De G., M. & G. 331, 1 Jur. N. S. 665; 20 Beav. 158; *Re* Cameron Coalbrook Company, 25 Beav. 1; Brassington *v.* Brassington, 1 S. & S. 455.

[5] Dunn *v.* Dunn, 7 De G., M. & G. 25, 1 Jur. N. S. 122; 3 Drew. 17; 18 Jur. 1068; *ante*, pp. 78, 79.

Although, however, the lien of a solicitor will, in general, prevail against persons claiming under the client, yet, where a client has transferred, either wholly or partially, his interest in the estate to which the papers relate, the solicitor will only be able to claim a lien, as against the person to whom the estate is so transferred, to the extent of the sum which was due to the solicitor at the time of the transfer. Thus, it has been decided, that a solicitor can only claim, as against a judgment creditor of his client, a lien upon the deeds of his estate for the amount of costs incurred prior to the rendition of the judgment.[6]

*1843 * For the purpose of creating a lien, all that is necessary is, that the papers should come into the hands of the solicitor in the course of his professional business: if the intention is to deposit papers for a particular purpose, and not to be subject to the general lien, a special agreement must be made.[1] It is necessary that the documents should have come into his hands in his professional character: for, if they came to him in any other capacity: as, for instance, in that of steward of a manor: he will have no lien upon them.[2]

As a general rule, where the solicitor has once acquired a lien upon the papers of his client, possession may be kept of them until they are redeemed by the full payment to the solicitor himself of the sum in respect of which the lien exists.[3] He may, however, it seems, be ordered to deliver them up, upon the amount of his demand being paid into Court.[4]

A solicitor cannot, however, refuse, on the ground of his lien, to produce an order of the Court, for the purpose of its being entered,[5] or corrected;[6] nor will his lien be allowed to prevent the course of justice, by hindering the prosecution of a suit;[7] and where the withholding of the document would occasion the loss of the property itself, the Court will make a special order to prevent the lien having that effect.[8]

The right, however, of the solicitor to refuse production of documents deposited with him until his bill is paid, will not be allowed to prevail when the relation of solicitor and client has been terminated by any act of the solicitor himself: though it is otherwise where the solicitor is discharged by his client or his representatives.[9] In a case where the solicitor discharges himself, whether he does it directly, or does some act

[6] Blunden *v.* Desart, 2 Dr. & War. 405; and see Smith *v.* Chichester, *ib.* 393; *Re* Gregson, 26 Beav. 87; and as to lien of mortgagee's solicitor, as against mortgagor, see Wakefield *v.* Newton, 6 Q. B. 276. [And if the solicitor of the mortgagor draw up a mortgage deed, he cannot claim against the mortgagee a lien for pre-existing fees: *In re* Snell, 6 Ch. Div. 105; *In re* Mason, 10 Ch. Div. 729; but he can as against the mortgagor: *In re* Messenger, 3 Ch. Div. 317.]

[1] *Ex parte* Sterling, 16 Ves. 258; and see Cowell *v.* Simpson, *ib.* 375; Vaughan *v.* Vanderstegen, 2 Drew. 408; *Re* Leah, 6 Jur. N. S. 387, L. JJ.

[2] Champernown *v.* Scott, 6 Mad. 93; Balch *v.* Symes, T. & R. 87, 94.

[3] Warburton *v.* Edge, 9 Sim. 508; Young *v.* English, 7 Beav. 10; Turner *v.* Letts, 7 De G., M. & G. 243; 1 Jur. N. S. 1057; Watson *v.* Lyon, 7 De G., M. & G. 288; [*Ex parte* Yalden, 4 Ch. Div. 129].

[4] *Re* Bevan and Whitting, 33 Beav. 439; Mills *v.* Finlay, 1 Beav. 560, 562; Clutton *v.* Pardon, T. & R. 304; *Re* Jewitt, 34 Beav. 22; but see Richards *v.* Platel, C. & P. 79.

[5] Clifford *v.* Turrill, 2 De G. & S. 1; 12 Jur. 428; see *ante*, p. 1016.

[6] Bird *v.* Heath, 6 Hare, 236; 12 Jur. 861; see *ante*, pp. 1029, 1030.

[7] Webster *v.* Leigh Hunt, 9 W. R. 804, V. C. K.; and see Merryweather *v.* Mellish, 13 Ves. 161.

[8] Richards *v.* Platel, C. & P. 79.

[9] Lord *v.* Wormleighton, Jac. 580.

amounting indirectly to a discharge, a different rule prevails, materially qualifying the right of retention: thus, where the plaintiff's solicitor, by assigning over the business to another, discharged himself, he was ordered, though his bills of costs were not paid, to deliver up the papers to the new solicitor of the party: the latter undertaking to hold them subject to the former solicitor's lien for what should be *found due to him on the taxation of the bills.[1] And sometimes *1844 the new solicitor has been required to give a further undertaking diligently to prosecute the cause.[2]

Where a party has employed, as his solicitors in a cause, a firm of two solicitors in partnership, the retirement from the business of one of them operates as a discharge; and the client is thereupon entitled to require that the papers necessary for the prosecution of the cause should be delivered up to his new solicitor, upon the usual undertaking for saving the lien of the discharged solicitors.[3] And so, when the solicitor was incapacitated from carrying on his client's business, by being in custody for debt, he was considered as having discharged himself by his own act, and a similar order was made:[4] but it was held, that the non-delivery of papers, retained by counsel and law stationers for non-payment of fees and charges, was not a breach of the order.[5]

Where, in a creditors' suit, the prosecution of the decree was taken from the plaintiff, and committed to another creditor, the plaintiff's solicitor was ordered to allow the other creditor's solicitor to inspect and take copies of all the papers in the cause in his possession.[6]

Where the papers of a client came into the hands of a firm of solicitors after a new partner had joined the firm, it was held, that the old firm had no lien on such papers for business done previously to the new partner being taken in.[7] So, a solicitor has no lien on documents subsequently coming into his possession, for costs due to a firm of which he had been a member.[8]

A solicitor's lien for costs is not confined to deeds and papers; but extends to other articles delivered to him for the purpose of being exhibited to witnesses on the trial of an action.[9]

Where the relation of solicitor and client is determined by the death of the solicitor, it seems that the Court will not order his personal representative to deliver the papers in the cause to another solicitor, without payment, or security for payment, of the solicitor's bill.[10]

[1] Colegrave v. Manley, T. & R. 400; and see Hodgkinson v. Metcalfe, 8 Sim. 622, 627; 3 M. & C. 184, 187; *Re* Smith, 4 Beav. 309; Webster v. Leigh Hunt, *ubi sup.*; see, however, Moir v. Mudie, 1 S. & S. 282; Commerell v. Poynton, 1 Swanst. 1; Mayne v. Hawkey, 3 Swanst. 93.

[2] Cane v. Martin, 2 Beav. 584; 4 Jur. 500; Wilson v. Lamnett, 19 Beav. 243. For form of order, see Seton, 857, No. 1.

[3] Griffiths v. Griffiths, 2 Hare, 587, 594; 7 Jur. 578; Rawlinson v. Moss, 7 Jur. N. S. 1033; 9 W. R. 743; V. C. W.; *Re* Moss, L. R. 2 Eq. 345; 12 Jur. N. S. 557, M. R.

[4] *Re* Williams, 28 Beav. 465; 6 Jur. N. S. 908; see also Scott v. Fleming, 9 Jur. 1085, V. C. K. B.

[5] *Re* Williams, 3 De G., F. & J. 104; 7 Jur. N. S. 323.

[6] Bennett v. Baxter, 10 Sim. 417; 4 Jur. 50; Lord Alvanley v. Kinnaird, 8 Jur. 114, L. C.; and for form of order by the Vice-Chancellor, see Seton, 858.

[7] *Re* Forshaw, 16 Sim. 121.

[8] Vaughan v. Vanderstegen, 2 Drew. 409.

[9] Friswell v. King, 15 Sim. 191.

[10] Redfearn v. Sowerby, 1 Swanst. 84.

*1845 * The lien of a solicitor upon the fund recovered in a suit, does not extend beyond the costs of that particular suit.[1] And even though the fund in Court is recovered by means of a deed, upon which he has a general lien, yet his claim upon the money, the fruits of the deed, is not allowed to extend to general professional charges.[2] Where the fund recovered in the cause consists of trust property, and the solicitor is retained only by the trustees, it does not appear that he has any lien upon the fund as against the *cestui que trusts*.[3] So, also, if retained by some of the *cestui que trusts*, he has no lien against the share of any parties, other than those by whom he has been retained.[4] It frequently happens that a decree directs mutual payments between the parties to the cause: in such a case, the lien of the solicitor does not extend to all sums coming to the credit of his client, but only to the ultimate balance to be paid to him in the suit.[5]

The lien, however, upon a fund, differs from that upon papers, in that it may be actively enforced. Thus, if a sum of money is declared by decree or judgment to be due from one party to another, the solicitor for the party to receive may give notice of his lien to the party to pay the money;[6] and if the notice is disregarded, such party is liable to pay the money a second time to the solicitor. So, also, when the fund coming to his client is in Court, the solicitor may present a petition for the taxation of his bill, and for payment of it out of the fund.

A solicitor cannot file a bill in Equity for an account, in respect of his bill of costs.[7] It seems, however, that in some cases a solicitor may obtain a stop order upon a fund in Court, before taxation of his bill or conclusion of the suit.[8]

[1] Lann *v.* Church, 4 Mad. 391; Hall *v.* Laver, 1 Hare, 571, 577; 5 Jur. 241, Eq. Ex.; Lucas *v.* Peacock, 9 Beav. 177; [Johnson *v.* Story, 1 Lea, 114. In the United States, the lien of a solicitor or attorney, on a money recovery or papers in his hands, has been extended to his honorary fees as counsel: McPherson *v.* Cox, 96 U. S. 404; *In re* Paschall, 10 Wall. 483; Cowdrey *v.* Galveston, &c. R. Co., 93 U. S. 352; Stone *v.* Hyde, 9 Shep. 318; McGregor *v.* Comstock, 28 N. Y. 237; Pleasants *v.* Kortrecht, 5 Heisk. 694; Cunningham *v.* McGrady, 2 Baxt. 141; Barnes *v.* Taylor, 3 Stew. Eq. 467. In Illinois, the lien for honorary fees is altogether denied. Humphrey *v.* Browning, 46 Ill. 476. And see, as to lien on realty recovered, *infra*, 1846, note 4.

The solicitor's lien is on the recovery, and does not prevent the client from compromising the suit, or receiving payment before judgment, nor afterwards, unless notice be given to the debtor: Marshall *v.* Meech, 51 N. Y. 140; Pulver *v.* Harris, 52 N. Y. 73; Young *v.* Dearborn, 27 N. H. 324; Averill *v.* Longfellow, 66 Me. 237; Clement *v.* Scott, 1 Tenn. Leg. Rep. 261; Tillman *v.* Reynolds, 48 Ala. 365; Parker *v.* Blighton, 32 Mich. 266; Wright *v.* Wright, 70 N. Y. 96, 98; but it is otherwise if the fund be impounded by attachment: Pleasants *v.* Kortrecht, 5 Heisk. 694. See also, where there is a lien by contract, Twiggs *v.* Chambers, 56 Ga. 279; Coleman *v.* Ryan, 58 Ga. 132. And the lien is not defeated by payment after judgment to the judgment creditor, without the consent of the attorney. McKenzie *v.* Wardwell, 61 Me. 136; Barnes *v.* Taylor, 3 Stew. Eq. 467; Boyer *v.* Clark, 3 Neb. 161. There is no lien on the judgment recovered in Maryland. Marshall *v.* Cooper, 43 Md. 46. As to mode of estimating services, see Eggleston *v.* Boardman, 37 Mich. 14; Bowling *v.* Scales, 1 Tenn. Ch. 621; Thompson *v.* Boyle, 85 Pa. St. 477; Van Every *v.* Adams, 42 N. Y. Sup. Crt. 126; Dorsey *v.* Corn, 2 Ill. Ap. 533; Reynolds *v.* McMillan, 63 Ill. 46; Van Ohlen *v.* Van Ohlen, 56 Ill. 528].

[2] Bozon *v.* Bolland, 4 M. & C. 354; 4 Jur. 763, overruling Worrall *v.* Johnson, 2 J. & W. 214.

[3] Worrall *v.* Harford, 8 Ves. 4, 8.

[4] Hall *v.* Laver, *ubi sup.*

[5] Bawtree *v.* Watson, 2 Keen, 713, 718; Verity *v.* Wylde, 4 Drew. 427.

[6] Cowell *v.* Simpson, 16 Ves. 281; see also Howell *v.* Harding, 8 East, 362; Nicholson *v.* Norton, 7 Beav. 67; Sympson *v.* Prothero, 3 Jur. N. S. 711; 5 W. R. 814, V. C. W.

[7] Allison *v.* Herring, 9 Sim. 583, 588.

[8] Hobson *v.* Shearwood, 8 Beav. 486;

If any security has been taken by a solicitor from his client, in any way inconsistent with the nature of the contract created by the lien, the lien, whether upon papers or a fund, seems to be altogether destroyed. Thus, a special agreement to give credit for three years, on condition of receiving interest, had the effect of forfeiting the lien.[9]

Where, by arrangement with his client, a solicitor retired from the conduct of the suit, and another solicitor conducted it thenceforth * to its conclusion, and there was a deficiency in the fund *1846 applicable to the payment of costs, it was held, that the lien of the latter solicitor had priority over that of the former.[1]

The lien of a solicitor on the fund recovered has priority over a subsequently obtained charging order,[2] or garnishee order.[3]

A solicitor has no lien for his costs, upon real estate recovered by him for his client.[4]

Where, after a decree for sale in a foreclosure suit, the defendant, having notice of the claim of the plaintiff's solicitor for the costs, compromised the suit on the terms of paying the plaintiff a certain sum in discharge of the debt and costs, it was held, upon the petition of the plaintiff's solicitor, that he had a lien for his costs on whatever had been received or paid for compromising the suit; and the Court ordered his costs to be taxed and paid by the plaintiff and defendant or one of them.[5]

A solicitor does not waive his lien on a fund in Court by attaching his client for the costs of the cause;[6] nor is his lien affected by the death

Lucas *v.* Peacock, *ubi sup.*; and see Lord *v.* Colvin, 2 Dr. & Sm. 82.

[9] Cowell *v.* Simpson, 16 Ves. 275, 282; and see Watson *v.* Lyon, 7 De G., M. & G. 288.

[1] Cormack *v.* Beisly, 3 De G. & J. 157.

[2] Haynes *v.* Cooper, 33 Beav. 431; 10 Jur. N. S. 303; *ante*, p. 1040.

[3] Simpson *v.* Prothero, 3 Jur. N. S. 711; 5 W. R. 814, V. C. W.

[4] Shaw *v.* Neale, 29 Beav. 157; 1 Jur. N. S. 666; 6 H. L. Ca. 581; 4 Jur. N. S. 695; see now 23 & 24 Vic. c. 127, § 28, *infra*. [The solicitor, it has been held, may be subrogated to the lien of the committee of a lunatic on the lunatic's estate, real and personal, for services rendered under a retainer by the committee. Barnesley *v.* Powell, Amb. 102; and see Stewart *v.* Hoare, 2 Bro. C. C. 662; *Ex parte* Price, 2 Ves. 407; Matter of Southwick, 1 Johns. Ch. 22; Yourie *v.* Nelson, 1 Tenn. Ch. 614. In Tennessee, a solicitor is entitled to an equitable lien on realty recovered by the litigation for his professional fees, of which lien the pendency of the suit is notice to all the world, and the lien may be preserved, and the notice extended by an order of the Court to that effect, in the judgment or decree: Hunt *v.* McClanahan, 1 Heisk. 593; Perkins *v.* Perkins, 9 Heisk. 95; Steel *v.* Chester, 1 Tenn. Leg. Rep. 211; Vaughn *v.* Vaughn, 12 Heisk. 472; Brown *v.* Bigley, 3 Tenn. Ch. 618; and on the rents of the realty: Wright *v.* Duffield, 2 Baxt. 218; but the lien is denied to the solicitor of the defendant successfully establishing in behalf of his client a title by resulting trust in the land in controversy: Garner *v.* Garner, 1 Lea, 29; and see Foxon *v.* Gascoigne, L. R. 9 Ch. Ap. 654. In other States, the rule that the solicitor has no lien on land in litigation is followed. Stewart *v.* Flowers, 44 Miss. 513, where the authorities are collated; Smalley *v.* Clark, 22 Vt. 598; Hanger *v.* Fowler, 20 Ark. 667. If, in an action for property, the fee of the attorney is payable, by special contract, out of the proceeds of suit, the attorney has an inchoate lien upon the property for his fee as soon as the action is commenced, and the client has no right to defeat such lien by dismissing the action before trial. Twiggs *v.* Chambers, 56 Ga. 279.]

[5] White *v.* Pearce, 7 Hare, 276; 13 Jur. 999; see also Hanson *v.* Reece, 3 Jur. N. S. 1204; 6 W. R. 46, V. C. W.; Brunsdon *v.* Allard, 5 Jur. N. S. 596; 7 W. R. 581, Q. B.; and see Beames on Costs, 139, 208; Morgan & Davey, 397.

[6] Davies *v.* Birch, Younge, 358; Bawtree *v.* Watson, 2 Keen, 713, 718; Lloyd *v.* Mason, 4 Hare, 132; 9 Jur. 772; O'Brien *v.* Lewis, 4 Giff. 296; 9 Jur. N. S. 620, *ib.* 764; 11 W. R. 973, L. JJ.

of his client; or by the fact that the order directs the fund to be paid to the client, without reserving the rights of the solicitor.[7]

In every case in which a solicitor is employed to prosecute or defend any suit, matter, or proceeding in any Court, the Court or Judge before whom the same has been heard, or is depending, may declare the solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, the solicitor has a charge upon and against, and a right to payment out of, the property preserved or recovered through the instrumentality of such solicitor, of whatever nature it may be, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and the Court or Judge may make such orders for taxation, and for raising and payment of such costs, charges, and expenses out of the property, as to the Court or Judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, unless made to a *bonâ fide* purchaser for value without notice, are absolutely void as against such charge or right; *1847 but no * such order is to be made in any case in which the right to recover payment of such costs is barred by any Statute of Limitations.[1]

This enactment does not, it seems, enable the Court to charge the costs upon the property of an infant.[2]

A solicitor is entitled under this enactment to a charge upon property recovered, or preserved, irrespective of his client's interest, and although it turns out that his client never had any interest therein;[3] and the order may be made, notwithstanding the death of the client, and that a decree has been made for administering his estate.[4]

Section II. — *Change of Solicitor.*

A party suing or defending by a solicitor is not at liberty to change

7 Lloyd *v.* Mason, *ubi sup.* [The lien is subordinate to the right of set-off of costs in the particular case. Pringle *v.* Gloag, 10 Ch. Div. 676. And see, generally, *Re* Davis, L. R. 2 Ch. Ap. 808; *Ex parte* Smith, L. R. 3 Ch. Ap. 125; Peatfield *v.* Barlow, L. R. 8 Eq. 61. The lien is, it seems, not barred by the statute of limitations. *Re* Murray, W. N. (1867) 190.]

1 23 & 24 Vic. c. 127, § 128; [Jones *v.* Frost, L. R. 7 Ch. Ap. 773]. As to the power of the Court to order payment of interest on costs, see *ib.* § 27; *ante*, p. 1381. For forms of orders under § 28, see Seton, 858.

2 Bonser *v.* Bradshaw, 7 Jur. N. S. 231; 9 W. R. 229, V. C. S.; 10 W. R. 481, L. JJ. The order was subsequently made, on the infant attaining twenty-one. S. C., 4 Giff. 260; 9 Jur. N. S. 1048.

3 Bailey *v.* Burchall, 2 H & M. 371; 11 Jur. N. S. 57.

4 Wilson *v.* Round, 4 Giff. 416; 10 Jur. N. S. 34; and see Wilson *v.* Hood, 10 Jur. N. S. 592, Ex., where an order was made charging certain costs incurred at Law, which the V. C. refused to include in his order. [And the solicitor is entitled to the costs of a successful suit against an incumbrancer, although the incumbrance is valueless, provided it formed a cloud upon the title, and although the application be made in a suit no longer pending, and never brought to a hearing, and the property had previously been sold: Jones *v.* Frost, L. R. 7 Ch. Ap. 773; and see Smith *v.* Winter, 18 W. R. 447; but see Foxon *v.* Gascoigne, L. R. 9 Ch. Ap. 654. See in favor of the text: Bulley *v.* Bulley, 8 Ch. Div. 479. The lien is good against mortgagee pending the suit: Faithfull *v.* Ewen, 7 Ch. Div. 495; or vendee: Pilcher *v.* Arden, 7 Ch. Div. 318.]

his solicitor in any cause or matter without an order of the Court for that purpose: which may be obtained by motion or petition as of course; and until such order is obtained and served, and notice thereof given to the Clerk of Records and Writs, the former solicitor will be considered the solicitor of the party.[5] Therefore, where a defendant had left his home, and not been heard of, and the solicitor on the record had ceased to act for him, but no order for changing the solicitor had been obtained, it was held, that notices served on the former solicitor were duly served.[6]

The order of course to change a solicitor or agent is, like any other order of course,[7] irregular, and will be discharged, if any material facts are suppressed: thus, where a country solicitor had agreed to employ a town agent for fifteen years, and before the expiration of the term obtained an order of course in a suit to change the agent, suppressing the existence of the special contract,[8] and where the fact that the solicitor had been appointed by a deed was suppressed,[9] the order was discharged. And where the plaintiff in a creditors' suit sold his debt after decree, and the purchaser, *in his name, and with *1848 his sanction, obtained an order of course to change solicitors, without disclosing these circumstances, the Court was of opinion that it was irregular, and that the proper course would have been for the purchaser of the plaintiff's debt to bring all the facts before the Court, on a motion to obtain the conduct of the cause.[1]

Where, under an order of the Court, the costs of all parties had been paid, and the fund carried over to the separate account of a party, it was held that that party might present a petition for payment out, by a solicitor who had not been his solicitor in the cause, without having obtained an order to change.[2]

Where a person has employed a solicitor, and afterwards desires to prosecute the suit in person, an order must be obtained,[3] usually on motion of course, or on petition of course at the Rolls.[4] Thus, where the plaintiff was a married woman, suing by her next friend, an order of course was obtained, upon the petition of the plaintiff and her next friend, giving the plaintiff and her next friend liberty to prosecute the suit in person, instead of prosecuting the same by her solicitor.[5]

Notice of the order to change a solicitor or agent must be given to the Clerks of Records and Writs, by leaving it for entry in their books;

[5] Ord. III. 3; *ante*, p. 454. For form of order on motion, see Scheme, 854, No. 1; and for forms of motion paper and petition, see Vol. III.

[6] Wright v. King, 9 Beav. 161; and see Newton v. Thomson, 16 Jur. 1008, V. C. T.

[7] See *ante*, p. 1590.

[8] Richards v. Scarborough Market Company, 17 Beav. 85; 17 Jur. 294.

[9] Jenkins v. Bryant, 4 Drew. 70; 18 Jur. 992.

[1] Topping v. Searson, 2 H. & M. 205.

[2] Waddilove v. Taylor, 12 Jur. 598, V. C. W.

[3] Braithwaite's Pr. 564.

[4] For forms of motion paper and petition, see Vol. III.

[5] Move v. Bateman, 17th June, 1857, Rolls Lib. 1989. An address for service was set out in the order, and the names of the parties, and the address for service, were indorsed upon or subscribed to all subsequent proceedings. Braithwaite's Pr. 564.

but before doing so, the order should be served on the solicitors of all the other parties in the cause.[6]

If the solicitor of a party, or his London agent, dies, an order to appoint another solicitor need not be obtained; but a notice should be given to the Clerk of Records and Writs in whose division the cause is, and a similar notice served upon the solicitors of all the other parties to the cause.[7]

A solicitor, entering into partnership subsequently to his original appointment as solicitor of a party does not render any order necessary; but the dissolution of partnership of a firm of solicitors operates as a discharge of the client:[8] who is not obliged to employ any one of the late firm to continue his suit or defence; and if he does so, *1849 it seems that the usual course is to obtain an order, on * motion of course, or on petition of course at the Rolls, appointing such member to be the solicitor in the place of the firm.[1]

The executor or administrator of a deceased plaintiff, or any new plaintiff, need not employ the former solicitor in the cause; and a bill of revivor or supplemental bill, or order to revive at the instance of a new party, will be received by the Record and Writ Clerks, and entered, without any order as to the solicitor; but where new parties thus come into the cause, pursuant to an order to revive, notice of the name and address of the solicitor acting for such new parties should be given to the Clerks of Records and Writs, and to the solicitors of all the other parties to the cause.[2] Where a party sues or defends in person and afterwards appoints a solicitor, an order is not necessary; but notice should be given to the Record and Writ Clerks.[3]

The effect of a change of solicitors on the lien upon a fund for costs, has already been considered.[4]

[6] Braithwaite's Pr. 563, 564.

[7] Braithwaite's Pr. 564, 565; Whalley *v.* Whalley, 17 Jur. 254, V. C. W. As to *subpœna* to name new solicitor, if the party neglects, see *ante*, p. 455. For form of notice, see Vol. III.

[8] Griffiths *v.* Griffiths, 2 Hare, 587, 594; 7 Jur. 573; Rawlinson *v.* Moss, 7 Jur. N. S. 1053; 9 W. R. 733, V. C. W.; Pulling's Law of Attorneys, 112; and see *ante*, p. 1844.

[1] See Braithwaite's Pr. 565; Muttlebury *v.* Haywood, 8 Jur. 1085, M. R.; Pulling, 112.

[2] Braithwaite's Pr. 565. For form of notice, see Vol. III.

[3] Braithwaite's Pr. 565. For form of notice, see Vol. III.

[4] *Ante*, p. 1844. [Letters from clients and copies of letters sent to clients, belong to the solicitor, and he is not obliged to give them up on a change of solicitors: *In re* Wheatcraft, 6 Ch. Div. 97.]

[Not applicable to American practice.]

* CHAPTER XLIV. *1850

THE STATUTORY JURISDICTION OF THE COURT.

SECTION I. — *Introduction.*

THIS Treatise has been hitherto devoted to the investigation of that part of the practice which relates to the original jurisdiction of the Court of Chancery. This practice is founded partly upon immemorial customs in the offices connected with the Court, partly upon the decisions of the Judges, the General Orders of the Court, and the Regulations of the Judges and Registrars, and partly upon direct provisions made by Acts of Parliament.[1] In many instances, where the legislature has thus conferred upon the Court additional means of enforcing its decrees and orders, the powers given for this object have been interwoven with the original practice: such statutes have, consequently, been already stated.[2] There are also other Acts of Parliament affecting, in various ways, the rights of property, and, therefore, incidentally controlling and modifying the jurisdiction in Chancery; but, although the construction of these Acts has frequently to be determined in Equity, they relate rather to the law than the practice of the Court, and do not therefore come within the object of this work.

Subject to these exceptions, it is intended, in this chapter, to review the Acts conferring additional powers upon the Court; and to state whatever peculiarities there may be in the manner in which this statutory jurisdiction is carried into effect. In the first place, there is this material distinction between the manner in which the powers and reme-

[1] See *ante*, p. 1.

[2] See *ante*, as to the following Acts: —
Aliens (7 & 8 Vic. c. 66), pp. 48, 49.
English and Irish Decrees, Enforcement (41 Geo. III. c. 90), p. 1067 *et seq.*
Exchequer in Equity, Transfer Jurisdiction (5 Vic. c. 5), p. 6.
Foreign Process (2 & 3 Will. IV. c. 33; 4 & 5 Will. IV. c. 82), p. 449.
Judgments (1 & 2 Vic. c. 110; 2 & 3 Vic. c. 11; 3 & 4 Vic. c. 82; 18 & 19 Vic. c. 15; 23 & 24 Vic. c. 38; 27 & 28 Vic. c. 112), p. 1023 *et seq.*
Marriages (4 Geo. IV. c. 76; 19 & 20 Vic. c. 119), p. 104.
Petitions of right (23 & 24 Vic. c. 34), p. 131.
Solicitors (6 & 7 Vic. c. 73; 23 & 24 Vic. c. 127), p. 1692 *et seq.*

dies incident to the original jurisdiction are called into opera-
*1851 tion, and the means by which orders under statutes are * made:
namely, that, in the former case, it is necessary, in almost all cases, that a bill should be filed, or a suit otherwise regularly instituted, before any relief can be obtained: whereas, in the latter case, it is usual for the Act of Parliament providing the additional remedy also to enact, that it may be obtained in a summary manner upon petition, motion, or summons.[1] In all such cases, the application should be entitled in the matter of the Act under which it is made;[2] and also in the matter of the particular trust or other subject to which it has reference.[3]

Where the application is directed by the Act to be made to the Lord Chancellor, it may be, and usually is, in the first place heard by one of the Vice-Chancellors;[4] but it seems it cannot be made to the Master of the Rolls, unless he is named in the Act.[5]

The Act itself frequently points out the precise relief which the applicant is ultimately entitled to receive. It was formerly usual for the statute to direct that the matter might be heard upon affidavit;[6] but, owing to the changes in the system of taking evidence, this is no longer necessary; and the evidence in support of the application is adduced in the usual manner.

Orders made under the statutory jurisdiction are enforced in the same manner as orders made in a suit which has been regularly instituted.[7]

Section II. — *Statutes relating to Charities.*

1. *Generally.*

Before any suit, petition, or other proceeding (not being an application in which any person claims any property or seeks any relief adversely to any charity, and not being an application in any suit or matter actually pending at the time the application is made), for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property or income thereof, shall be commenced, presented or taken by any person whomsoever (other
*1852 than the Attorney-General), he must obtain * from the Board of Charity Commissioners an order or certificate, signed by their secretary, authorizing or directing such proceeding to be taken; and

[1] See *ante*, p. 3.
[2] *Re* Law, 4 Beav. 509, 510.
[3] 1st Rep. Eng. & Ir. Com. Ap. 73. Where the jurisdiction is conferred by the statute, and the property sought to be affected forms the subject-matter of a suit or other proceeding, the application should be entitled both under the Act, and in such suit or proceeding. For the mode of entitling petitions, see Lord Lyndhurst's directions, Vol. III.
[4] *Re* Carew, 8 Beav. 128; *Re* Howard, *ib.* 424, 426; *Re* Taylor, 10 Sim. 291.
[5] *Re* Scott, 12 Beav. 361, 363; Meyrick *v.* Laws, 23 Beav. 449.
[6] See *Ex parte* Greenhouse, 1 Swanst. 60.
[7] See *ante*, p. 1042 *et seq.*; and Ord. XXIX.

no proceeding for obtaining any such relief, order, or direction as aforesaid will be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and in conformity with an order or certificate of the said Board.[1] This provision applies to applications made to the Court, although such applications are made under the authority of a special Act of Parliament.[2] It is not necessary to show that the Commissioners approve of the particular application; but only that it is made with their sanction.[3]

The sanction of the Commissioners is not, it seems, required where a fund belonging to a charity has been paid into Court under the Trustee Relief Act;[4] or the Lands Clauses Consolidation Act;[5] nor was it required where an application was made to deal, for the purposes of a college, with an estate, of which part belonged to a school and the residue to the college.[6] Where a final order has been made, and a scheme settled, the matter is no longer pending within the meaning of the provision above stated; and the sanction of the Commissioners must be obtained.[7]

The Statute 43 Eliz. c. 4, commonly called the Statute of Charitable Uses, recites that "lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent Majesty and her most noble progenitors, as well by sundry other well-disposed persons: some for the relief of aged, impotent, and poor people; some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; some for the repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; some for education and preferment of orphans; some for or towards relief, stock, or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed; and *others for relief or redemption *1853 of prisoners or captives, and for aid or ease of any poor inhabitants, concerning payments of fifteens, setting out of soldiers, and other taxes: which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, nevertheless have not been employed according to the charitable intent of the givers

[1] Charitable Trusts Act, 1853 (16 & 17 Vic. c. 137), §§ 17, 18; *Re* Lister's Hospital, 6 De G., M. & G. 184; Markwell, 17 Beav. 618; *Re* London, Brighton, and South Coast Railway Company, 18 Beav. 608; and see *Re* Chelsham College, 1 Jur. N. S. 295, V. C. W.; *Re* Skerrett, *ib.* 1047, V. C. K.; *Re* St. Giles and St. George, Bloomsbury, 25 Beav. 313; 4 Jur. N. S. 247; *Re* Whitehall Chapel, 2 Dr. & Sm. 467, 468; *ante*, p. 16; and for the rules of the Commissioners, as to the application for their certificate, see Vol. III.

[2] *Re* Rugby School, 2 Drew. 284; 18 Jur. 668; and see *Re* Watford Burial Board, 2 Jur. N. S. 1045, V. C. W.

[3] *Re* Watford Burial Board, *ubi sup.*

[4] *Re* St. Giles and St. George, Bloomsbury, *ubi sup.*; but see *Re* Markwell, *ubi sup.*

[5] *Re* Lister's Hospital, *ubi sup.*; but see *Re* Chelsham College, *Re* London, Brighton, and South Coast Railway Company, and *Re* Skerrett, *ubi sup.*; *Re* Faversham Charities, 10 W. R. 291, V. C. W.

[6] *Re* Meyrick, 1 Jur. N. S. 438, V. C. K.

[7] *Re* Floyd's Charity, 3 Drew. 324; *Re* Jarvis' Charity, 1 Dr. & Sm. 97; 5 Jur. N. S. 724.

and founders thereof by reason of frauds, breaches of trust, and negligence in those that should pay, deliver, and employ the same."

This statute has become obsolete;[1] but the recital above set out is still important, inasmuch as the Court has reference to it, in deciding what is to be deemed a charitable purpose: for such purpose must be either one of those purposes denominated charitable in the above statute; or one which the Court construes to be charitable, by analogy to those mentioned in that statute.[2]

2. *Sir Samuel Romilly's Act.*

When the statute of Elizabeth fell into disuse, the only mode by which any remedy could be obtained in Chancery for the abuse of a charity was by way of information.[3] Under these circumstances, the statute usually called Sir Samuel Romilly's Act was passed. By that Act it is provided, that in every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direction or order of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal, or Master of the Rolls for the time being, upon the petition of any two or more persons stating such complaint, and praying such relief as the nature of the case may require, to make such order therein, and with respect to the costs of such applications, as to him or them shall seem just; and that such order shall be final and conclusive, unless the party or parties who shall think himself or themselves aggrieved thereby, shall, within two years from the time when such order shall have been passed and entered, appeal from such decision to the House of Lords.[4] By a subsequent Act, the Attorney-General, acting *ex officio*, is empowered to make application by *1854 petition, to the Court of Chancery * with respect to any charity, under the provisions of Sir Samuel Romilly's Act, or under the provisions of any Act or Acts passed, or to be passed, authorizing the application to the Court by petition, according to the provisions of that Act.[1]

It has been held, that the Court, though it has jurisdiction, ought to consider, in all cases, whether it is fit to exercise that jurisdiction, or to put the party to file an information;[2] and that, in cases of breach of

[1] *Ex parte* Kirby Ravensworth Hospital, 15 Ves. 305; Corporation of Ludlow *v.* Greenhouse, 1 Bligh N. S. 17, 62; and for a detailed account of the effect of the statute and the decisions under it, see Duke's Law of Charitable Uses; Shelford on Mortmain, p. 276 *et seq.*; and see Tudor's Charitable Trusts; and Finlason's Charitable Trusts Acts.

[2] Kendall *v.* Granger, 5 Beav. 300, 302; 6 Jur. 919; Attorney-General *v.* Corporation of Shrewsbury, 6 Beav. 220, 229; 7 Jur. 757.

[3] *Ante*, p. 7 *et seq.*

[4] 52 Geo. III. c. 101, § 1.

[1] Charitable Trusts Act, 1853 (16 & 17 Vic. c. 137), § 43.

[2] *Ex parte* Rees, 3 V. & B. 10; and see *Re* Dean Clarke's Charity, 8 Sim. 34, 42.

trust, the jurisdiction ought to be confined to the simple case of abuse of a clear trust, not involving any question beyond the question of such abuse, and particularly not involving the interest of persons to whom abuse of trust could not be imputed.[3] The Court has no power, under the Act, to repair a previous misapplication of trust funds.[4]

The Act has been held not to apply to cases of constructive trusts;[5] or where different persons claim the trust property adversely to each other,[6] and it is sought to obtain the decision of the Court as to which of them is entitled to the benefit of the charity;[7] or where, although the object of the petition was a scheme for the management of the property, it appeared that there was a dispute as to the persons in whom the legal estate was vested.[8] It has also been decided, that the Court had no jurisdiction to make an order upon petition, transferring the funds of a dispensary to a hospital, and amalgamating the two institutions.[9]

Where the object of the petition is the internal regulation of a charity, an application may be made under the statute;[10] but if there is a visitor, and the matter concerning which the interference of the Court is sought belongs exclusively to his cognizance, then the complaint must be addressed to him, and no remedy can be obtained in the Court of Chancery.[11]

It has been held, that the Court has jurisdiction under the Act: where the point to be decided is simply a question of law, depending on the construction of a particular instrument;[12] where the objects of the charity have no distinct interests, and the Attorney-General, therefore, properly represents them all, and where, * although *1855 there may be distinct interests, no substantial question of title can arise between the several objects of the charities;[1] where there are no specific directions as to the application of the trust property, or it cannot be advantageously applied in the execution of existing trusts;[2] where it is sought to alter a scheme which has been settled by a decree, and which might have been altered on an information;[3] and where the question is as to the site of the charity.[4]

[3] Corporation of Ludlow *v.* Greenhouse, 1 Bligh N. S. 17; Ld. Red. 19; *Ex parte* Skinner, 2 Mer. 453; and see cases collected, 14 Beav. 120, n.; *Re* Manchester New College, 16 Beav. 610; 17 Jur. 540.

[4] *Re* Hall's Charity, 14 Beav. 115; and see cases collected, *ib.* 120, n.

[5] *Ex parte* Brown, G. Coop. 295.

[6] *Ex parte* Rees; and *Re* Dean Clarke's Charity, *ubi sup.*; *Re* West Retford Church Lands, 10 Sim. 101, 109; 3 Jur. 501.

[7] *Re* Dean Clarke's Charity, *ubi sup.*; and see Attorney-General *v.* Bishop of Worcester, 9 Hare, 328; 16 Jur. 3.

[8] *Re* Phillpott's Charity, 8 Sim. 381, 389; see also *Re* West Retford Church Lands, *ubi sup.*

[9] *Re* Reading Dispensary, 10 Sim. 118, 121; 3 Jur. 697.

[10] *Re* Shrewsbury School, 1 M'N. & G. 324, 331; 14 Jur. 259; *Re* Manchester New College, 16 Beav. 610; 17 Jur. 540.

[11] Attorney-General *v.* Clare Hall, 3 Atk. 674; *Ex parte* Berkhampstead Free School, 2 V. & B. 134, 144; Thompson *v.* University of London, 10 Jur. N. S. 669; 12 W. R. 733, V. C. K.

[12] *Re* Upton Warren, 1 M. & K. 410, 415.

[1] Attorney-General *v.* Bishop of Worcester, 9 Hare, 328; 16 Jur. 3; *Re* Manchester College, *ubi sup.*

[2] *Re* Shrewsbury School, *ubi sup.*; *Re* Congregational Church, Smethwick, 1 W. N. 196, V. C. K.

[3] Attorney-General *v.* Bishop of Worcester, *ubi sup.*

[4] *Re* Manchester New College, *ubi sup.*

The Court may also, under the Act, declare the proportions in which different charitable objects are entitled to the funds:[5] and may, where it appears that it will be for the benefit of the charity, direct a sale of part of the estates belonging to it.[6]

Unless the application is made by the Attorney-General acting *ex officio*,[7] the petition must be presented by two or more persons:[8] who should have a direct interest in the charity;[9] and of whom two, at least, must be individuals: a corporation not being within the meaning of the Act;[10] and the Attorney or Solicitor-General must also signify his allowance or approbation of the petition, by affixing his signature to it.[11] The Solicitor-General, however, can only act during the vacancy of the office of Attorney-General.[12]

Before such allowance can be obtained, the petition must be signed by the petitioners in the presence of their solicitor, and their signatures be attested by him;[13] and a certificate must also be obtained on the petition, and signed by the counsel who prepared the petition, to the effect that, in his opinion, the petition is one proper to be presented under the Act. The solicitor for the petitioners must likewise certify on the petition that the petitioners are able to answer the costs of the application.[14] Upon the petition, so signed and certified, being left with the Attorney-General's clerk, he will obtain the Attorney-General's signature thereto, in testimony of his approbation.

The petition may be addressed either to the Lord Chancellor or the Master of the Rolls;[15] and it is presented, and a copy left for the Judge, in the usual way;[16] but unless the petition is presented *1856 * by the Attorney-General acting *ex officio*, or in a matter which is pending at the time of the application, the order or certificate of the Charity Commissioners authorizing the application must also be previously obtained,[1] and produced, before the petition will be answered.

As a general rule, the petition ought to be served upon all persons whose interests will in any manner be affected by the order sought to be obtained.[2]

The petition, if addressed to the Lord Chancellor, is usually heard by one of the Vice-Chancellors, from whose decision an appeal[3] lies to the Court of Appeal in Chancery:[4] if the order is made in the first instance

[5] *Re* Hall's Charity, 14 Beav. 115; 15 Jur. 940; and see cases collected, 14 Beav. 120 n.

[6] *Re* Parkes' Charity, 12 Sim. 329, 332; *Re* Overseers of Ecclesall, 16 Beav. 297; *Re* Ashton Charity, 22 Beav. 288.

[7] *Ante*, p. 1853.

[8] 52 Geo. III. c. 101, § 1; *ante*, p. 1853.

[9] *Re* Bedford Charities, 2 Swanst. 518.

[10] *Re* London, Brighton, & South Coast Railway Company, 18 Beav. 608.

[11] 52 Geo. III. c. 101, § 2. For form of petition, see Vol. III.

[12] *Ex parte* Skinner, 2 Mer. 453.

[13] 52 Geo. III. c. 101, § 2.

[14] *Re* Warwick Charities, 1 Phil. 559. For forms of certificates, see Vol. III.

[15] *Ante*, p. 1853.

[16] *Ante*, p. 1605.

[1] *Ante*, p. 1728 *et seq.*; *Re* London, Brighton, & South Coast Railway Company, 18 Beav. 608; *Re* Ford's Charity, 3 Drew. 324; *Re* Jarvis' Charity, 1 Dr. & Sm. 97; 5 Jur. N. S. 724.

[2] *Ex parte* Rees, 3 V. & B. 10; *Ex parte* Seagers, 1 V. & B. 496; see, however, *Re* Warwick Charities, 1 Phil. 559. As to service of petitions, see *ante*, pp. 1606, 1607.

[3] See *Re* Upton Warren, 1 M. & K. 410, 415; as to appeals from orders on petition, see *ante*, pp. 1472, 1611.

[4] As to appeals to this Court, see *ante*, pp 1459, 1470.

by the Master of the Rolls, no appeal lies to that Court;[5] and whether the order is made by that Court or the Master of the Rolls, an appeal may be presented to the House of Lords within two years from the time when the order has been passed and entered.[6]

The proceedings under this Act have the same effect, as if they were taken under an information.[7] If a scheme is directed to be settled, or any other proceedings to be taken in the Judge's Chambers, the petitioners and respondents have a right to attend there; and it seems, that it is not only the right, but also the duty, of the Attorney-General to interfere in the subsequent proceedings upon the petition, in any manner he may think for the public benefit.[8] Under the present practice, the Attorney-General is always directed to be served with the summons to proceed on the order.[9]

Upon the return of the summons to proceed,[10] directions will be given as to the manner in which the inquiries directed by the order are to be prosecuted, and the parties to attend thereon.[11] A concise statement, showing the objects and property of the charity, is sometimes directed to be brought in, and substantiated by affidavit or other evidence.

If trustees are directed to be appointed, evidence of the fitness of such of them as are not appointed *ex officio* is required; and *their written consent to act, verified by affidavit, must be pro- *1857 duced, as in other cases.[1]

Where a scheme is directed, it is usually prepared by the petitioners, and submitted by them to the Attorney-General: who makes such suggestions or alterations as he thinks fit.[2] A fair copy of the scheme, showing any alterations which may not have been agreed upon between the parties, is then left at the Chambers of the Judge; and the scheme is then settled by him, either in Chambers, or on an adjournment into Court. When finally settled, a fair copy is signed by the Judge, and filed in the Report office: whence office copies may be obtained. The final order usually refers to the scheme as filed; and, in this manner, the expense of setting out the whole scheme in the order is avoided.[3]

When the inquiries are answered, if the further consideration of the petition has not been adjourned, an order will be made in Chambers, appointing the trustees and approving the scheme, or as may be required by the circumstances of the case; and giving such consequential direc-

[5] *Re* Manchester New College, 16 Beav. 610; 17 Jur. 540.

[6] 52 Geo. III. c. 101, § 1; *ante*, p. 1853.

[7] Attorney-General *v.* Bishop of Worcester, 9 Hare, 328; 16 Jur. 3.

[8] Corporation of Ludlow *v.* Greenhouse, 1 Bligh N. S. 1785; Attorney-General *v.* Earl of Stamford, 1 Phil. 737, 749; 7 Jur. 359.

[9] *Re* Hanson, 9 Hare Ap. 54.

[10] For the practice as to carrying in the order, and issuing a summons to proceed, see Ord. XXXV. 15, 16. For forms of orders, directing accounts and inquiries as to charities, see Seton, 342 *et seq.*; and for form of summons to proceed, see Vol. III.

[11] Ord. XXXV. 16.

[1] *Ante*, p. 1160. As to appointing and removing trustees of charities, see Seton, 361 *et seq.* For forms of consent and affidavits, see Vol. III.

[2] *Re* Hanson, *ubi sup.*; *Re* Wyersdale School, 10 Hare Ap. 74; Seton, 360. As to schemes, see *ib.* 360-362, and for form of scheme, see Vol. III.

[3] *Re* Conyers School, 10 Hare Ap. 5; Seton, 347; and for form of order, see *ib.* Nos. 1, 2.

tions, as to costs or otherwise, as may be necessary.[4] If, however, the further consideration is adjourned, the Chief Clerk makes his certificate of the result of the proceeding: which is completed, and may be discharged or varied, as in other cases;[5] and the petition may then be brought on again in Court for consequential directions, in the manner before explained.[6]

Section III. — *Arbitration.*

By the 9 & 10 Will. III. c. 15, powers are given enabling persons, desirous of settling their controversies by arbitration, to agree that their submission of the suit to the award of any person should be made a rule of any Court of Record;[7] and by "The Common Law Procedure Act, 1854," it is provided that "every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the Superior Courts of Law or Equity at Westminster, on the application of any party thereto, *1858 unless such * agreement or submission contain words purporting that the parties intend that it should not be made a rule of Court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such Superior Courts, it may be made a rule of that Court only; and if, when there is no such provision, a case be stated in the award for the opinion of one of the Superior Courts, and such Court be specified in the award, and the document authorizing the reference have not, before the publication of the award to the parties, been made a rule of Court, such document may be made a rule only of the Court specified in the award; and where in any case the document authorizing the reference is or has been made a rule or order of any one of such Superior Courts, no other of such Courts shall have any jurisdiction to entertain any motion respecting the arbitration or award.[1]

The application to make the submission a rule of Court is made by motion: which must be on notice, unless the submission provides that either party may make it an order of the Court without notice to the other party;[2] and the execution of the submission must be proved: unless the application is consented to.[3] The order will not be passed until the submission has been filed in the Report office, and a note thereof made on the order by the Clerk of Reports.[4]

[4] For forms of order, see Seton, 347 *et seq.*; and as to costs in charity cases, see *ib.* 350, 351, 363; Morgan & Davey, 138 *et seq.*

[5] See *ante*, p. 1238 *et seq.*

[6] *Ante*, p. 1609. For forms of orders, see Seton, 347 *et seq.*

[7] The Court of Chancery is a Court of Record, within the meaning of this Act. Heming *v.* Swinnerton, 2 Phil. 79, 82; 1 C. P. Coop. t. Cott. 386, 416; 10 Jur. 907.

[1] 17 & 18 Vic. c. 125, § 17; and see *ante*, pp. 554, 671.

[2] For forms of notice of motion and motion paper, see Vol. III.

[3] Seton, 1123. For forms of orders, see *ib.* 1123, 1124; Braithwaite's Pr. 553.

[4] Ord. XXIII. 23. *In re* Cambridge University, and *Re* Haigh, Seton, 1123, No. 3; the submissions were directed to be filed with the Clerks of Records and Writs; and each was impressed with a 1*l.* 15*s.* Inland Revenue stamp; see Braithwaite's Pr. 554. The submission, when directed to be so filed, should be enclosed in a sheet of strong brown or

If the award has been procured by corruption or undue means, it is to be considered void and of non-effect.[5] Any application to set it aside must be made to the Court of which the submission has been made a rule, before the last day of the next term after the making and publishing of the award.[6]

The application to set aside the award is made by motion, of which notice must be served on the other parties and the arbitrators.[7]

*Any party neglecting or refusing to execute the award, or *1859 any part thereof, is guilty of a contempt of the Court of which the submission was made a rule.[1]

"If, in any case of arbitration, the document authorizing the reference provides that the reference shall be to a single arbitrator, and all the parties do not, after difficulties have arisen, concur in the appointment of an arbitrator, or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator, — or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one, — then, in every such instance, any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served, no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any Judge of any of the Superior Courts of Law or Equity at Westminster, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be; and such arbitrator, umpire, or third arbitrator respectively, shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties."[2]

cartridge paper, and indorsed with the name of the matter, and the name and address of the solicitor taking it. A copy of the order directing such filing should also be enclosed, and the original order produced at the time the submission is left. *Ibid.* A certificate of the filing will be given, if required; and a copy or an office copy of the submission may be taken by any party, as in other cases of documents left with the Record and Writ Clerks for safe custody, *ibid.*; and *ante*, p. 1838. For the practice at Law as to arbitrators, see Chitty's Arch. 1649 *et seq.*

Jeremy on Eq. 493 *et seq.*; Russell on Arbitration, 689 *et seq.*; Seton, 1122 *et seq.*; Story Eq. Jur. § 1450 *et seq.*

[5] 9 & 10 Will. III. c. 15, § 2; Heming v. Swannerton, 2 Phil. 79; 1 C. P. Coop. t. Cott. 386; 10 Jur. 907; and see Nichols v. Roe, 3 M. & K. 431; and *ante*, p. 1621.

[6] 9 & 10 Will. III. c. 15, § 1.

[7] For the form of notice of motion, see Vol. III.

[1] 9 & 10 Will. III. c. 15, § 2. For the jurisdiction of the Court over awards, see *ante*, pp. 297, 553, 970, 671; and see Adams on Eq. 191 *et seq.*; 1 C. P. Coop. t. Cott. 386 *et seq.*;

[2] 17 & 18 Vic. c. 125, § 12. The section applies where the arbitration was commenced previous to the passing of the Act. Re Lord, 1 K. & J. 90. As to what is an arbitration within the meaning of sec. 12, see Collins v. Collins, 26 Beav. 306; 5 Jur. N. S. 30. For form of summons, see Vol. III.

Where a party has, under the provisions of the statute,[3] appointed an arbitrator to act as sole arbitrator, the Court or a Judge may revoke the appointment, on such terms as shall seem just.[4]

Where the arbitrator has stated his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court,[5] it will, on application by motion on notice, be set down for hearing.[6]

*1860 If the submission has been or may be made an order of the * Court of Chancery, the time for making the award may from time to time be enlarged by an order of the Court or of a Judge at Chambers; the order should state the cause for the enlargement, and if no period is stated, it will be deemed to be for one month.[1] The application is made on notice;[2] and the order may, it seems, be made after the expiration of the time for making the award.[3]

"Where any award made on any such submission, document, or order of reference as aforesaid, directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party, either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the Court of which the document authorizing the reference is, or is made a rule or order, to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award; and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as in a judgment in ejectment."[4]

The Court or Judge may, from time to time, and on such terms as may seem fit, remit the matters referred, or any of them, to the reconsideration and re-determination of the arbitrators.[5] The object of this provision is, to enable the Court, where any error, formal or otherwise, has occurred which would vitiate the award, to send it back to the arbitrators to correct such errors, instead of setting the award wholly aside.[6] Where the award was in part conclusive, but in another part imperfect, it was remitted to be reconsidered and amended.[7]

[3] 17 & 18 Vic. c. 125, § 13.

[4] *Ib.* § 13. For form of summons, see Vol. III.

[5] Under 17 & 18 Vic. c. 125, § 5.

[6] For form of order to set down special case for hearing, see Seton, 1126, No. 1. For form of notice, see Vol. III.

[1] 17 & 18 Vic. c. 125, § 15.

[2] For form of order, see Seton, 1126, No. 2; and for forms of notice of motion and summons, see Vol. III.

[3] Watson *v.* Bennett, 6 Jur. N. S. 637; 8 W. R. 612, Ex.

[4] 17 & 18 Vic. c. 125, § 16.

[5] *Ib.* § 8; see *Re* Titswell, 33 Beav. 213; 10 Jur. N. S. 143.

[6] Mills *v.* Bowyers' Co., 3 K. & J. 60.

[7] *Re* Aitken, 3 Jur. N. S. 1296; 6 W. R. 145, V. C. W. [The evidence of an arbitrator is admissible in explanation of his award; and when it appears from such evidence that there has been a mistake on his part, either as to the subject-matter referred to him, or in point of legal principle affecting the basis on which the award is made, the award will be set aside, or referred back again to the arbitrator. *Re* Dare Valley R. Co., L. R. 6 Eq. 429; Duke of Buccleugh *v.*

The Court, by consent of the parties, will order the matters in question in a suit to be referred to arbitration.[8] In this case, the order should reserve liberty to apply, but not further consideration, unless only some of the matters in dispute are referred.[9] The Court will not give directions as to the mode of carrying out the reference,[10] and, if it fails, the suit will proceed as if it had not been directed.[11] The award is made an order of Court on * motion with notice, in the *1861 same way as a submission,[1] and must be filed in the Report office before the order is passed;[2] and proceedings may then be taken upon it.[3] In a suit affecting a charity, the reference will not be made, or the award acted upon, unless the Attorney-General or the Court considers that it will be beneficial to the charity.[4] We have already seen that, in certain cases, the awards of the Charity Commissioners may be made rules of the Court.[5]

"Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at Law or suit in Equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Court in which action or suit is brought, or a Judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such Court or Judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require."[6]

The onus of showing that no adequate relief can be obtained by proceeding under the agreement to refer to arbitration lies upon the plaintiff.[7] The proceedings will be stayed wherever the application is made *bonâ fide* by a party who has always been ready to refer, and there are

Metropolitan Board of Works, L. R. 5 Ex. 221.]

[8] For form of order, see Seton, 1122.

[9] Seton, 1126.

[10] Hamshere v. Bankart, 3 De G., F. & J. 16; 17 Jur. N. S. 57.

[11] Crawshay v. Collins, 3 Swanst. 90.

[1] Anon., pp. 1857, 1858; Lipscomb v. Palmer, 6 Jur. N. S. 1282, 9 W. R. 262, V. C. S.

[2] Ord. XXIII. 23.

[3] Crawshay v. Collins, 3 Swanst. 90, 92.

[4] Attorney-General v. Hewitt, 9 Ves. 232; Attorney-General v. Lea, 4 Mad. 274.

[5] Sec. 16 & 17 Vic. c. 137, § 64, 18 & 19 Vic. c. 124, § 46.

[6] 17 & 18 Vic. c. 125, § 11. [See Tschender v. Biddle, 4 Drew. 63.]

[7] Cook v. Catchpole, 10 Jur. N. S. 1068, 13 W. R. 42, 43, V. C. W.

matters in dispute within the meaning of the agreement.[8] The *1862 proceedings will not be stayed where an arbitrator * would not have power to deal completely with the case,[1] or the case is one of fraud;[2] or where, in consequence of some of the contemplated parties not having entered into the agreement, it would be contrary to the intention of the parties to refer the matters in dispute to arbitration.[3]

The application for the order is made by motion on notice, and should be made after appearance, but before plea or answer.[4]

The Court has no jurisdiction to stay the proceedings, unless the instrument on which the action is brought contains an agreement to refer differences to arbitration: even though the parties have in writing agreed to do so after the differences have arisen.[5]

Section IV. — *Infant Custody Acts.*

By the 2 & 3 Vic. c. 54, the Court is enabled, upon the petition of the mother of an infant which is in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after his death, to make such order for the access of the petitioner to such infant, at such times and subject to such regulations as the Court shall deem convenient and just; and if such infant shall be within the age of seven years, the Court may order such infant to be delivered into the hands of the petitioner until such age, subject to such regulations as the Court shall deem convenient and just.[6] Applications under this Act may be made either to the Master of the Rolls, or to any of the Vice-Chancellors.[7]

Upon the hearing of the petition, affidavits on either side are admissible;[8] and orders made under the Act may be enforced by the usual process of contempt.[9] No mother against whom adultery has been established by the sentence of the Divorce Court is entitled to the benefit of the Act.[10]

The petition may be presented without a next friend;[11] and,

[8] Russell *v.* Pellegrini, 6 El. & Bl. 1020; 3 Jur. N. S. 183, 185; and see Hirsch *v.* Im Thurn, 4 C. B. N. S. 569; 4 Jur. N. S. 587; Wickham *v.* Hardy, 5 Jur. N. S. 871, Ex.; but see Lury *v.* Pearson, 1 C. B. N. S. 639; Wheatley *v.* Westminster Brymbo Colliery Co., 2 Dr. & Sm. 347; 11 Jur. N. S. 232.

[1] Cook *v.* Catchpole, *ubi sup.*

[2] Wallis *v.* Hirsch, 1 C. B. N. S. 316; and see Lury *v.* Pearson, *ib.* 639; [Malmesbury Ry. Co. *v.* Budd, 2 Ch. Div. 113].

[3] Mason *v.* Haddon, 6 C. B. N. S. 526.

[4] 17 & 18 Vic. c. 125, § 11; *ante*, p. 1860. For form of notice of motion, see Vol. III.

[5] Blyth *v.* Lafone, 1 El. & El. 435; 5 Jur. N. S. 364.

[6] 2 & 3 Vic. c. 54, § 1. As to this Act, see Chambers on Infants, 93, 100; Macpherson on Infants, 164; Seton, 713; and see Swift *v.* Swift, 11 Jur. N. S. 148; 13 W. R. 378, M. R.; 11 Jur. N. S. 458; 13 W. R. 731, L. JJ.; 34 Beav. 266; Austin *v.* Austin, 11 Jur. N. S. 101; 13 W. R. 332, M. R.; 11 Jur. N. S. 536; 13 W. R. 761, L. C.; 34 Beav. 257; *Re* Newbery, 1 Law Rep. 431; 12 Jur. N. S. 12, V. C. S.; 1 Law Rep. Ch. Ap. 263; 12 Jur. N. S. 154, L. JJ. For forms of orders, see Seton, 713, 714; and for form of petition, see Vol. III.

[7] *Re* Taylor, 10 Sim. 291.

[8] 2 & 3 Vic. c. 54, § 2. For the practice on petitions, see *ante*, p. 1603 *et seq.*

[9] *Ib.* § 3.

[10] *Ib.* § 4; and see 20 & 21 Vic. c. 85, § 35.

[11] *Re* Groom, 7 Hare, 38.

by * leave of the Court, *in formâ pauperis*.[1] If rendered neces- *1863
sary by the circumstances of the case, it seems that an order under the Act may be made *ex parte*.[2] The mother is not entitled to an order as a matter of course, but the Court will exercise its discretion upon all the circumstances of the case.[3]

The object of the Act is to protect mothers from the tyranny of husbands who ill use them; and it gives the Court the power of interfering, when the Court sees that the maternal feelings are tortured for the purpose of obtaining any thing like an unjust advantage over the mother.[4] The Act does not, as a condition for the interference of the Court, require that the wife should have obtained or be entitled to obtain a decree for a judicial separation;[5] and it gives the Court an absolute discretion as against the father or testamentary guardian;[6] but the Court will not interfere where the mother has deserted her husband without reasonable cause;[7] or where her conduct, although she has not been guilty of any moral delinquency, has not been such as to entitle her to its favorable consideration.[8] And if the conduct of the father has been free from impropriety or bad motive, the Court has no right to have any opinion as to whether the father is judicious or not in the particular training he may direct the child to undergo.[9]

It has been held, that the Act does not enable the mother to resist an application of her husband for the custody of his children, to which, by law, he is entitled: even though upon her application the Court may be bound to order them to be delivered back to her;[10] or apply where the children are not in the custody of the father.[11] Where, however, the children were living with the mother, the Court, on a petition intituled in the Act, made an order continuing the custody of them to her; but it would seem that the order was made under the general jurisdiction of the Court.[12]

By the 3 & 4 Vic. c. 90, the Court is empowered, upon the application of any person willing to take charge of any infant who has been convicted of felony, and to provide for his maintenance and education, to assign the custody of such infant to such person, and to rescind or vary the terms of any such assignment; * and, if it shall think *1864
fit, to award costs against any applicant: such costs to be payable to any parent or other natural or testamentary guardian who shall oppose such application.[1] The infant is not to be sent out of the

[1] *Ex parte* Hakewill, 3 De G., M. & G. 116; 17 Jur. 334. *As to suing in formâ pauperis, see ante*, p. 37 *et seq.*

[2] *Re* Taylor, 11 Sim. 178, 180.

[3] *Re* Taylor, 11 Sim. 178, 200; *Re* Halliday, 17 Jur. 56, V. C. T.; *Re* Winscom, 11 Jur. N. S. 297; 13 W. R. 452, V. C. W.; 2 H. & M. 540; [*In re* Taylor, 4 Ch. Div. 157].

[4] Per Lord Cottenham, in Warde *v.* Warde, 2 Phil. 787, 788; and see *Re* Winscom, *ubi sup.*

[5] *Ex parte* Bartlett, 2 Coll. 661, 662.

[6] Shillito *v.* Collett, 8 W. R. 683, V. C. K.; affirmed, *ib.* 696, L. JJ.

[7] *Re* Taylor, *ubi sup.*

[8] Shillito *v.* Collett, *ubi sup.*

[9] *Re* Winscom, *ubi sup.*

[10] Corsellis *v.* Corsellis, 1 Dr. & War 235.

[11] *Re* Fynn, 2 De G. & S. 457, 475; 12 Jur. 713.

[12] *Re* Tomlinson, 3 De G. & S. 371.

[1] 3 & 4 Vic. c. 90, § 1. No fee is to be taken by any officer of the Court; and counsel

jurisdiction of the Court;[2] and the execution of the sentence passed upon the infant is not to be interfered with.[3]

Section V. — *The Declaration of Title Act*, 1862.

By this Act,[4] which relates to England only, and came into operation on the 1st January, 1863,[5] "every person claiming to be entitled to land in possession for an estate in fee-simple, either absolutely or subject to any incumbrances, estates, rights, or interests, vested or contingent, or claiming to have a power of disposing of land for his own benefit for an estate in fee-simple in possession, either absolutely or subject to any incumbrances, estates, rights, or interests vested or contingent, and every person entitled to apply for the registration of an indefeasible title to the Registrar appointed under any Act which may be passed in the present session for the Registration of Real Estates and the Title thereto,[6] may apply to the Court of Chancery by petition in a summary way for a declaration of title under this Act."[7]

"Every petition for a declaration of title shall contain an exact description in their actual state of the lands as to which the declaration is sought: stating particularly the boundaries thereof, and the lands on which the same and every part thereof abut, and, so far as conveniently may be, the names and descriptions of the owners and occupiers of such last-mentioned lands."[8]

"Every such petition shall state what incumbrances, estates, rights, and interests, if any, the petitioner admits to affect his title, and subject to which he seeks to have his title declared, and shall be in such form as the Court shall by general order direct."[9]

"Any two or more persons claiming to have together such estate *1865 or interest in land as would have enabled any one person * to petition as aforesaid may join in such a petition, and such proceedings shall be had thereupon as in the case of a single petitioner."[1]

"No such petition shall be admitted as to lands of copyhold or customary tenure."[2]

"It shall be lawful for the Court, by general order or otherwise, if it shall think fit, to require that the Registrar who may be appointed under any Act passed during the present session for the Registration of Real

and solicitor may be assigned: *ib.* § 3. As to this Act, see Chambers, 178, 199; Macpherson, 133.

2 3 & 4 Vic. c. 90, § 2.

3 *Ib.* § 4.

4 25 & 26 Vic. c. 67. The short title is, "The Declaration of Title Act, 1862:" *ib.* § 49. The Lord Chancellor has power to appoint additional clerks: § 42; and with the advice and assistance of three of the Judges of the Court, to make general rules and orders; which must be laid before Parliament: §§ 40, 43. Until such orders are made, the rules of the schedule are to be adopted: § 41.

5 *Ib.* § 49.

6 The Act referred to is the 25 & 26 Vic. c. 53.

7 25 & 26 Vic. c. 57, § 1. For the practice on petitions, see *ante*, p. 1603 *et seq.* For form of petition, see Vol. III.

8 25 & 26 Vic. c. 67; Sched. r. 1.

9 *Ib.* § 2. No general orders have as yet been made.

1 25 & 26 Vic. c. 67, § 3.

2 *Ib.* § 4.

Estates and the Title thereto[3] shall be served with notice of such petition, and the Registrar shall thereupon be made a party to and attend the proceedings on such petition, and the costs thereby properly incurred shall be paid by the petitioner."[4]

"The Court on the hearing of any such petition, on being satisfied that the petitioner has proved such a possession, and has stated such a title as, if established, would entitle him to a declaration under this Act, shall make an order for the investigation of the title, in the same way as if the petitioner had obtained as vendor a decree for a specific performance of an agreement for sale of the land in question for the estate claimed in his petition."[5]

"On the investigation of the title to the lands as to which the declaration is sought, the identity of the lands described in the petition with the parcels as described in the title deeds shall be established by affidavit or otherwise, as the Court may deem just.[6] The Court may, if it shall deem it necessary or proper, require the petitioner to lodge in Court a map or plan of the lands in question."[7]

"If the Court, on such investigation, shall not be satisfied that the petitioner has shown such a title as it would have compelled an unwilling purchaser to accept, then it shall dismiss the petition, but subject to the right of appeal hereinafter mentioned."[8]

"In case the Court is satisfied after such an investigation that the petitioner has shown such a title as it would have compelled an unwilling purchaser to accept, it shall, on the conditions hereinafter mentioned being complied with, make an order that on some day, not less than three months from the date of the order, a declaration shall be made establishing the petitioner's title, unless in the mean time cause is shown to the contrary; and the Court may enlarge the time for so showing causes as often as it may deem proper."[9]

*"No such order shall be made until the petitioner shall have *1866 given security to the satisfaction of the Court for payment of all costs, if any, which may be awarded to any person who may oppose the petitioner's right to the declaration prayed for."[1]

"No such order shall be made until the petitioner and his solicitor, and any other person whom the Court may require, shall have made and filed an affidavit that to the best of their respective knowledge, information, and belief, all settlements, deeds, documents, instruments, maps, plans, and papers relating to the title to the land in question

[3] The Act referred to is the 25 & 26 Vic. c. 53.

[4] 25 & 26 Vic. c. 67, § 5.

[5] *Ib.* § 6. For the proceedings under such a decree, see *ante*, pp. 987, 988, 1129-1134.

[6] 25 & 26 Vic. c. 67, Sched. r. 2.

[7] *Ib.* r. 3.

[8] *Ib.* § 7; and see *ib.* §§ 17-19.

[9] *Ib.* § 8. The declaration of title may, when the time for appealing has expired, or as soon as any appeal is withdrawn, or the declaration affirmed, be registered under the 25 & 26 Vic. c. 53; 25 & 26 Vic. c. 53, § 31; 25 & 26 Vic. c. 67, § 21. For form of application, see Land Registry Orders, 1 Oct., 1862; No. 22, Sched. I. (8 Jur. N. S. Pt. II., 461, 465); and Vol. III.

[1] 25 & 26 Vic. c. 67, § 9. For the practice in giving security for costs, see *ante*, pp. 33-37.

have been produced to the Court, or the cause of their non-production has been fully and fairly explained, and that all facts material to the title have been fully and fairly disclosed to the Court: provided always, that the Court may dispense with such affidavit either from the petitioner or his solicitor when it shall think it reasonable so to do, or may permit the same to be modified as circumstances may seem to require." [2]

"The petitioner, after obtaining such order, shall give notice of the same by advertisement in such newspapers and at such times as the Court may direct, and in any other manner which the Court may deem expedient, for the purpose of informing all persons interested thereof, and as may be directed by any general or special order in that behalf." [3]

"The petitioner, after obtaining the order for a declaration of title, shall cause a copy thereof, together with the description of the lands in question, with any engraved or lithographed plan thereof (if any exists) to be served on every adjoining occupier and owner, or on such of them, and on such other persons (if any), as the Court may direct to be so served.[4] He shall also cause a copy or copies thereof to be deposited in some office or place, offices or places, to be appointed by the Court, on or near to the lands in question, to be accessible at all reasonable times to all persons desirous of examining the same, and notice of every such deposit shall be affixed in some public place or places on or near to the lands in question." [5]

"Every such copy served on any adjoining occupier or owner, or deposited as aforesaid, shall state that any person wishing to *1867 * show cause against the making of the proposed declaration may do so by presenting a petition in a summary way to the Court of Chancery at any time before the day appointed for making the proposed declaration." [1]

"The petitioner, after such deposit shall have been made, shall cause advertisements to be inserted three times at least in such newspapers on such days as the Court shall direct, stating the said order, and stating also where any copy has been so deposited for inspection.[2] Unless the last of such advertisements is made within four weeks next after the date of the order, the time thereby fixed for showing cause against the same shall be enlarged for one calendar month, or such further time as the Court shall direct." [3]

"Any person may, at any time before the proposed declaration of title has been made, petition the Court in a summary way to be heard against the making thereof; and the Court shall thereupon fix a time for the hearing of such petition, and shall, if necessary, enlarge the time for making the declaration until such petition shall have been disposed of." [4]

[2] *Ib.* § 10. For form of affidavit, see Vol. III.
[3] *Ib.* § 11.
[4] *Ib.* Sched. r. 4.
[5] *Ib.* r. 5.

[1] 25 & 26 Vic. c. 67, Sched. r. 6.
[2] *Ib.* r. 7.
[3] *Ib.* r. 8.
[4] *Ib.* § 12.

"On the hearing of such petition, the Court may introduce such restrictions or qualifications in the title sought to be declared as the justice of the case requires, or may reserve the rights of any person or class of persons, or may refuse to make any declaration of title.[5] If it shall appear to the Court that all or any of the title deeds relating to the land in question have been lost or destroyed, the Court may, if it shall think fit, reserve the rights of all persons under any such lost or destroyed deeds."[6]

"If no petition has been presented against the proposed declaration of title, within the time in that behalf limited, or if, having been presented, the Court shall be of opinion that no sufficient ground has been shown for refusing to make a declaration of title, then the Court shall, after the expiration of the time limited for showing cause, upon being satisfied that the required notices have been duly given, and that all other requisitions have been duly complied with, make a declaration that the original petitioner has such title to the land in question as he sought to establish by his petition, or such title, subject to any restrictions, reservations, or qualifications which it may deem necessary or proper to introduce."[7]

"Any person may, at any time within six months from the *making of any such declaration, appeal therefrom to the Court *1868 of Appeal in Chancery; and such Court shall, on the hearing of the appeal, make an order, confirming, varying, or annulling, the declaration as it may see fit; but if there is no such appeal, then the said declaration shall, at the expiration of the said six months, become final for the purposes of this Act."[1]

"Any person may appeal from any such order of the Court of Appeal to the House of Lords, at any time within six months from the making thereof, and the said house may make an order confirming, varying, or annulling the said declaration, as to them shall seem just; but if there is no such appeal, then the declaration, as approved by the said Court of Appeal in Chancery, shall, at the expiration of the said six months, become final for the purposes of this Act.[2] In case of any such appeal as aforesaid to the House of Lords, the declaration of title as finally approved by them shall become final for the purposes of this Act."[3]

"In case the Court shall have dismissed the original petition on the ground that the petitioner had not shown such a title as it would have compelled an unwilling purchaser to accept, or if, on the hearing of any petition against the making of the declaration of title prayed for, the Court shall have refused to make any declaration of title, the original

[5] *Ib.* § 13.
[6] *Ib.* § 14.
[7] 25 & 26 Vic. c. 67, § 13.
[1] 25 & 26 Vic. c. 67, § 16. For the practice on appeals to the Court of Chancery, see *ante*, p. 1471 *et seq.*
[2] 25 & 26 Vic. c. 67, § 17. For the practice on appeals to the House of Lords, see *ante*, p. 1491 *et seq.*
[3] 25 & 26 Vic. c. 67, § 18.

petitioner shall have the same rights of appeal to the Court of Appeal in Chancery and to the House of Lords as is hereinbefore given to any person appealing against a declaration of title actually made." [4]

"The declaration of title, when it has in manner aforesaid become final for the purposes of this Act, shall not be set aside or called in question by reason of any irregularity or informality in the proceedings previous to the making thereof." [5]

"Every declaration of title made under this Act may, at the option of the person obtaining the same, be registered as an indefeasible title under any Act which may be passed in the present session of Parliament for the Registration of Real Estates and the title thereto." [6]

"Any person who has obtained in manner aforesaid a final declaration of title shall be entitled to receive from the Court, on payment of the proper fees, and on production of his title deeds for the purpose next hereinafter mentioned, a certificate under the seal of the *1869 Court setting forth the title so declared, and * further stating that the time for appealing has expired; and such certificate shall be conclusive evidence of the facts therein stated." [1]

"Before any such certificate shall be sealed, the petitioner shall produce to the Court such of his deeds and muniments of title as the Court shall require, and the same shall be stamped or marked by the officer issuing the certificate, in such manner as the Court shall by general orders direct, for the purpose of showing that a declaration of title has been made as to the land therein comprised, or as to such part thereof as is comprised in the declaration." [2]

"Such declaration of title, as soon as it shall have become final for the purposes of this Act, shall, in favor of any person thereafter deriving title as a purchaser for valuable consideration of the land therein referred to, or of any part thereof, or of any estate, right, or interest therein, by, from, through, or under the person whose title has been so declared, be deemed and taken to have correctly declared the same; but save as aforesaid such declaration shall have no force or effect whatever as to the title of the land comprised therein." [3]

"Instead of a single declaration of title, or a single certificate, the Court may, on the application of the petitioner, make separate declarations, or give separate certificates as to the title of separate parts of the land referred to in the petition." [4]

"If, for the purpose of a sale or other disposition of the land comprised in any certificate of title, or of any part thereof, the holder of any such certificate shall be desirous of having separate certificates of title relating to separate portions of the land, it shall be lawful for the Court on petition by such holder to order his certificate to be cancelled, and

4 *Ib.* § 19; see §§ 16–18 *supra.*
5 *Ib.* § 20.
6 *Ib.* § 21; see *ante*, p. 1865, n. (9); 25 & 26 Vic. c. 53, § 31.
1 25 & 26 Vic. c. 67, § 22.
2 *Ib.* § 23. No general orders have as yet been made.
3 25 & 26 Vic. c. 67, § 24.
4 *Ib.* § 25.

in lieu thereof give to him separate certificates for separate parts of the land comprised in the certificate so cancelled; and every such separate certificate shall refer to and state the date of the cancelled certificate, and shall have the same effect as to the land therein comprised as if it had been given at the time of such date; but no such substitution of certificate shall in any way prejudice or affect the title of any person who shall previously thereto have become entitled to any part of the land comprised in the original certificate, or any interest in the same." [5]

"Whenever any such substitution of certificates shall take place, the land mentioned in every such separate certificate may be entered upon the Register of Estates with an indefeasible title, under * any *1870 such Act for the Registration of Real Estates, and the title thereto as aforesaid: and in that case, any transactions relating thereto shall, subject to any regulations to the contrary that may be made by general order, thenceforth form a separate record in the register, distinguished by a separate number, or in such other manner as the Registrar may determine." [1]

"If any certificate of title shall be lost or destroyed, the Court may issue a fresh certificate in lieu of that so lost or destroyed, expressing on the face thereof that it is a duplicate; but no such fresh certificate shall be of any avail against any person who may have already derived title under the original certificate." [2]

"The declaration of title shall not affect any of the claims, rights, or matters hereinafter mentioned; that is to say: land tax, succession duty, tithe rent-charge, rights of common, rents payable to the Crown, public rights of way, liability to repair highways by reason of tenure, rights of way, watercourses, rights of water and other easements, or servitudes, manorial rights and franchises, leases or agreements for leases for any term not exceeding twenty-one years where there is occupation under the same." [3]

"From and after the registration of any land, as to which any such declaration of title as aforesaid shall have been made, in the hereinbefore mentioned Register of Estates with an indefeasible title, such land shall be subject to the provisions of any such Act for the Registration of Real Estates and the Title thereto as aforesaid, in the same manner as if the registration thereof had been made by virtue of proceedings duly taken under such last-mentioned Act." [4]

"If, at any time after any such declaration of title as aforesaid has been made, any person shall consider himself to be aggrieved thereby, it shall be lawful for him to present a petition praying that the same may be recalled or varied in such manner as may be just; and the Court shall thereupon proceed in the hearing of such petition in the

[5] *Ib.* § 26.

[1] 25 & 26 Vic. c. 67, § 27; and see § 21, *ante*, p. 1868; and also *ante*, p. 1869, n. 2; and 25 & 26 Vic. c. 53, § 31. No general orders have as yet been made.

[2] 25 & 26 Vic. c. 67, § 28.

[3] *Ib.* § 29.

[4] *Ib.* § 30; and see 25 & 26 Vic. c. 53.

same manner as if the same had been presented before the declaration of title had been made; and the Court may, on the hearing of the said petition, annul the declaration and order the certificate or certificates to be given up to be cancelled, or may make such variations therein as it may deem just, and may, if it shall think fit, also direct the registry thereof, if made, to be cancelled: but no proceeding on any such petition shall prejudice or affect the title of any person who before
*1871 any *such annulling or variation shall have acquired a title under the said declaration as a purchaser for valuable consideration of the said land or of any estate or interest therein." [1]

"The Court may, on the hearing of any such last-mentioned petition, make any order which it may deem just, restraining the person who has obtained the declaration, and all persons claiming by, through, from, or under him otherwise than as a purchaser for valuable consideration, from in any manner dealing with the said land until such petition shall have been disposed of." [2]

"All proceedings on any such petition shall be liable to the same right of appeal as in the case of petitions presented before such declaration of title was made." [3]

"The Court shall have power to order costs, either as between party and party or as between solicitor and client, to be paid by and to any person, party to any proceeding under this Act, and give directions as to the fund out of which such costs shall be paid." [4]

"And whereas it may happen that at the time of making the declaration of title as aforesaid there may be estates, rights, or interests, in the land which may not be saved by the declaration, and the persons entitled to such estates, rights, or interests may be damnified by the subsequent alienation of the land for valuable consideration: be it therefore enacted, that all money received by the person so alienating shall be deemed to have been received by him in trust to invest the same in the purchase of lands to be settled to the uses and on the trusts to and on which the lands so alienated stood limited at the time of such alienation: provided always, that this clause shall not be deemed to impose any liability on any person who may have received any money on such alienation as a trustee, so far as relates to money which he may have duly applied in execution of the trusts reposed in him." [5]

"Where any married woman is desirous of making an application, giving any consent, or doing any act, or becoming party to any proceeding under this Act, her husband's concurrence shall be required, and she shall be examined apart from her husband touching her knowledge of the nature and effect of the application or other act, and it shall be ascertained that she is acting freely and voluntarily; and such examination may be taken by the Court or such persons as are authorized to

[1] 25 & 26 Vic. c. 67, § 31.
[2] *Ib.* § 32.
[3] *Ib.* § 33; see §§ 16–19, *ante*, p. 1868.
[4] 25 & 26 Vic. c. 67, § 34.
[5] *Ib.* § 35.

take acknowledgments of deeds by married women under the Act of the session holden in the third and fourth years of King William the Fourth, chapter * seventy-four, 'for the Abolition of Fines and *1872 Recoveries, and for the Substitution of more simple Modes of Assurance;' and the form and manner in which such examination is to be certified to the Court shall be determined by the General Rules and Orders to be made under this Act: provided always, that a married woman entitled to her separate use, and not restrained from anticipation, shall for the purposes of this act be deemed a *feme sole*." [1]

"Where any person who (if not under disability) might have made any application, given any consent, done any act, or been party to any proceeding under this Act, is a minor, idiot, or lunatic, the guardian or committee of the estate respectively of such person may make such applications, give such consents, do such acts, and be party to such proceedings, as such persons respectively, if free from disability, might have made, given, done, or been party to, and shall otherwise represent such person for the purposes of this Act: provided always, that where there is no guardian or committee of the estate of any such person as aforesaid, being infant, idiot, or lunatic, or where any person the committee of whose estates if he were idiot or lunatic would be authorized to act for and represent such person under this Act is of unsound mind and incapable of managing his affairs, but has not been found idiot or lunatic under an inquisition, it shall be lawful for the Court to appoint a guardian of such person for the purpose of any proceedings under this Act, and from time to time to change such guardian.[2]

"Proceedings under this Act shall not abate or be suspended by any death or transmission or change of interest, but in any such case of death or transmission or change of interest it shall be lawful for the Court, where it sees fit, to require notices to be given to persons becoming interested, or to make any order for discontinuing, suspending, or carrying on the proceedings, or otherwise in relation thereto, which to the Court may appear just." [3]

"A register shall be kept in such place as the Lord Chancellor shall appoint, wherein any person having or claiming to have any estate, right, title, or interest in or to any land, or having or claiming to have any incumbrance thereon, shall be at liberty to enter his name and address, with the name of the county, parish, and township in which such land is situated, in such form as the Chancellor shall order; and when any person shall have made such entry the Court shall not make an order under this Act unless it * is satisfied, after such evidence *1873 as it shall think sufficient, that notice of the application for such

[1] 25 & 26 Vic. c. 67, § 36. No general orders have as yet been made.

[2] *Ib.* § 37. For the practice on appointing guardians, see *ante*, pp. 160-176, 1214-1221.

[3] 25 & 26 Vic. c. 67, § 38.

order has been given to such person as shall have made such entry in a reasonable time before such order is actually made." [1]

Any order or declaration of title obtained by means of fraud or falsehood is to be null and void for or against all persons other than a purchaser for valuable consideration without notice; [2] and nothing contained in the Act is to entitle any person to refuse to make a complete discovery.[3]

"In the construction of this Act (except where the context or other provisions of the Act require a different construction), the word 'person' shall include a body politic or corporate; the word 'possession' shall include receipt of the rents and profits; and the word 'land' shall not include any incorporeal hereditaments, but shall include all corporeal tenements and hereditaments not expressly excepted." [4]

Section VI. — *Confirmation of Sales Act.*

"Every trustee and other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals, or may (unless forbidden as aforesaid) dispose of by way of sale, exchange, or partition, the minerals with or without such rights or powers, separately from the residue of the land; and, in either case, without prejudice to any future exercise of the authority with respect to the excepted minerals, or (as the case may be) the undisposed of land; but this enactment shall not enable any such disposition as aforesaid without the previous sanction of the Court of Chancery to be obtained on petition,[5] in a summary way, of the trustee or other person authorized as aforesaid: which sanction, once obtained, shall extend to the enabling from time *1874 to time of any disposition within * this enactment of any part or parts of the land comprised in the order to be made on such petition, without the necessity of any further or other application to the Court." [1]

[1] 25 & 26 Vic. c. 67, § 39.

[2] *Ib.* § 44. Penalties are imposed on persons making false statements, suppressing deeds or evidence: *ibid.*; or making fraudulent alterations in the certificate of title: § 45; but no conviction under this Act is to affect the civil remedy: § 46.

[3] 25 & 26 Vic. c. 67, § 47.

[4] *Ib.* § 48.

[5] For the practice on petitions, see *ante*, p. 1603 *et seq.*; and for form of petition, see Vol. III.

[1] 25 & 26 Vic. c. 108, § 2. The statute came into operation on 7 Aug., 1862. By § 1, sales, exchanges, partitions, or enfranchisements under powers of lands and minerals separately, which had been effected previously to the Act, and not declared invalid, or concerning the validity of which no proceedings were pending, are confirmed. For former law on the subject, see Buckley *v.* Howell, 29 Beav. 546; 7 Jur. N. S. 536; Sugd. V. & P. 71.

The Court will, under this Act, make an order authorizing the sale of land, reserving the minerals, or of the minerals apart from the land, without reference to any particular sale.[2] If all the beneficiaries do not join in the petition, they should be served with it.[3]

[2] *Re* Willway, 32 L. J. Ch. 226; 1 N. R. 469, V. C. W.
[3] *Re* Brown, 9 Jur. N. S. 349; 11 W. R. 19, V. C. S.; and for orders under the Act, see S. C.

END OF VOL. II.

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